

CULTURAL-ANTHROPOLOGICAL DIMENSION OF MODERN CRIMINAL LAW: FROM DOCTRINE TO REGULATION

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ABSTRACT

The spread of cultural-anthropological methodology to the problems of modern criminal law enabled to formulate a new doctrinal definition of criminal law as a culturally agreed system of social freedoms focused on protecting social, material and spiritual values that are the human culture achievements and belong to a person. The proposed cultural-anthropological dimension allowed us to substantiate the appropriateness of recognition anthropodicy as a paradigm of modern criminal law. The idea of periodization of criminal law genesis was further developed with the identification of three qualitatively different periods of pre-modern, modern and postmodern, each of which is distinguished by a special role played in culture in general and criminal law in particular. The article provides different understanding of social justice as the purpose of applying criminal law which is more complicated in the context of the rule of law dominance than in the traditional understanding of the compliance between crime and punishment.

Keywords: Cultural-Anthropological Methodology, The Rule of Law, Cultural-Anthropological Definition of Criminal Law, Periodization of Criminal Law, Anthropodicy.

INTRODUCTION

Criminal law, more than any other branch of law, focuses on permanent change in order to identify those forms of socially dangerous behavior that require the application of the most severe measures of legal influence. Such measures are combined within the framework of criminal law. The genesis of modern criminal law in post-Soviet countries, including Ukraine, is accompanied by the solution of two interrelated problems: the preservation of those legal values that have long proved their effectiveness (social conditionality of criminalization, the dominance of punishment as a form of criminal influence, etc.); formation of short stories that modernize criminal law in accordance with the requirements of the dominance of the rule of law (the institution of criminal offenses, expanding the system of criminal law measures through additional measures to punishment, etc.). The solution of both of these problems requires the formation of a new conceptual model of criminal law, which in turn is impossible without expanding the methodological foundations of criminal law research, provided that they reflect the objective laws of scientific research. Current trends in the methodology of law indicate that positivism, as the basis of scientific research, gives way to the humanitarian methodology, within which the most promising is the cultural and anthropological dimension of criminal law realities. It is the cultural-anthropological approach that allows to comprehensively solving the core

problems of modern criminal law. It should be noted that today only the first attempts are made to extend the anthropological methodology to the study and solution of the genesis of law (Goodale, 2017; Ogneviuk, 2018) and statehood, which mostly relate to the analysis of these realities as certain holistic social phenomena, without attempts to apply cultural and anthropological methodology to certain branches of law, among which, as already mentioned, a special place is occupied by criminal law.

This publication is aimed at highlighting the results of the application of cultural and anthropological methodology for the analysis of the past, current state and forecasting the prospects for further development of criminal law in its doctrinal, normative and law enforcement trichotomy. The use of a comprehensive methodology, which includes cultural and anthropological dimension, and the multifaceted nature of modern criminal law make it impossible to study all manifestations of the latter within a single publication of the selected format of a scientific article, but there is a possibility to present the results of cultural and anthropological methodology. Defining the paradigm of the current state of this branch of law, its definition and language requirements (doctrinal level), rethinking in order to increase the role of anthropocentric principles of criminalization and penalization (normative level), introduction of additional safeguards for voluntary application of criminal law (law enforcement level).

Cultural and Anthropological Methodology of Studying Criminal Law

Modern law in general and criminal law in particular are characterized by a number of features that indicate a certain period of stagnation. Without focusing on the analysis of the causes of this process, such manifestations include the following determinants, overcoming which is not possible without changing the methodological principles of both the study of this branch of law and its legal regulation. First, the lack of clear boundaries of legal regulation, accompanied by the expansion of statist law (positive law, which protects primarily state interests) in various spheres of social life, which are traditionally governed by other types of social norms (religious, corporate, customary, etc.). Secondly, if the crisis of legal understanding and its functionality has affected all countries, an additional challenge for post-Soviet law is the need to reform the mechanism of state power on a democratic basis with the prospect of building a welfare state and establishing new guidelines for socio-cultural and legal development of civil law. Society third, the crisis of law is determined by the problem of certainty of human rights, the study of which is overgrown, and tends to become a quote-slogan science, which focuses solely on the proclamation of truths without ensuring their implementation in the dominance of natural law. Fourth, there is a gradual loss of the connection between law and culture, which with its development has ensured the formation of the legal basis for the regulation of relations in society. This process significantly impoverished the content of the law itself and disoriented it, depriving it of the defining paradigm of its existence (Kozachenko, 2011). These and other characteristics of modern law determine the search for new methodological principles that can guide the right to its gradual development and ensure its effective functioning. It seems that the modern methodology of development of both laws in general and criminal law in particular can be their cultural and anthropological dimension.

The cultural-anthropological dimension of law embodies two completely self-sufficient approaches, the combination of which is able to bridge certain gaps in their autonomous use. It is

well known that the anthropological approach in legal analysis is important for the study of human rights issues, legal consciousness and culture; anthropocentric patterns of the genesis of the legal system or certain legal categories, etc. (Zavalnyuk, 2013; Rosen, 2018; Kovnierova, 2020). However, the absolutization of the anthropological approach is sometimes accompanied by the formation of erroneous ideas and theories that can provide regression rather than the progress of law. A well-known example is the popular concept of the Soviet period, the so-called theory of "*new social protection*", which received not only doctrinal approval, but also normative implementation. This theory, which, unfortunately, has become a practice, required the subordination of all goals of criminal law regulation to a single goal-to protect society from the criminal, for which legal regulations can be neglected. The result of the application of the new social protection was the reality of criminal prosecution in the absence of a crime or the guilt of a person in its commission. The culturological dimension of legal realities allows us to expand the potential of the anthropological approach and at the same time act as a safeguard against erroneous conclusions about the absolutization of individual personality traits. From the standpoint of culture, law is a system of norms, ideas and attitudes that ensure the purposefulness of social activities, forming certain stereotypes of behavior that receive social approval on the basis of recognition of their compliance with human expectations. Law, playing an instrumental role along with such other regulators of social relations as morality, custom, religion, is seen as a way of social organization, social control over the behavior of subjects and, of course, their social protection. The culturological dimension of criminal law, given the obvious conditionality of law by cultural heritage, akin to the anthropological dimension of law focused on the personal conditionality of law, and according to which man plays a centripetal role in building any social structure to regulate and protect the most important relations, form a new perspective of law.

It should be emphasized that before extending the cultural and anthropological methodology to criminal law, we were convinced that its effectiveness has been substantiated by authoritative philosophers-methodologists. Thus, the American researcher Kroeber Alfred Lewis, analyzing the phenomenology of culture, identified two approaches to the characteristics of culture-value (ideal) and real. Value culture is a system of ideas and ideas about the desired and is embodied in philosophy, art, religion, moral norms. Instead, real culture is the current state of development of society in its cultural dimension. The nature of the relationship between these cultures is quite complex, albeit definite, because the ideal culture is the actual basis for understanding real culture. Without it, there are only many individual objects, and with the help of an ideal holistic system, culture makes sense (Kroeber, 1948).

Another follower of cultural-anthropological approach, Herskovits Melville John, in his seminal work *Cultural Anthropology*, describes culture as the creation of the human environment, meaning "*the sum of the behaviors and habitual thinking of the people who shape a society*" (Herskovits, 1955). Based on the fact that the combination of these factors creates a unique result, M. Herskovits pointed to the existence of traditions that are manifested in specific value systems, sometimes incomparable with the values of cultures of other nations. Within the development of unique cultures, a certain dominant is distinguished, an essential feature of the culture of the people, which was characterized by the scientist as a "*cultural focus*", or in modern sound-a paradigm. Within the cultural-anthropological approach, the scientist notes that cultural values are a system of judgments about the desired, special understanding of each people, about

ideal patterns of behavior. Herskovits derived the defining principle of the existence of culture in its inseparability with man, and the autonomy of man and culture destroy them both.

An abstract review of the work of adherents of cultural and anthropological methodology convinces that this dimension is able to offer new solutions to the problems facing modern criminal law and which are related to the need to increase the role of man in the system of legal regulation. The spread of cultural and anthropological methodology to the study of criminal law is accompanied by the formation of a number of conclusions of theoretical and applied nature.

Understanding of Criminal Law, its Purpose and Criminal Law in the Focus of Cultural and Anthropological Methodology

The cultural and anthropological dimension of the doctrinal definition of criminal law deserves attention. It should be emphasized that criminal law is a special subsystem of cultural values that reflect the needs of man, society and the state in the order of social life. At the same time, criminal law is a system of norms (rules of conduct), ideas and attitudes that ensure the purposefulness of the social movement, forming certain stereotypes of social behavior that receive general social approval. However, criminal law is aimed at protecting only those values that are the property of human culture and are not transient. And the protection of such values by criminal law is carried out only if they comply with the norms of human morality (Merkulova, 2002), which are formed on the basis of cultural values justice, honor, dignity, expediency, necessity and so on. The purpose of criminal law regulation is focused on ensuring law and order, which, in addition to the legal component, which is determined by bringing the behavior of individuals to the requirements of law, is characterized by cultural and anthropological component of human security as a prerequisite for further social development.

Thus, the cultural and anthropological dimension of the definition of criminal law indicates that this branch of law is a culturally agreed system of social freedoms, focused on the protection of social, material and spiritual values, which are cultural assets, the implementation of which is accompanied by criminal legal measures aimed at restoring the pre-criminal state and reflects the orderliness of social life through fair treatment of the person who committed the crime, the victim and other participants in the relationship arising in connection with the commission of a socially dangerous act recognized as criminally illegal.

The application of the cultural and anthropological dimension of criminal law indicates a combination of two spheres of its existence: the ideal sphere of criminal law, which is a system of rules of conduct that has objectively developed and exists in society, and the real sphere of criminal law as a special material carrier of prohibited information under threat of criminal law measures (Kozachenko et al., 2021). The conflict-free coexistence of these spheres focuses on their unifying component—the language of criminal law, which is quite specific, because the sign-semantic symbols of criminal law must accurately convey the will of the legislator, eliminate hidden meanings, subtext. In addition, when creating the text of the criminal law, one should take into account the specifics of a wide range of addressees to whom the norm applies—both the subjects of criminal law relations and their potential participants (Musychenko et al., 2021). Therefore, for an adequate understanding of the content of the norm in the criminal law prescriptions should reflect the features of the linguistic and cultural tradition inherent in a particular people.

The cultural and anthropological dimension of criminal law, in its normative manifestation, requires the consolidation of the defining goal of its existence, which is social justice. It is well known that social justice is a basic element of social relations, which is derived from the equal and fair opportunities of each person to realize their own potential. From a legal point of view, social justice is seen as the correspondence between rights and responsibilities, between action and surrender, between work and reward. Social justice in the dominance of the rule of law is a more complex phenomenon than in the traditional understanding of the correspondence between crime and punishment. The modern approach to the analysis of instrumental characteristics of criminal law measures requires focusing on four areas of compliance: 1) the correspondence between a socially dangerous act and coercive criminal law measures applied to the person who committed it; 2) correspondence between damage, damages and measures of restitution and compensation nature; 3) correspondence between positive post-criminal behavior and rehabilitation and incentive measures; 4) the search for coherence between the interests of man, society and the state (Kozachenko & Musychenko, 2015).

In addition, the chosen dimension of criminal law indicates the need to take into account certain provisions of legal technique, which are dictated by the special attitude to man as the dominant law. In particular, when formulating dispositions in articles of the criminal law, which contain an indication of prohibited conduct (Special Part of the Criminal Code), in our opinion, we should begin the description of such conduct with the phrase: "*A person who...*", which, first, makes it impossible to consider criminally illegal "*not actions*" (thoughts, emotions, feelings) of the person, instead will allow to consider as such only the actions described in the law, secondly, will shift an emphasis of responsibility for it on the person, instead of own action. It is necessary to abandon the idea that criminal law is a right exclusively about the criminal responsibility of a person, because in the current law and, of course, in the future in the system of criminal law, a minority is those endowed with signs of legal responsibility.

The application of cultural and anthropological methodology in the process of implementing the provisions of criminal law is characterized by variability and is as follows: unquestioning compliance with the general principles of criminal law, taking into account the need to achieve social justice in resolving criminal disputes; finding a balance of interests of man, society and the state in the application of criminal law measures; giving priority to private principles of resolving criminal law disputes; transfer of assessment, in the application of criminal law, from the emotional level to the level of logic, etc.

Anthropodicy is a Paradigm of Modern Criminal Law

We should pay attention to the unique features of the cultural and anthropological paradigm of modern criminal law. A feature of today's criminal law is the restoration of private principles of legal regulation, which, in combination with the traditional for this branch of law public law method of regulation, can provide a balance between coercion and encouragement, which in Soviet times was violated in favor of coercion. It seems that the paradigm of modern criminal law in the process of applying the cultural and anthropological dimension should be recognized as anthropodicy, which elevates man, his interests to the level of the core factor of both criminal law and the practice of their application (Kozachenko et al., 2020). This is indicated by the legal foundations of modern criminal law, among which a special place is

occupied by the rule of law, which proclaims man, his rights and freedoms the highest social value, and all state and legal mechanisms for regulating relations between people must be built with this axiom.

Anthropodicea, as a paradigm of criminal law, is characterized by a trichotomy of its intended use. First, anthropodicy focuses on the formation of humanistic principles of criminal law, which are implemented in the process of resolving the issue of the nature and content of criminalization (recognition of an act as criminally illegal) and penalization (liability of the perpetrator). Secondly, anthropodicy requires in the process of finding adequate forms of influence on the behavior of the offender to take into account the interests of the victim. Third, this paradigm emphasizes the respect for the interests of third parties who have become subjects of criminal relations or relations arising in the process of applying criminal law measures.

New Periodization of Criminal Law

The extension of cultural and anthropological methodology to the criminal law doctrine makes it possible to propose new approaches to the periodization of criminal law. In general, periodization is important in criminal law doctrine, because it is able to separate real social values from opportunistic ones, which are characterized by ephemerality. In its content, periodization is to determine certain time periods of the genesis of culture and its component - criminal law, during which such a process is characterized by identity, defined by the specifics of those properties that are taken as the basis of periodization. Given the fact that the defining feature of the cultural-anthropological approach is culture and its carrier-man, the most representative in terms of this study is the periodization into three epochs of culture in general and criminal law in particular: premomodern, modern and postmodern. Consider the features of individual periods of genesis of culture and law in their conditional separation.

The culture of the premomodern period, which in each country has its own temporal boundaries, but in general ceases to be dominant with the advent of the Renaissance, is determined by the lack of rigid separation of man from his nature, and man himself only makes the first attempts at self-awareness as an independent element of objective reality. That is why the premodern human worldview is characterized by an initial reflection on determining the place and role of oneself in the surrounding world. The nature of the relationship between man and nature can be determined by the formula "*nature in man and man in nature.*" Moreover, the surrounding world of premomodern man is mostly limited to the manifestations of nature itself and does not extend to the social component of human existence. The premomodern paradigm can be defined as the "*collective loneliness of man*" and indicates that the main conflict of premomodernism occurs between nature and man, who realizes himself separate from nature, but not yet part of a new reality-society.

The defining feature of the criminal law of the premomodern era should be recognized as a special attitude to crime as "*evil*", "*disaster*", "*misfortune*", characterized by signs inherent in natural manifestations with dangerous consequences for humans. In turn, the search for an adequate form of retribution for criminal behavior is based on talion, which has become a criterion of justice. We believe that the principle of talion in the premodern period was universal, because, being formed in the social environment; it quickly acquired legal meaning and was actively used in various areas of tort law.

The modern period is marked by the awareness of man as an independent and autonomous element of objective reality. The man of the modern era is "*not only an actor but also the author of his own drama.*" The determinant of modernism-the Enlightenment-created an idea of the possibility of building a person's own future, which depends only on herself. The reflection of the modern era is directed not to the past, which was characteristic of the previous era, but to the future. During this period, man's self-determination ends and he begins to challenge the environment from which he came-nature. The man of modernism is a man with the Mind, which, according to the worldview of the metaphysicians of modernism, is a universal means of solving all, without exception, the problems facing man. The paradigm of modernism is the belief that "*life is not under the control of nature or God, but of Man.*" An educated individual, according to R. Osborne: "*realizes himself as an intelligent, pragmatic and independent being, part of a society, but above all an individual endowed with the will, rights and responsibilities that control their own destiny-while the state, in in which it lives, suppresses any encroachment on its authority and appropriates a monopoly on violence within its borders (Osborne, 2022)*".

The modern era in criminal law is characterized by the strengthening of the statist content of law, which is accompanied not only by the recognition of a crime of violation of legal provisions of the state, but also the responsibility that a person bears not to others but exclusively to the state. Thus, the private principles of regulation of social relations are replaced by public law, which are characterized by virtually unlimited coercion and restriction of natural rights and freedoms.

The modern age begins to lose its influence in the twentieth century, as soon as man began to realize himself as the center of social life. The new epoch postmodern is formed on the basis of effective scientific and innovative activity of the person which on the one hand led to increase of level of well-being, and on the other caused crisis phenomena and social confrontation between those who have access to use of achievements of civilization. Produces them, but is not able to meet their own needs. The ideology of technocracy is formed, according to which technology and its achievements are symbols of unlimited human possibilities and at the same time generate uncritical attitude to oneself and one's own social existence, and nature is considered exclusively as a source of fulfillment of human whims. A postmodern person is a person who attributes to himself the transcendent, extraordinary possibilities that have become possible thanks to modern technologies, and not the qualities of the person himself. In addition, the technocratic crisis has become a prerequisite for the formation of a number of global problems of mankind in the environmental, spiritual and social spheres. The crisis of spirituality and the crisis of socialization, the dehumanization of social ties, the devaluation of intellectual activity, and distrust of social justice are considered to be the main substantive characteristics of the postmodern era.

Postmodern criminal law is characterized by a significant expansion of the regulatory function due to a significant increase in the list of circumstances that exclude criminal liability or are an imperative basis for exemption from criminal liability and punishment. Moreover, punishment ceases to be considered as an unalterable legal consequence of committing a criminal offense. The criminal law of the postmodern era is a "*small*" but "*hard*" law that contains a wide range of legal measures to influence a person's behavior, the combination of

which allows solving the problem of criminal law in the least burdensome way for the offender to restore the rights of victims.

CONCLUSION

The cultural and anthropological methodology used in the work allows applying new approaches to the understanding of criminal law from the standpoint of humanitarian methodology, which fully meets the task of ensuring the formation of various branches of law, especially criminal, according to the rule of law. The proposed approach allows to obtain a new type of criminal law, in which a person, regardless of the nature of participation in criminal relations, is provided with a number of rights and legal opportunities to protect their own, or those represented by it, interests.

The proposed approach creates grounds for further study of less global, but no less relevant problems of criminal law, in particular, ensuring objective criminalization, the formation of a coherent system of criminal law measures as a legal consequence of a socially dangerous act, the ratio of measures to physical and legal persons, etc.

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