

# Criminal Law at a Time of Change



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By

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# TABLE OF CONTENTS

Introduction .....	1
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## **Part One: Philosophical and Methodological Foundations for Understanding Criminal Law during the Transformation of Social Relationships**

Chapter One.....	4
Man and Criminal Law in the Social Dimension	

Chapter Two .....	19
The Essence of Criminal Law and the Basis of Criminal Law Protection	

Chapter Three.....	29
Criminal Law Methodology in the Postmodern Era	

Chapter Four.....	41
Philosophy and Criminal Law: The Limits of Contact	

## **Part Two: The Criminal Law Paradigm in the Age of New Institutions**

Chapter One.....	50
The Global Instrumentalisation of Criminal Law	

Chapter Two .....	67
In Search of a New Vector of Criminal Law Development	

Chapter Three.....	86
<i>Criminal Matter</i> or Criminal Law in a Broad Sense	

Chapter Four.....	94
Free Will and Criminal Responsibility	

Chapter Five .....	108
Autonomy of Criminal Law: The Limits of an Instrumental Understanding of Law	

**Part Three: Criminal Law in the Context of Total Digitalisation**

Chapter One.....	118
The Impact of Digitalisation on the Modernisation of Criminal Law Institutions	
Chapter Two .....	127
Artificial Intelligence and Criminal Law	

**Part Four: Crime and Punishment in Conflictual Discourse**

Chapter One.....	146
Ontological Foundations for Understanding the Doctrine of Offence	
Chapter Two .....	160
Criminalisation of Acts in Criminal Law	
Chapter Three .....	174
Punishment and Criminal Law Effects	
Conclusion.....	187
Bibliography .....	190

# INTRODUCTION

Modern society is very unstable, however, as there are constant shifts in the socio-economic and political dimension of the level of social development. It cannot be said that this process has a special acuteness and significance today. Regulators will always be able to object and cite a lot of examples from history and practice, recalling that it has already happened and, moreover, not once. And strangely enough, they will be right.

Progress has a progressive development, and it concerns absolutely all spheres of social life and human existence. But how universal is the idea of progress and is it the only true one? Everyone will have a different answer to this question and the arguments "for" or "against" will be diverse. Nevertheless, it is obvious that the idea of progress is not absolutely universal, as well as the global development of mankind in this perspective. This fact imposes its imprint on absolutely all spheres, including law.

And if we are talking about criminal law, it cannot understandably be left aside. Be that as it may, the law has undergone significant changes over the last decade. In the perspective of the problem under consideration, it would seem that the protective function should correspond to the regulatory function. However, this is not always the case. This is where the global question arises as to what path criminal law will follow in its development, whether it will be able to preserve its classical institutions or whether they will also be subjected to revision. Of course, it is not a question of changing priorities in criminal law overnight. It is a long and progressive process. But which direction will it take? In the direction of global criminal law or the law of an individual state, within the framework of strengthening the security function of the state or in the context of the priority of criminal law protection of human rights and freedoms from any interference. Ultimately, whether criminal law should remain a shield for the individual or a punitive sword in the hands of the state.

All this will be discussed in this study, as well as the trends that are taking place today and, by analysing them, we can predict the contours of the future of criminal law. Once again, everyone has different and far from ambiguous attitudes towards the current events in society. For this reason, there can be no consensus. But it is important for us to point out those

regularities that are already obvious and the reflection of which generates new facets of development for criminal law itself, no matter how conservative it strives to be.

The author's vision of criminal law and its basic institutions is presented in this edition. And in our opinion, the discussion in this matter is just beginning. Because the new era requires new approaches, and here the old methods and approaches cannot always be fully adopted and adequately involved in a single mechanism of regulation and protection of social relations. The man himself is changing and it is necessary to proceed from this. The state is also changing, because it faces new challenges and tasks. Therefore, it is quite obvious that criminal law is also changing. Let us try to consider these changes, which first of all affect the basic institute of criminal law: crime and punishment, as well as its institutional formations.



## **PART ONE:**

# **PHILOSOPHICAL AND METHODOLOGICAL FOUNDATIONS FOR UNDERSTANDING CRIMINAL LAW IN THE PERIOD OF TRANSFORMATION OF SOCIAL RELATIONS**

## CHAPTER ONE

# MAN AND CRIMINAL LAW IN THE SOCIAL DIMENSION

### **The Individual and the New Reality: What will be the Choice?**

The history of mankind is filled with various ideas and revelations, and it so happens that these ideas move the world and fill the minds of many people. It has always been so, and always some meta-idea dominated, was the main forerunner of various events, be it revolutions or world wars, shifts in economy or socio-political life.

It was only necessary to indoctrinate a person that a certain social reality is the norm and the correct basis of social existence, and seemingly yesterday, unthinkable and forbidden things became a given. At the same time, all this happened not only to the man himself, but also to the values, goods, and standards that surrounded him. Law did not escape this fate either. In general, the twentieth century was in a deep crisis, a crisis that overthrew the human essence and humanistic nature. The rejection of divine principles and revelations in favour of humanism and justice, faith in scientific and technological progress has not really made the world cleaner and freer. Evil still surrounds many people, and the principle of humanity has become hateful, because indifference has filled human hearts. The fruits of this indifference are being reaped today.

Everyone aspires to domination, total domination, the idea of superman has found its embodiment in the minds and hearts of many people, but the people have forgotten that it is possible to become such, only through the subjugation of others, in fact, making them slaves of their aspirations. Of course, we will not find this in the direct sense today, everything has a much different shape and is obscured by democratic principles and ideas of human rights protection, but the essence of this process is very clear and quite obvious.

The global transformation of society and its social relations is reflected in the refrain on man, his essence and purpose. It is obvious that in the heat

of the scientific and technological revolution and all new achievements in science and technology, the essential purpose of man has changed radically. Man has become "sharpened" on his rights and freedoms, their realisation, protection and guarantees, which necessarily has a material component as its basis. Personal success in life is now an indicator of chosenness, a measure of human dignity and a fundamental category of social consciousness. The success of today's man is measured only through one criterion: material wealth multiplied by the social position and status that a person occupies (a kind of place in the caste hierarchy). Money, status, career - that is the god of the present mankind. Receiving benefits and pleasures, having a good and cheerful time is another component, which is the basis of the modern universe and human goal-setting.

At the same time, there is nothing stable and definite in modern society, as well as in the picture of the world it draws: reality is illusory, a product of imagination, and sometimes it bursts like a soap bubble. In such a world, man has nothing to rely on and nothing to strive for, he must only seize the moment and think less, because, as they say nowadays, "thinking is the idle endeavour of losers". In this paradigm, science has become increasingly self-contained and reduced to elementary technology, where the main goal is not the search for truth, but the commercialisation of its final results. Art is degenerating into a means of entertainment and enjoyment, a meaningless play of the imagination. Design and fantasy constitute the future of such art, where the symbol is the black square - the image of emptiness and the black hole of meaning, the curtain between man and the new existence (Golubev 2007, 53).

If earlier the credo of human life was success and realisation of vocation, which required real effort and creative abilities, today play has become a fundamental way of being. The game, based on luck and good fortune, epitomises idleness and it (idleness) becomes the holiday of the modern man's soul. Therefore, the purpose of human life is now reduced to pleasure, and the will of chance is the limit of dreams and life strategy.<sup>1</sup> That is, a person prefers not to work on himself, systematically moving towards success and self-realisation, but to wait for chance. Hence the increased fussy social mobility of mankind, the constant change of occupation and priorities, place of residence, work, marriage partners is largely understandable. Modern man does not want to set himself any tasks and his catchphrase becomes the slogan: "I don't owe anyone anything".

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<sup>1</sup> The main life values of the majority of citizens are such as power and wealth, personal success and social recognition.

At the same time, no matter how we say it, but this is the foundation on which the process of tacit education of the young generation is actually based. Of course, no one directly talks about it and does not teach it, but these values are arbitrarily and involuntarily imposed, society is pushed to the fact that it is always more pleasant to relax and enjoy life than to work, do business and give oneself to one's neighbour and not to another gadget. Thus, the world as a whole does not make sense, it has become filled with uncertainty, false attitudes of searching for oneself. Life becomes a game, and it is the game that turns from a means to an end.

Man has become enslaved by various passions, tormented by the inner contradictions of choosing between faith and pride. An example of this is computer games. Here man prefers to escape from reality, from the pressurising atmosphere of spiritlessness, material gain, general distrust, trying to be realised in virtual space. Man has become so absorbed in the illusory world of the game that it has become a real idol for him. He (man) lives the life of his virtual character, in the game he is fearless and immortal, but these virtual qualities speak more about the irresponsibility of man, his lack of self-realisation. The price of such behaviour is loneliness, vanity and irritability.

In general, man today, as never before, lives together with his new technical "friend" - gadget, he is completely penetrated and absorbed by it. Electronic means completely control a person. The world of corporeal things has given way to incorporeal things. Virtual reality has become a given and spiritual world (and sometimes a measure) of modern man. All this suggests that each person now has his own virtual world and this individual world of man is in a simple technical device, which practically replaces everything. This minicomputer has become the embodiment of the XXI century. And if the XX century was the century of the book, then without exaggeration the XXI century can be called the century of the mobile phone.

If we talk about gadgets, they have certainly replaced human beings. People prefer to devote their free time to their favourite phone, indiscriminately browsing news, messages, videos, messages and so on. While earlier people used to read more fiction, now most of them read themselves, their opuses and mistakes that are all over social media. People shoot videos, make clips, take selfies and put it all out there for everyone to see. The goal here is very simple. Everyone wants to get more votes, views, likes, etc. In general, everyone wants to become successful and famous. And this success is measured by only one indicator: how many people appreciated you. Maybe these people do not approve of your deed or extravagant selfies, but it is not important.

Today we can hardly find a young person who does not have a personal page on social media. On such a page, you can learn a lot about his character, about his connections, preferences, hobbies, friends, thoughts, etc. What is all this done for? What is the meaning behind these actions? In our opinion, the answer is obvious: it is a kind of self-realisation of a person (when the "I" needs the approval of others). Moreover, in this process everyone solves his or her own tasks. Someone is fond of his appearance and flaunts it, someone talks about his business and favourite activities, someone shoots videos about animals, etc., in the end, all this variety cannot be counted. But everyone is trying to do something and to give it all virtual publicity. It turned out that all this was possible because many people lack the basic opportunity to declare themselves, to show their self. And most importantly, many people have lost faith in the objectivity of assessing their capabilities. Hence the logic of all these actions and desires for total self-realisation becomes clear.

Today a gadget can do a lot of things and many people also use this opportunity. Everyone has his own intentions and goals. The consequence of all this is that the main way of social management of mankind becomes stimulation and manipulation. Freedom is no longer needed, it is replaced by comfort, cosiness and conventionality. In such a situation, gadgets have replaced the human being and strangely enough, human communication is becoming less and less. Modern technology is arranged in such a way that communication has become non-verbal, gesture-based. People prefer to just send a text message, repost a picture than just dial a number and communicate live, not to mention face-to-face meetings. Why? After all, a person saves time. It is possible to watch videos, films, play card games, listen to music, virtually attend lectures, etc. using the phone, which is always at hand. All this has become accessible and achievable. Man began to save time. This is already a given. But here, there is another question: what does he do with saved time? And the answer to this question hangs in the air.

As we can see, in this virtual reality, which has long been a given, there is no living being, humanity loses visual contact and there is no sense of responsibility for its actions. This reflects the edges of proper behaviour in such a paradigm, where simply the morals of society become a phantom. The world becomes unprincipled.

So, nowadays one can easily find any information, study it, analyse it, etc. However, the effect of action here is equal to counteraction: when information is publicly available, there is less probability of selecting the necessary and correct information. A person simply gets lost in this large array of news and total awareness. The ultimate availability of knowledge

is replaced by mere information. With increasing availability of information, depth and individuality disappears. Information is a means of entertainment where man "kills" time.

Is this a bad thing? Actually, things are not as pessimistic as they may seem. There are many rational things in all this, and it is probably pointless to argue and fight with it. However, what is important in this connection is something else. Man has become closer not to a human being, not to a living being, but to a gadget, a functional technical device. And nothing more. With the development of progress and scientific achievements, the human essence is moving in a proportionally opposite direction, ordinary morality and morals are being replaced by other "rules of the game". And if there is no longer Christian morality, there is a very different one. This is a place that cannot be unfilled. And that moral foundation is the idea of human rights. In fact, today's man has put himself in the place of God and replaced him with himself. The supernova man, about whom F. Nietzsche once wrote, has already appeared. This man believes only in himself, in scientific and technological progress, and the ideology of human rights is the basis of his existence and being. The only thing left is to comprehend the phenomenon of immortality!

Thus, the modern man has withdrawn into himself, lives only for himself and his own pleasure, and this ideology of narcissism has begun to penetrate into law, with its total and imperative importance and the dominance of human rights. The deficit of personality (or rather humanity) is natural and has deep causes in the psychology of Western man in the postmodern era. But today, the characteristic feature of such a person is the fashion of searching for the self. However, the reality is that it is technology that has filled the inner world of man. Trends towards simplification, programme man to act according to predetermined standards invented by others. Synthesised, artificial perception of the world produces algorithms of behaviour and deprives man of creativity. A person who does not resort to reflexion began to simplify not only the world around him, but also himself. The completeness and multidimensionality of meanings have been replaced by banal consumption of all kinds of information.

It feels as if a person has completely lost feeling and responsibility. It is as if we have become broken into projections of various social roles and cannot "put ourselves together" at the right moment. In this situation of constant inconsistency with ourselves, everything becomes a mere imitation: virtue, deeds, democracy, freedom. A person can reason with these categories, believe in their words, but never be guided by these values and principles in life (Buck 2014, 34). This is due to the fact that

man has ceased to be himself, has become a function, an embodiment of technology (and all technologies have become subject to market laws). And all progress turns into a cultural brake, simplification and public accessibility.

Along with this, the "cell of society" - the family - has lost its status. It turns out that a person does not need it today. If earlier the family was connected with certain semantic values and rather in some way was an element of survival, now it has simply turned into a vestige of modern mankind.

In order to satisfy his instinctive needs, modern man does not need to have a family, there is no such need for cooking, household services, housekeeping, etc. Today, all this can be done and found by one person and for this purpose it is not necessary at all to look for the second half. Mankind has created a lot of opportunities to coexist alone: today a man can easily satisfy his every desire without expecting to give something in return, and he is not obliged to anyone.

Man's self-sufficiency and his independence has exposed the problem of loneliness, but this loneliness is now easily filled with various gadgets and Internet entertainment. The modern man is afraid to be alone with himself, to listen to himself and understand the meaning and purpose for which he exists. But does he need to know this meaning? The Modern man is in a state of meaning-life crisis, which is aggravated in the context of the development of the individual, society and mankind as a whole. In this situation, man is suddenly left alone with himself. This means that the crisis is the line beyond which there is either its overcoming or emptiness, loneliness and ruin of a person, and maybe, all of mankind (Fironov 2022, 5).

As we can see, the total informatisation of society carries a lot of risks and they are connected with the alienation of man, his dependence on technology, the instability of the social system itself and the growing stratification of society (Berezina 2022, 157). The category of "uncertainty" has come to dominate everything, but it can hardly be the basis of social progress. Moreover, entering the era of digital technologies has significantly changed the value system of society, and in the near future will radically transform its culture, including the cultural code, and will predetermine the further development of civilisation (Laptev 2022, 91).

At the same time, in a world of uncertainty, people are beginning to lose their sense of meaning, and this is partly due to the lack of mutual understanding and communication. People have simply stopped understanding each other, and have an indifferent attitude to what is happening today in society, politics and economy, indicating a change in the priorities of man

himself. A man is closing himself in and his own world predetermines his choice. However, the loss of meaning of life for man has become so great that it has overshadowed the phobia of death. The loss of meaning is now the most terrible thing for man. And it must be said that the consumer society leaves man no choice in this unrestrained race and total domination of the ideas of technological and pragmatic behaviour of society.

The sacralisation of human rights and inner narcissism devalues life itself. The reduction of the human being to the property of simply being alive, easily turns into the possibility of becoming dead, becomes, as a result of the practical implementation of the Western power paradigm, a reality in which human life as a living being is practically worthless, can always be questioned by political expediency and become a bargaining chip (Sayamov 2022, 8). Especially when it comes to other ("third") countries and this reflects the *status quo* of modern existence. Consequently, in a society of hyper-consumption, the value of human life is determined by its economic profitability.

In other words, today there is a dehumanisation of man, when man himself does not want to make a moral choice, but prefers simple life values and the very approach to their understanding. The humanistic component gives way to another. A person becomes alien to other similar people and strives to live in a virtual world and not pay attention to the events taking place in society.

It can be seen, at present, in the conditions of aggravating social conflicts and political contradictions, the fundamental values of human civilisation are weakening and losing the ability to ensure its sustainable existence and development.

And as D.V. Miroshnichenko notes, "at this time the axiological theme becomes a priority for humanitarian science" (Miroshnichenko 2015, 62).

The change of paradigms of society's development, value attitudes and orientations, giving the political component a new reality, complication of economic, social and legal discourse reveals complex problems and metamorphoses due to shifts in the value priorities of society and its essence. Let us also not forget that a person is formed and acquires his moral image within the framework of those values that he experiences and through which his moral image is formed, the ability to adequately assess the events taking place in the lives of many people.



## Law Before Choice

This is where the question arises: in this regard, is the law capable of properly regulating new social relations? Due to their seeming permanence, and in fact their impermanence, the law is objectively unable to do so. Moreover, today it is formally unable to fix what already exists. And this poses a global challenge for the law itself: whether it is able to direct new social relations into the legal direction and predict their development, positive and negative processes of the mechanism of their legal regulation as a whole. The answer to this question is not obvious, because it is not clear what the law will be in this paradigm, what role it is destined to play: serving the interests of political elites, ruling classes or fighting for justice, observance of the rule of law and human dignity?

However, the existing trends in the development and functioning of law show that it has become unpredictable, more technological and pragmatic, in some ways standardised, as a result of which:

there is a breakdown of the basic institutions of law, private law flows into public law and vice versa, the methods of legal regulation become inertial;

the role of the state as a kind of arbiter, resolving social conflicts and establishing the balance of rights and obligations between social groups is questioned;

the introduction of digital technologies into social life raises the question of abandoning and modifying established and known structures, but no one knows the ultimate goal of such a process, and as a result, it becomes unclear what we will be dealing with at all;

man is withdrawing into himself, into his world of digital reality, and this changes context and requires the recognition of other values, which must be juridified and incorporated into the existing reality.

Nevertheless, the globalisation crisis of 2001 and 2020 and the total pandemic of 2020-2021 have only exacerbated the problem of personal identity and human rights, or rather revealed the deep crisis of these institutional formations.<sup>2</sup> This became clearly visible in 2022, when the world order requires reformatting. It is obvious that nowadays there is a

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<sup>2</sup> As they point out in this regard, "the Western world has not become fully free and democratic in recent times. Proof of this is the widespread programmes of forced vaccination, artificial quarantines, bans on freedom of speech and protest, and other such measures" (Bezborodov and Khalafyan 2022, 26). And all this is done under the slogan of "protecting people". As a result, the right experiences the negative consequences of political processes and is replaced by political discretion and elementary expediency.

rethinking of values and basic constructions of building social relations, because it is not the individual, but the security of society and the state as a whole that is at the centre of attention. Consequently, the law with its arsenal of measures and means of regulation of social relations, as well as the fight against socially dangerous manifestations will have to take into account these changes. And they consist in the fact that mankind shifts emphasis from total globalisation of all spheres of public life to regional development, protection and security of the state in the first place. And the law, by the way, should reflect the interests of its society and territory, taking into account the mental and subjective preferences of specific states and persons inhabiting them. Hence, institutional transformations are inevitable, the essence of which will consist not in protecting the interests of transnational corporations and supranational organisations, adjusting everywhere and in everything, unification of law and its standardisation, but in refracting one's own interests, protecting them and understanding what law is in general, and how deeply it is able to intrude into the sphere of regulation of social relations, what measures of influence are optimal and effective in this case, what are the limits of the mechanism of legal regulation.

The fact is that globalism as a clearly formulated economic project is not based on cultural and ethical values and the idea of building a society of "social welfare". In this case, the facade of human rights and the development of democracy hides quite different goals of universal unification and reflection of hidden interests of certain social groups and political forces. In such a situation, law is only an appendage of this global idea and serves only as a means of ensuring and realising supranational projects. Simply, law is called to fix the existing state of affairs. And this role is assigned to absolutely all branches of law (both public and private), where law (or a particular branch of law) is viewed through the prism of a peculiar instrument of realisation of practical possibilities of total economic, political and social law and order. This is not in line with the principles of national and sovereign states. It is obvious that in the near future, we will face the dilemma of reassessing the principles of international and national law development, and reformatting their classical foundations in the digital era. In this sense, the global instrumentalization of law is just beginning. Further, it will take place in the spirit of the security of national interests of the state and its citizens, where it will be about the de-globalisation of law and its instruments. From this point of view, the human choice should be obvious for modern Russian, as well as Belarusian society. While preserving true national, spiritual and moral values, it is important not to miss the chance to remain

a state with a human face in this unrestrained world race, where true moral values are the basis of the foundation for building the state and society. Technologisation cannot and should not replace the moral face of man (Khiluta 2022, 94-99).

## **What about Criminal Law?**

In life, it so happens that every new generation tries to overthrow from the pedestal those ideas that were developed by the previous generation and function in society as basic, dominant and a priori true. This is by no means a process of self-assertion, but it is a cyclical progressive movement, as each new generation tries to prove its own consistency and that its idea of what is proper. It concerns almost all spheres of life in society and one cannot do without it. Moreover, it is a natural process of life. It is directly related to criminal law. And if at the level of legislative tendencies, the ongoing transformations are not so obvious, then at the level of criminal law doctrine the considered tendencies are clearly visible. Moreover, the issue here is not a fundamental breakdown of the foundations of criminal law, its central institutions, etc., but is to give a new impetus to criminal law regulation, verification of its subject matter and method, scope of action and modification of the very concept of what constitutes a crime. And in the context of what constitutes punishment, here the subject area of criminal law comes to the mechanism of criminal-legal impact, the essence of which is prevention, not punishment. That is, from this perspective, criminal law turns into a mechanism of social protection, a means of ensuring the security of the state, society, and the individual (and the sequence of criminal law protection looks like this).

In the most general view, the essence of criminal law in this paradigm is reduced in this paradigm to conflict resolution. A conflict that, on the one hand, exists in society and, on the other hand, between specific individuals. But in fact, criminal law fails to fulfil this task, because by resolving the conflict with the arsenal of means at its disposal, it generates a new conflict. This chain is inevitable. And in this case, we cannot say that criminal law is a universal tool in the hands of the state in resolving conflict situations. It is just that today there are no other such means.

The socio-political processes currently taking place in society and in the world as a whole, raise the question of the transformation of criminal law itself, the need for its adaptation to new institutional formations and the demands of society. However, criminal law has constantly lived in an era of change. These changes have always taken place and are always taking place, as man himself, his essence, is changing. And here the

fundamental question is to what extent criminal law itself is capable of reflexion and whether it needs it at all.

Remaining one of the conservative branches of law, criminal law gradually begins to become obsolete, not changing in its nature, it tends to resolve new conflicts in the old ways. And in this respect, it still continues to be the "last argument" of the state in the system of ensuring social order and resolving all kinds of disputes and conflict situations. From this point of view, criminal law violence is an element of compromise between society and the state. But if one side loses parity in this issue, it is clear that this is no longer a compromise, but domination. However, in such a plane, the attributive forms of the state's impact on society are generated by the needs for co-existence of the state and society.

Therefore, as pointed out by A.E. Zhalinsky, criminal law "develops under the influence of contradictory interests of power groups and the general pressure of the population, consciously or unconsciously seeking to enhance security through increased repression, and in many situations to psychologically satisfy various aspirations (restoration of justice, revenge, revenge, joining a strong group, etc.). The problem is that it should still develop on the basis of general regularities, while necessarily taking into account the balanced interests of the country and ensuring equal position of its citizens" (Zhalinsky 2015, 18).<sup>3</sup>

In determining the meaning of criminal law and its place in the life of a particular person, it is necessary to make a fundamental emphasis on the fact that criminal law is just one of the forms of life activity of society (society), which (it is society) seeks to protect itself from any arbitrariness on the part of anyone, including the state. Literally, this means that criminal law is not at all a means of solving those tasks that the state faces in a particular historical dimension. These tasks may vary and for obvious reasons they will always vary. Even if we talk about criminal law becoming a means of security, such a means cannot be directed against society itself, against the individual, if only because criminal law is designed to resolve social conflicts, not to generate them.

Positive regulation of social relations is not the subject of criminal law, so it is not at the forefront of those socially significant processes that occur

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<sup>3</sup> Note in this regard, that in modern conditions, criminal law acts as one of the strict social tools, one of the effective resources in the hands of the state. However, criminal law, whatever it is today, needs to be adapted to the processes that are taking place in society today. At the same time, it should adapt not only to new forms and types of socially dangerous behaviour, but also to the expectations placed on it.

in society. This is the domain of other branches of law. But the question is how quickly and promptly, taking into account the transformation of social relations and mechanisms of their regulation, criminal law should develop its own standard of criminalisation of acts that are socially dangerous, deform the existing social relations and are beyond the boundaries of permissible.

Of course, this is the eternal question of what constitutes an offence and what its normative boundaries are. But today, it is also obvious that criminal law cannot remain outside the context of socio-political processes taking place both inside and outside society, outside the process of modification of the social essence of man. Of course, political expediency often predetermines the vector of development of criminal law. But on the other hand, it is also obvious that this vector is unstable and extremely changeable, depending on many factors that are beyond the criminal law itself.<sup>4</sup> Much more important in this question is the answer that allows us to define the boundaries of criminal law in the context of the changing social essence of the individual himself. And in this situation, it seems that the choice of man himself predetermines the contours of the future of criminal law.

Nevertheless, in this question we must bear in mind that the progress of humanity does not lead to the perfection of man himself. The excess of techniques and technologies, of course, has simplified the life of man, made his life more comfortable and generally accessible, and life itself has become richer and more multifaceted. However, all this, we repeat, has not led to a change in the social essence of man. Man has not become better internally (and does not even strive for this), has not grown spiritually, so all those human passions (bordering on marginal and immoral behaviour from the point of view of the Christian way of life and natural values), which took place earlier, have not disappeared anywhere, but on the contrary, doubled. Therefore, the question that criminal law will gradually fade into oblivion, due to the eradication of crime, is naive and not even up for discussion. And if it is, then in a completely different format, because it is obvious that scientific and technological progress gives rise to new social conflicts and contradictions, which are then translated into crimes of a new form.

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<sup>4</sup> This sometimes gives an answer to the question of why criminal law is so often amended, and they are quite contradictory. This situation forces us to look for an answer on a different plane, namely one where the foundation of criminal law is not the element of political expediency, but its real basis is the social values of society. The only problem is that these values have also recently started to change rapidly.

At the same time, when we talk about the digitalisation and technologisation of criminal law (and law in general), we overlook one detail that significantly sheds light on the issue under discussion. The point is that digitalisation itself was a product of a more global concept - progress. It was progress in the system of neoliberalism that presupposed the course of human development, shaped the socio-political and legal foundations of society and its institutions. And this state of affairs has taken place over the past decades. However, today, mankind began to abandon the idea of progress and global development of society due to its dead-end path of development, stratification of society itself into strata and social classes. The world has reached the threshold of deglobalisation and stratification.

In this system of coordinates, digitalisation is a fragment of the idea of progress, which has no place today. This is why digitalisation has taken on a life of its own, separate from its meta-idea. It is obvious that digitalisation cannot exist for long in such a paradigm, and all attempts to adapt it to the needs of criminal law are doomed to failure, because they are not systematic and do not bring rational principles to the law itself, but actually replace old postulates with a new wrapper, without changing anything in essence (Khilyuta 2021, 123-128). Technological innovations and refinements are only an accompanying part in the development and functioning of the law itself, but they cannot predetermine the course of development of criminal law itself, formulate its subject and method in its basis. Thus, as we have already pointed out, the value system of liberalism is receding into the background, and the idea of universal globalisation is being abolished. And these processes concern not so much criminal law, but law in general, its basic institutions, which until recently were subject to total control and domination by supranational organisations. In criminal law, this manifested itself in the form of the establishment of new universal principles, systemic criminal law prohibitions, issues of liberalisation and decriminalisation of relations in the sphere of economic activity, interests of the service, etc. (Khilyuta 2022, 7-13). However, at present these tendencies are acquiring the opposite character.

It seems, for this reason, that those processes that are currently taking place in society are not realised by criminal law. Therefore, there is a feeling that criminal law lives its own life, and society - its own. Hence, for many segments of the population, criminal law prohibitions and prescriptions, often bordering on anachronism, become incomprehensible, and on the other hand, it can also be seen that criminal law cannot realise

the social interests and demands of society, being guided only by the position of the state in ensuring total security.<sup>5</sup>

The idea of security, which is now becoming dominant in criminal law, narrows the scope of criminal law itself, as criminal law becomes an appendage of dominant power interests.<sup>6</sup> However, such a paradigm does not develop criminal law and pushes it into a rigid framework of serving the interests of the dominant power elites and the system that is dominant under the circumstances. In this system, the key principles and ideas of criminal law (mainly based on the provisions of the classical school of criminal law) are of secondary importance.

But it also suggests that a new criminal law is emerging, however we may personally feel about it. This new criminal law breaks old stereotypes, established dogmas and legal principles. This new criminal law is based on the idea of security, and in this context, it is not the act of a person (a physical person, and in some legal families, a legal person) that comes first, but the person himself. Or, if you like, the act and the person are the basis of what we will call the offence.<sup>7</sup>

In this sense, we have to talk about the instrumentalisation of criminal law, when it began to be perceived exclusively as a means (and not even the main one) of solving certain tasks facing the authorities (Khilyuta 2020, 201-207). Here, criminal law is directly derived from those tendencies and mindsets that exist in the institutions of power (but not in society) and is completely predetermined by the legal policy of the state and the element of expediency. From this perspective, criminal law is a purely dogmatic means of solving political problems. Therefore, there is no reason to have illusions today that criminal law will be a kind of shield

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<sup>5</sup> Usually in this case, we speak about the crisis of criminal law and as its general features point to the fact that: a) the growth of crime continues and criminal law repression is unable to change the current state of affairs; b) the scope of criminal law is expanding, but only in one direction: the formulation of new criminal law prohibitions; c) criminal law decisions are taken mainly for reasons of political expediency, in order to solve conjunctural problems.

<sup>6</sup> Here we can also see the opposite situation when we are talking about the liberalisation of criminal legislation. And as V.N. Shikhanov points out, liberalisation of criminal legislation mainly finds support only in those social groups directly affected by it, and negatively affects the sense of security, alienation of other social strata of the population, departure from the principle of equality and achievement of personal success of everyone (Shikhanov 2022, 57).

<sup>7</sup> At least, law enforcement approaches to the assessment of a minor offence and administrative prejudice allow us to raise the question that today there is a shift of emphasis from the act to the actor himself, where we are already talking about the increasing role of public danger of the person who has committed an unlawful act.

in the hands of society against possible arbitrariness on the part of the state. We emphasise that criminal law has never been in the hands of society, on the contrary, it has always been used as a tool for "soft" regulation of social relations and suppression of marginal sentiments in society. In this aspect, it is meaningless to argue further that criminal law will be outside the policy pursued by the state.



## CHAPTER TWO

# THE ESSENCE OF CRIMINAL LAW AND THE BASIS OF CRIMINAL LAW PROTECTION

### **Limits to the Understanding of the Essence of Criminal Law**

The question of understanding the essence of criminal law is not an idle one. This question has always been raised, but the answer is not so unambiguous. This is understandable, because with the change of social foundations of society, political formations, the change of epochs and paradigms, ideas about the proper and essence changes and the idea of criminal law itself, its purpose and meaningful perception changes.<sup>8</sup> And in our opinion, the key point here lies in the value orientations of society itself and the ideas that dominate in a particular historical period, because criminal law is, first of all, a protective (not regulating) branch of law.

Protecting its foundations and building new relations, society always needs a guarantee of its inviolability, protection from arbitrariness, both on the part of an individual and the state. Mechanisms of such protection can be very diverse, but the most effective and efficient is law, and if we are talking about crime, then in this case - the law is the most severe and punitive - criminal law.

The essence of criminal law can be explained in various ways. But in order to understand the purpose of criminal law, it is necessary to understand why it exists, what is its essence and main function. These

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<sup>8</sup> Of the various subjects, a student encounters at university, criminal law may seem the most familiar to him or her. From an early age, every young person is exposed to images of various aspects of criminal law life and system. Law enforcers and criminals already appear in children's books and toys. Criminal investigations and trials are dramatised on television and in films. There is ample, perhaps exaggerated, media coverage of crimes, arrests, trials and punishments. Criminal law appears everywhere, partly because it is almost everywhere in the modern state: every country uses criminal law interventions with a frequency and severity unrivalled in most other social systems.

questions are not idle and are raised not for the first time. However, the answers to them have always been different, and this difference depends on the era in which they were posed and the context itself. Nevertheless, the main postulate of the thesis always remained unchanged: criminal law is the most punitive branch of law and it is designed to protect the most important and significant values in society.

So, a distinctive feature of criminal law is that, being in essence a protective branch of law, it directs all its efforts to the behaviour of people who come into conflict with existing regulations. And in this case, such human behaviour is considered criminal, which not only violates the established order and normative prohibitions, but also harms the most significant and important social relations, those social benefits and values that are of paramount importance. Therefore, criminal law, protecting social relations, is also called upon to regulate social contradictions, to prevent their most radical forms.

By committing a crime, a person enters into irreconcilable conflict with those moral values that exist in society, opposing his behaviour to moral and legal standards. At the heart of a criminal act lies a deep contradiction between the individual who commits it and the socially approved attitudes of society. Therefore, the awareness of society and the state of the need to combat such negative manifestations and generally disapproved behaviour leads to the fact that the state has to formulate prohibitions, define the legal nature of such destructive behaviour in the norms of the law and establish the limits of such interference. Typical forms of such behaviour define the generic concept of crime.

From this point of view, criminal law represents a compromise based on a contract between society (a particular individual) and the state. It can be said that society places its security in the hands of the state and gives the state extremely broad powers to ensure its own security and to define what is unlawful behaviour (crime) and what its boundaries are. In this case, the state is called upon to protect those values and goods that are meaningful and sacred to society itself, and ultimately to the state. It is clear that these values are changeable and are sometimes subject to significant modification, depending on many factors and the degree of mood of society itself in a particular historical period. And such values (goods) can be life, health, property, religion, human rights, etc. However, the formula for declaring specific behaviour that deviates from the norm or given standards is exclusively in the hands of the state and depends on its preferences.

Thus, the main point of criminal law is to determine what behaviour of people in society is criminal and in what cases criminal liability for the

committed crime is incurred.<sup>9</sup> However, even as the most severe branch of law and using violent forms of influence on persons who have committed unlawful acts, criminal law must endeavour to limit the scope of punishment.

## **Criminal Law as a Social Institution**

In this regard, it is impossible not to pay attention to the fact that criminal law is first of all a social institution (a kind of construction) through which social conflicts and social problems should be resolved. And this process includes two aspects: 1) discrete way of social regulation of social relations; 2) formulation of prohibition as a special method of protection of social relations and social values, as a result of which standards and rules of human behaviour in certain conditions and situations are established. For this purpose, criminal law is forced to constantly bring its prohibitions in line with those social realities that take place in a particular period of time and modernise the means of combating crime. This is done through the mechanism of criminal law regulation.

At the same time, the need for the existence of criminal law prohibitions is not realised by all persons, some of them ignore the existing regulations. However, in this case, criminal law cannot rely on the principle of voluntary fulfilment of existing regulations, because in such a case it would lose its social value and significance. Therefore, criminal law has to use the mechanism of compulsory enforcement of the prescriptions established in the state in order to ensure the security and stability of the development of society. If criminal law is unable to provide this function,

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<sup>9</sup> For this reason, the question is often raised as to what distinguishes criminal law from other branches of law. In this regard, we note that criminal law was once referred to as the "law of crime", and it is the concept of crime that can help us determine what distinguishes criminal law. In popular culture and in lay language, the term "crime" often conjures up images of wrongful or harmful acts. However, it would be a mistake to think of criminal law as a law that regulates (prohibits) acts of violence or other types of harm. Of course, many socio-cultural depictions of crime encourage this view, equating crime with murder, rape, robbery, etc. But in legal terms, a crime is any act that has been defined as an offence by the state. Nevertheless, many acts now defined as crimes do not involve any harm or even behaviour that is widely regarded as socially dangerous and harmful. However, regardless of whether the acts we consider criminal are in fact wrongful or harmful, the designation of a person as a 'criminal' has significant negative consequences for the individual himself or herself.

it loses its purpose and becomes an unwanted element in the proper protection of social values.

So, as an institution regulating social conflicts and problems, criminal law fulfils the function of protecting social values, principles and interests. In this regard, criminal law is always a changeable and adaptable construct; it does not exist in isolation, but functions in a historical, social and instrumental context. Therefore, in the broadest sense, criminal law is the institutionalisation in law of fundamental values that have always changed, evolved, and are now enshrined in law and reflect the status quo.

Nevertheless, today criminal law can no longer be considered solely as an instrument of punishment for dangerous and socially destructive behaviour. Recent trends in the development of criminal law are that the criminalisation of behaviour that does not always deserve punishment and whose general social stigma is not so obvious has led to a gradual blurring of the purposes and boundaries of criminal law. As a result, we cannot identify a clear dividing line between criminal and non-criminal behaviour, crime and misdemeanour. However, criminal law still remains the main instrument of social control over citizens by the state. And in this regard, criminal law sets the parameters for the exercise of the state's monopoly on power, thereby limiting and directing the scope of state violence.<sup>10</sup> In this context, criminal law entails the enforcement of certain types of behaviour that have been predetermined by the state. Therefore, as a means of social control, criminal law reflects the moral expectations of society and protects the fundamental values on which the state and society are based.

It is obvious in this vein that the main feature of criminal law is its repressive nature, because no other branch of law involves such acts of violence as imprisonment or the death penalty. And in this case, the criminal law is repressive, because it restricts human rights and freedoms. The paradox here, however, is that, on the one hand, the criminal law protects basic human rights and freedoms, its basic values, but on the other hand, it also restricts these very human rights and freedoms. Therefore, criminal law through repression influences those socio-economic and political processes that take place in society. Thus, criminal punishment is legalised violence against a person by the state, and the criminal law (Criminal Code) is a system of norms that determine when the state has the right to use violence against its citizens (Titov 2018, 61). However, in this case, state repression is not applied arbitrarily, but with the consent of

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<sup>10</sup> Sometimes this can manifest itself through the moral abuse of a person through formed public opinion.

society. Therefore, we can say that society delegates this function to the state in deceit for its security. This is a kind of contract between society and the state, which legitimises the status of criminal law.

Therefore, criminal law has as its task the protection of those interests and social values that exist in society and the state. In this capacity, criminal law is not capable of modernising social relations, as this is the prerogative of other branches of law (mostly of a regulatory nature), but it can create conditions for the development of social relations, ensuring their security and stability of functioning.

Thus, a distinctive feature of criminal law is that it publicly censures and condemns a person. But despite this, criminal law, as the most sensitive branch of law (meaning to those changes that occur in society), is designed to proclaim and ensure compliance with recognised moral standards and values, to resolve existing conflicts in society and to apply measures of influence to persons who have committed violations of the law. From this point of view, criminal law aims to restore social justice and must by definition contribute to the restoration of the harm caused, to try on the people involved in the conflict and thus to restore the social relations previously existing, spoilt by the conflict.<sup>11</sup> Consequently, criminal law should be aimed at the smooth functioning of society and the preservation of the existing order, the protection of collective and common values (goods), which would provide the necessary conditions for the development and life activity of a particular individual and society as a whole.

### **Characterisation of Criminal Law Through the Prism of Moral and Ethical Values**

In addition to the protection of positive relations, where criminal law reflects the status quo of the existing state of affairs, criminal law should be concerned with the protection of moral and ethical principles and foundations of society, its basic values, benefits and freedoms. However, the value of criminal law itself derives from the relationships it helps to protect and, at the same time, to create. On the other hand, the value of criminal law derives from the relations that precede it, and these are always positive relations between the various subjects of law. And in this situation, the value of criminal law is based on the relations in which the

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<sup>11</sup> Note here that criminal punishment cannot contribute to these goals because it reflects a primitive, backward-looking concern for retributive justice, whereas today we should rather look for forward-looking restorative or reparative justice.

state, society, and the individual are situated. Therefore, it is the state that has a monopoly on the protection of social relations and the benefits that exist in a concrete-historical period, and in a legitimate system of criminal law this is the only possibility.

It should also be noted that the existence of criminal law is justified by its role in stabilising the institutional formations of society. For this reason, criminal law is an instrument that is often used to maintain economic, educational, family, military and political institutions. And it is often said in this respect that criminal law is an instrument of a special kind - a "sledgehammer with a moral load" (Simester and Hirsch 2011, 10). The problem here, however, is not that criminal law is by nature based on moral norms and is meant to protect the basic foundations of society, but rather the opposite: criminal law imposes certain values on society, and failure to comply with existing prescriptions is seen as transgressing the law, which is always backed up by criminal (and not other) liability. Criminal law is therefore a non-ideal system.

It is obvious that criminal law cannot be based on nothing. It cannot be fully autonomous and inherently outside other regulators of social relations. The notion of what we will deal with and what we will recognise as criminal has deep roots. These basic principles are found in the field of morality and morals, and it is these postulates that form the foundations of criminal law, determine the contours of its subject and method of regulation. It seems in this case that the offence objectively reflects the moral state of society, its understanding of what is good and what is evil. After all, a human deed is condemned by society only when the person who committed it is condemned from a moral point of view. We can say otherwise, any deed becomes a crime if there is a social demand for it.

Nevertheless, the question of morality and morality in criminal law is very specific. And if the concept of positivism rejects any morality and morality in the law, the ideas of the school of natural law, on the contrary, are based on the primordial rights and fair assessment of any deed from the point of view of generally accepted morality, which is based on the postulates of humanism, as if we would say today. In principle, it cannot be otherwise, because if criminal law influences a person by the most severe means and forces him to a certain behaviour, then moral and ethical prescriptions must be the foundation of such activity. In this situation, criminal law faces the dilemma of what moral values and moral norms the criminal law prohibition should correspond to, because criminal law is not only based on moral and moral prescriptions, but often formulates them itself, forcing society to comply with them.