

Democratic Development of the Ukrainian Criminal Legislation in drug trafficking area

Demokratyczny rozwój ukraińskiego ustawodawstwa karnego w obszarze handlu narkotykami

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Wstęp. Przeciwdziałanie szerzeniu się zakażeń HIV jest doskonałym przykładem siły praw człowieka i swobód demokratycznych. Jeśli ta tendencja będzie się nadal rozwijać, a rząd będzie stawiał prawa człowieka w centrum uwagi, to możemy oczywiście pokonać epidemię w czasie nie dłuższym niż 10 lat, pod warunkiem, że będą usunięte wszelkie przeszkody prawne, które utrudniają osobom z grup wysokiego ryzyka dostęp do profilaktyki i leczenia. Jednym z najistotniejszych problemów w przeciwdziałaniu szerzeniu się epidemii HIV/AIDS w Rosji, Ukrainie i Estonii pozostaje środowisko wstrzykujących sobie narkotyki dożylnie. Dlatego wpływ na drogę transmisji zakażenia jest jednym z głównych wyzwań w przeciwdziałaniu epidemii i jej negatywnych skutków. To będzie możliwe, jeśli system polityczny i ustrój polityczny znajdą odzwierciedlenie w krajowym systemie prawnym w tej dziedzinie, a przede wszystkim w Kodeksie Karnym.

Cel. Przystudiowanie i przeanalizowanie zmian demokratycznych i różnic pomiędzy starym Kodeksem karnym z 1960 roku z okresu Ukraińskiej Socjalistycznej Republiki Radzieckiej (SRR) – uchylonym w 2001 roku – i nowym Kodeksem karnym Ukrainy, który obowiązuje od 2001 r.

Materiał. Badanie obejmuje krajowe normatywne akty prawne: 1. Kodeks karny Ukraińskiej SRR z 1960 r. i 2. Kodeks karny Ukrainy z 2001 r. – w obszarze handlu narkotykami.

Metoda. Przeprowadzono badania semantyczne, analizę porównawczą prawa z użyciem metod strukturalnych i logicznych.

Słowa kluczowe: Kodeks Karny, handel narkotykami, odpowiedzialność prawna, HIV/AIDS

Introduction. The challenging struggle against HIV is a great example of human rights power and democratic liberties. If this trend continues to develop, and the government will realize that a man and human rights have to be in the spotlight, then we can of course defeat the epidemic in less than 10 years, on condition of removal of all legal obstacles that hinder people of high-risk groups to access prevention and treatment. One of the main driving forces of the HIV/AIDS epidemic in Russia, Ukraine and Estonia remains the IDUs (injecting drug users) environment. Therefore, the influence on a transmission link is one of the main challenges in resistance to the epidemic and its negative consequences. This could be possible if the political system and political regime were reflected in the national legal framework in this area, and primarily in the Criminal Code.

Aim. To study and analyze the democratic changes and difference between old Criminal Code of the Ukrainian SSR 1960 (abrogated in 2001) and the new Criminal Code of Ukraine, which has been effective since 2001.

Materials. The research covers national normative-legal acts: 1. Criminal Code Ukrainian SSR 1960 and 2. Criminal Code Ukraine 2001 – in the area of the drug trafficking.

Methods. Bibliosemantic studies, comparative analysis, legal methods and also structural and logistic method were used.

Key words: Criminal Code, drug trafficking, legal liability, HIV/AIDS

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Almost 90% (<1.5 million pers.) of the HIV epidemic across the CIS and Central Asia region accounts for Russia and Ukraine in the registered indices. In accordance with the evaluation data, the HIV prevalence in Ukraine is one of the highest in Europe, i.e. 0.86% of the population of the age group over 15 years is classified as a concentrated epidemic [1]. Between 2000-2009 this index became almost three times higher [2].

In 2009, 54 people were diagnosed with HIV every day, 12 people – diagnosed with AIDS, and 7 died

of AIDS-related diseases. At the beginning of 2010 Ukraine was inhabited by 360 thousand people aged 15 years and older, who were reinfected with HIV [3]. 59% of HIV-positive – IDUs, 55 thousand HIV carriers are in the penitentiary system. Overall number of HIV cases in Eastern Europe and Central Asia continues to grow [4]. According to official statistics, HIV-infected and AIDS patients in Ukraine constitute about 200 thousand. The vast majority of HIV-infected are persons aged 20-39 years. Over the period of epidemio-

logical surveillance of AIDS-related diseases, 32 055 people died [5]. Six hundred people die of AIDS each day in South Africa, 4 million among them PLWA [6]. Unlike most regions of the world the HIV epidemic in the CIS (Russia, Ukraine and Estonia – the worst affected countries in the region) continues to grow.

The fight against HIV is a great example of human rights power and democratic liberties. If this trend continues to develop, and the government will realize that a man and human rights have to be in the spotlight, then we can of course defeat the epidemic in less than 10 years, on condition of removal of all legal obstacles that hinder people of high-risk groups to access prevention and treatment [7].

One of the main driving forces of the HIV/AIDS epidemic in Russia, Ukraine and Estonia remains the IDUs environment. Therefore, the influence on a transmission link is one of the main challenges in resistance to the epidemics and its negative consequences. This could be possible if the political system and political regime were reflected in the national legal framework in this area, and primarily in the Criminal Code.

The etymology of the word “regime” (Fr. *regime*) and Latin *regimen*) – is a management system of the government or administration. “Political regime” is defined as the relationship between public authorities and society [8]. From the point of view of the French political scientist Jean-Louis Kermonn the political regime is “the set of elements of ideological, institutional and sociological order, which contribute to the formation of political governance of the country for a certain period” [9].

The viewpoints of the Ukrainian political scientists are of broader sense. They consider regime as:

1. A method of the governmental management – the set of elements of institutional, social and ideological orders, forming the political power of particular country at a particular period;
2. Variable and open-to-change features of a political system, including its socio-economic grounds;
3. The source of the government management, or responsible authority that determines the political system and its changing components [10].

For Citizens of Ukraine and stateless persons a general age of criminal responsibility is 16 years (in accordance with Art. 18 of the Criminal Code of the Ukraine), and in some cases over 14 years (Part 1, 2, Art. 22 of the Criminal Code), those who committed a crime associated with drug trafficking or equivalent substances are liable under current Criminal legislation of Ukraine (CCU).

In most European countries the criminal liability arises under the general rules by the age of 18, while in the UK, Ireland and Wales of 21 (but under the laws of the United Kingdom for certain crimes a 10-year-old child could be convicted), Belgium, Spain and Scotland 16, France with 13 and even 6 years – in Iran [11, 12].

Criminal liability in Ukraine is reflected in the classification of crimes by severity and criteria, which determines the stage, the guilt shape, the content and the nature of the crime. In the analytical comparison of the Criminal Code of the Ukrainian SSR and for the independence of Ukraine, the most democratic changes are tracked in the Code of Ukraine, which came into force in September 2001. However the radical changes in criminal responsibility in drug trafficking were carried out by the Law of Ukraine of 15.02.1995 p. N 64/95-BP “On Amendments and Additions to Certain Legislative Acts of Ukraine” in connection with the adoption of the Law of Ukraine “On the use of Ukraine narcotic drugs, psychotropic substances, their analogues and precursors” [13] and the Law of Ukraine “On measures to fight illicit trafficking in narcotic drugs, psychotropic substances and precursors and its abuse” [14]. This law amends the Criminal Code of Ukraine, which is supplemented by Articles 70-1, 229-12, 229-17, 229-19, 229-20.

The Criminal Code of Ukraine 2001 [Special Section. Crimes against national security of Ukraine. Section XIII. The offenses related to narcotic drugs, psychotropic substances, their analogues or precursors and other crimes against public health. As amended pursuant to Law number 2953-III dated 17.01.2002 N 1723-IV dated 18.05.2004. Declaring unconstitutional certain provisions in the Constitutional Court decision № 15-pn/2004 of 02.11.2004, N 2252-IV of 16.12.2004 – N 2924-VI dated 13.01.2011 [15] has been compared with the Criminal Code of the Ukrainian SSR 1960 (with changes valid till 2001 only) [Special Section. Chapter I. Crimes against the state. With changes and additions made in accordance with the Decree of the Presidium of the Supreme Soviet of the Ukrainian SSR on 27.06.1961, on 21.07.1961, on 10.09.1962, on 12.01.1983 N 4571-X, on 29.02.1984 N 6591-X, on 14.04.1989 N 7373-XI, on 16.06. 89 N 7617-XI; Law of the Ukrainian Soviet Socialist Republic on 28.10.1989 N 8314-XI; laws of Ukraine from 12.09.1991 N 1546-XII, on 11.10.1991 N 1649-XII; in the wording of Law of Ukraine from 17.06.1992 N 2468-XII). 1. Especially dangerous crimes against the state] [16].

In terms of guilt the most current Code differs from the previous types of criminal sentences in matters of various types of crime. Total Chapter XIII of the Criminal Code of Ukraine holds 18 articles and some of them contain liability mitigation or vice versa liability increase, which should also be considered as a democratic development of the national criminal legislation, the impact on public safety and security of the individual. Attention is drawn to the fact that the primary responsibility for criminal acts are mitigated in almost all the Articles of Part XIII, allowing convicts to rethink their actions, while recurrence in the future becomes more dangerous to society and leads

to tougher punishment. These are the crimes committed by a group of persons, collusion, recurrence, combination of crimes, professional or official crimes etc. Accordingly, the responsibility has become more clear and transparent.

Thus, in the invalid Code responsibility is defined in 25 articles. From 18 current articles more or less mitigation is gained in 11 articles, some of them with criminal field moved into the field of view of civil law and administrative law. This is Part 1, 2 and 3 Article 305. The smuggling of drugs, psychotropic substances, their analogues or precursors (note to Article 305 as amended by the Law N 875-V dated 05.04.2007.) [In conformity with of the Criminal Code of the Ukrainian SSR 1960 (analogue): Art. 70¹. The smuggling of drugs, psychotropic substances and precursors];

p. 1, 3 Art. 307. Illegal production, making, purchasing, storage, transport, transfer or sale of narcotic drugs, psychotropic substances or their analogues, p. 2 left unchanged. (Analogue: Art. 229-1. Illegal production, making, purchasing, storage, transport, transfer or sale of narcotic drugs or psychotropic substances);

p. 2, 3 Art. 308. Stealing, appropriation, extortion of narcotic drugs, psychotropic substances or their analogues or acquisition by fraud or malpractice (Analogue: Art. 229-2. Theft of narcotic drugs or psychotropic substances);

p. 1, 2 Art. 309. Illegal production, preparation, purchasing, storage, transportation or transfer of narcotic drugs, psychotropic substances or their analogues without intent to sell (as amended in accordance with the Law N 270-VI dated 15.04.2008) (Analogue: Art. 229-6. Illegal production, making, purchasing, storage, transportation or transfer of narcotics or psychotropic substances without the purpose of sale);

p. 1, 2, 3. 311. Illegal production, making, purchasing, storage, transportation or transfer of precursors (as amended in accordance with the Law № 270-VI dated 15.04.2008) (Analogue Art. 229-20. Illegal manufacture, acquisition, possession, transportation or transfer of precursors);

p. 1, 2, 3. 312. Stealing, appropriation, extortion of precursors or obtaining by fraud or malpractice (Art. 312, as amended in accordance with the Law N 270-VI dated 15.04.2008) (Analogue Art. 229-19. Theft of precursors) p. 1 Art. 313. Stealing, appropriation, extortion of equipment for manufacture of narcotic drugs, psychotropic substances or their analogues, or taking them through fraud or abuse of office and other illegal acts with such equipment (as amended in accordance with the Law N 270-VI of 15.04.2008) (Analogue Art. 229-17. Theft, illegal manufacturing, purchase, storage, transfer or sale to others of equipment for manufacturing of narcotic drugs or psychotropic substances);

p. 1, 2 Art. 317. Organizing or running illegal use, production or manufacture of narcotic drugs, psycho-

tropic substances or their analogues (Analogue Art. 229-4. The organization or keeping of the premises for the use or manufacture of narcotic drugs or psychotropic substances);

p. 1, 2 Art. 318. Illegal production, imitation, use or sale of forged documents to obtain narcotic drugs, psychotropic substances and precursors (Analogue Art. 229-13. Illegal manufacture, forgery, use or sale of forged documents to obtain narcotic drugs, psychotropic substances and precursors);

p. 1, 2 Art. 319. Unlawful issuance of a prescription for the right to purchase of narcotic drugs or psychotropic substances (as amended in accordance with the Law N 270-VI dated 15.04.2008) (Analogue Art. 229-14. Illegal delivery of prescription authorizing the purchase of narcotic drugs or psychotropic substances);

p. 1, Art. 320. Violation of rules related to narcotic drugs, psychotropic substances, their analogues or precursors (Analogue Art. 229-7. Violation of rules of narcotic drugs, psychotropic substances and precursors).

In general, after the adoption of the Criminal Code in the new version and its implementation arrangement, it has received a liberal development, but part of Chapter XIII has obtained the highest level of responsibility: part 1 of Art. 306. The use of proceeds from illicit traffic in narcotic drugs, psychotropic substances, their analogues or precursors (as amended in accordance with Law N 430-IV of 16.01.2003 – effective by 11.06.2003, N 485-IV of 06.02.2003 – effective by 11.06.2003 [Analogue Art. 229-12. Use of proceeds from illicit traffic in narcotic drugs, psychotropic substances and precursors];

p. 1, 2 Art. 310. Sowing and cultivation of opium poppy or cannabis (as amended pursuant to Law N 270-VI dated 15.04.2008, N 1165-VI dated 19.03.2009) (Analogue Art. 106-2. Illegal sowing and cultivation of opium poppy or cannabis. It is important that the present Criminal Code excluded article 106-1. Failure to ensure the protection of crops of opium poppy or cannabis, places of storage and processing);

p. 1 Art. 314. Illegal injection of narcotic drugs, psychotropic substances or their analogues (Analogue Art. 229-15. Illegal injection of narcotic drugs or psychotropic substances);

p. 1 Art. 316. Unlawful public drug use (Analogue Art. 229-16. Public Illegal drug use).

Two articles of the Criminal Code 2001 have been differentiated, where some of the areas are mitigated, and some became tougher: p. 1, Art. 315 is liberalized. Addiction to the use of narcotic drugs, psychotropic substances or their analogues, but p. 2. assumes responsibility increase as more dangerous (Analogue Art. 229-5. Addiction to use narcotic drugs or psychotropic substances);

p. 1, Art. 321 has been liberalized. Illegal production, making, purchasing, transportation, transfer, possession with intent to sell or sale of toxic or potent

substances or toxic or potent drugs, while p. 2, 3 and 4 of the same article transferred to the rank of greater responsibility as more dangerous criminal acts (as amended by Law N 875-V of 05.04.2007) (Analogue Art. 229. Production, purchase, possession or sale of toxic and potent substances).

Art. 44. Illegal making, purchasing, storage, transportation, transfer of narcotic drugs or psychotropic substances without the purpose of sale in small quantities, Art. 44-1. Avoidance of medical examination or medical examination and Art. 229-18 Notification of false information about the narcotic drugs turnover, psychotropic substances and precursors are not appeared in the new Code.

Only one article of the Criminal Code 2001 which is remained unchanged is the Art. 322. Illegal organization or running the places for the use of intoxicating substances (as amended by Law N 875-V dated 05.04.2007) (Analogue Art. 229-11. Organization or keeping of premises for the use of intoxicating substances).

The Criminal Procedure Code of Ukraine has also obtained democratic development. This law has been functioning without any changes since 1961 and does not meet the norms of the Constitution and European standards. The draft of this Code has been reviewed by the Venice Commission, and as a result is approved by the Ukrainian Parliament and signed by the President of Ukraine.

Eventually there are seven key innovations: procedural and adversarial equality, increase of the rights of suspects, victim empowerment, renewal of procedures of prejudicial inquiry, improvement of the judicial control process, prohibition of case return for additional investigation and improvement of procedure to appeal court decisions [17].

Summing up, we can draw the following conclusion: The comparative analysis of the Criminal Code of 1960 and the Criminal Code of Ukraine 2001 indicates the democratic changes to matter of the Law and closer approach to the European standards of the human rights.

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