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Criminal Law Response to Shamanism—Is Combating Immaterial Culture a Means to Civilisation Progress on the Example of Penal Code Regulations of the Central African Republic and the Democratic Republic of Congo?

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Abstract: The function of the law in shaping social values is exposed in the article. Thispaper considers whether certain practices penalised in the surveyed countries (carrying our rituals with the use of human remains) could be classified as intangible cultural heritage and, thus, whether these practices should be legally protected. The main conclusion of the analysis is the statement that criminal law as a response to shamanism is inconsistent with the basic principles of a democratic state oflaw, including the right to expression and self-determination. Assuming that described social phenomenon exists in a society, and at the same time, this practice does not threaten other members of this society and is commonly accepted, the legislator should avoid creating regulations that are inconsistent with the current axiological system in a given community. The elimination of certain practices should take place by creating civilisation awareness inside a community. Criminal law does not fulfil this function. On the contrary, it contributes to the deepening and consolidation of the existence of certain pathological phenomena, as well as to the disappearance of indigenous cultures.

Keywords: superstition; criminal law; intangible culture; human rights; indigenous right

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1. Introduction

There is no doubt that culture is one of the key factors in the development of civilisation. It helps to shape national identity and organises social life. Culture, in its broadest sense, consists of both material creations (buildings, literature, crafts, etc.) and intangible heritage (music, theatre, customs). However, there are spheres of life in which manifestations of human creative interference have a negative impact on other values. Furthermore, it is not possible to unequivocally qualify certain creations of the human mind as culture-creating activities, such as superstition, including polytheistic beliefs (mythology). In many highly developed countries, traditions relating to the cult of deities worshipped in ancient times are still alive (Ogarek-Czoj 1988; Künstler 1981). In others, on the other hand, certain beliefs, which undoubtedly qualify as intangible cultural heritage, are stigmatised with the help of legal instruments, including the harshest of them: criminal law. This legal state of affairs raises some reservations as to the legitimacy of such a restrictive approach to the fight against superstition. In the first place, it should be considered whether there is a collision of protection of values when combating certain practices and, if so, whether the value to which a higher position in the hierarchy in a legal system is granted is accepted by the society as a higher value. A positive answer to the posed question is tantamount to approval of the criminal law interference with the value in question. On the other hand, the situation is different when a certain phenomenon (value) is to be eliminated, which, in the assessment of a given society, arouses its opposition. Such a situation is the case of combating the practices of shamanism and charlatanism in the analysed African countries[1]. The legislators of the countries concerned seem to have completely disregarded the long-term process of the emergence and spread of the customs in question. The negative consequences of combating

superstitious practices were also not taken into account. The fight against social phenomena that are intangible heritage should be carried out by positively shaping the voluntary abandonment of their practice through civilisational development and understanding of their negative effects. More precisely, is treatingthelawas a means to introduce a change of cultural habits in society effective? The point is to answer the question of whether the right to religion as a human right is limited, and if so, what is the reason forthisconstraint?The point is also toshowthattheimpossibility of precisely indicatingvalue protected by such limitationsmakesanalysed regulations unjustified both in legal and moral terms. With the above in mind, a criminal law response to shamanism should be considered.

The structure of the article consists of two parts: Materials and methods and Discussion. First among these isfromapresentation of analysed regulations—art. 149 and 150 of the Criminal Code of the Central African Republic, as well as art. 57 and 59 of the Criminal Code of the Democratic Republic of the Congo (Zaire). Selected laws are an example of eradicating cultural norms through criminal law. Then, a definition of culture in general, the legal meaning of the intangible cultural heritageand the legal limitations of protecting a non-material culture are presented. The right to religion as a human right is also described. Moreover, there is deliberation as towhatdefinesshamanism (barbarism) and whether such practices could be treated as an integrant of the culture of a given society. TheDiscussion ponders the relations between law and social acceptance of some cultural practices, the effectiveness of legal regulation and its social acceptability and whether the law might create social values and shape public awareness.

2. Material and Methods

2.1. Regulations Examined

2.1.1. Criminal Code of Central African Republic[2]

Title III. Crimes against the person. Chapter XI. charlatanism and witchcraft (Du Charlatanisme et de la Sorcellerie).

Article 149. Subject to a term of imprisonment of five to ten years and a fine of 100,002 to 1,000,000 francs, whoever commits the practice of charlatanism or sorcery which is likely to disturb public order or cause damage to person or property or involves the purchase, sale, exchange or donation of human remains or bones. In addition to the penalty, a ban on such practices shall always be imposed.

Article 150. If these practices have caused serious injury or permanent disability, the punishment will be forced labour. If they have resulted in the death of a human being, the perpetrator shall be punished with hard labour for life.

2.1.2. Criminal Code of Democratic Republic of the Congo (Zaire)[3]

Title I. Crimes against the person. Section III. Against superstition and barbaric practices (Des epreuvessuperstitieuses et des pratiques barbares).

Article 57. The perpetrator of any superstitious practice (touteépreuvesuperstitieuse) involving the exposure of a human being, voluntarily or by force (de gréou de force), shall be liable to imprisonment from one month to two years and a fine from 25 to 100 zairs, or to both of these penalties, to a physical harm actual or presumed (mal physique réelousupposé) in order to deduce from his or her ability to attribute effects or other conclusions to an act or event (envue de déduire des effetsproduitsl'imputabilité d'un acteou d'un événementoutouteautre conclusion).

If the practices have caused illness or incapacity to work (maladieouuneincapacité de travail), or if they have led to the loss of a vital organ (perte de l'usageabsolu d'un organane) or serious mutilation (mutilation grave), the offender is liable to imprisonment from two months to twenty years and a fine of one hundred to two thousand zairs, or only one of them.

The offender shall be liable to the death penalty if the practice has caused death.

Article 59. If a superstitious practice, whether or not it constitutes an offence, is the direct cause of the offence, the persons who participated in it are accomplices (complices) to the offence caused, unless they could not have foreseen that it would be committed.

There is no crime if the crime caused is theft or deprivation of liberty (détention) not accompanied by physical violence (non accompagnée de sévices sur les personnes) or other less serious crime[4].

2.2. On the Concept of Culture in General

The discussion on the legal background should be preceded by an indication of how culture is understood hereinafter[5]. The concept is present in the meta-language of a large part of the human sciences. It is defined differently in different fields of knowledge. However, no synthetic definition of the term has been developed. For the purposes of further discussion, two main currents in defining culture should be distinguished. The first of these is purely objectivist in nature and regards any transformation (intellectualisation) (Daszkiewicz 2010) of nature as culture. Every human activity undertaken for reasons other than instinctual reflexes is culture (cultural heritage)[6]. It should be mentioned that this activity must be within the limits of social acceptability. Such a definition of culture, perhaps too broad, equates the concept with civilisation or technology, which is common in science[7]. This is a trend that has existed since ancient times (Krąpiec n.d.) but which is still current in scientific deliberations[8]. I assume the second way of defining culturalsubjectivity. It introduces a kind of limitation on the possibility of defining human activity as a product of culture. This limitation is the requirement (Adelung 2018, p. 411)[9] that this activity should have positive effects in the moral and ethical spheresor that it should be aimed at improving the existing state of affairs[10]. This approach is correct insofar as it makes it possible to distinguish culture from civilisation, technology or art. On the other hand, however, this creates the necessity to introduce a subjective criterion of the nobility of the behaviour itself or of its aims. Whilethis position might have merited full approval in the age of national cultures, in the age of globalisation, it is impossible to accept it. Nowadays, every social process is determined by external factors. One such factor is the spread of mass culture. The standardisation of life is conducive to the improvement of living conditions, but it also contributes to the disappearance of certain areas of culture. The economic goal (new markets) of many global producers contributes to a change in the civilisational awareness of societies and the disappearance of certain cultural products (traditions, customs, crafts). This causes the indicated criterion of nobility to be defined by a global rather than a local prism, which further encourages the nihilisation of immaterial culture. With the above in mind, it seems that it is more correct to understand culture broadly, covering with its subject matter every product of human activity aimed at modifying the surrounding world, respecting the existence of social limitations.

2.3. The Right to (Freedom of) Religion as a Human Right

Certain practices of a religious nature involve, in their exercise, violations of the freedoms and rights of others. Thus, there is a collision of legally protected goods. This raises the question of whether, at the price of violating the freedoms and rights of individuals, these practices should be upheld as intangible heritage. The answer to this doubt is contained in the Universal Declaration of Human Rights, adopted by the UN General Assembly through Resolution 217/III A on 10 December 1948 in Paris[11]. According to its provision, everyone has the right to freedom of religion (Bielefeldt et al. 2022, p. 2). This right includes the freedom to change one's religion or belief and the freedom, individually or in association with others, in public or in private, to manifest one's religion or belief through worship, teaching, practice and participation in rites (Article 18) (Koppelman 2018, p. 987). In the exercise of his rights and freedoms, every person shall be subject only to such limitations as are established by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and in order to satisfy the legitimate requirements of morality, public order and the general welfare of a democratic

society (article 29). However, in the case of performing rituals using human remains, are we violating the rights and freedoms of others, and if so, whose—the deceased (Smolensky 2008, pp. 766–67) or their next of kin (Belliotti 1979; Hohfeld 2010)? Are the collective values such as morality (Partridge 1981, p. 256) or public order (Callahan 1987) violated? There is no consistent answer to this question.

In this paper, deliberately chosen examples are presented, such as the use of human remains in rituals or the performance of charlatan practices (implicitly also with the use of human remains), which do not obviously violate basic human rights such as health or life already discussed in detail in the literature on the subject (such as in the case of ritual genital mutilation (Williams-Breault 2018) or the killing of albinos (Mwanyanja Mwiba 2019)). Despite this, the legislator attempts to eliminate their occurrence by criminalizing them. The indication by the legislator of the object of protection in a negative way, as it seems, indicates unequivocally that the regulation is aimed at the elimination of certain behaviors under the guise of protecting other values (here: human beings), which constitutes an instrumentalisation of criminal law (Robert and Arnold 1992, p. 7). It should be emphasised, however, that in societies where belief in witchcraft is widespread, there may be so-called psychic crimes, i.e., causing ailments to another person caused by fear of that person (Cannon 1942, p. 171).

Referring to other, supposedly similar practices (Voodoo[12]), FGM, persecution of people with albinism, criminalisation of homosexualism),it must be emphasised as hereinbefore that these practices violate different legally protected values (freedom, sexual orientation, body integrity), which are easy to indicate directly. In analysingcases, it is not so easy. Thatiswhythe question of criminalising behaviors without pointing out why (or just because of esthetical reasons[13]) is vague andseemsunable to receive a positive answer.

2.4. Legal Definition of Non-Material Culture

The above discussion should start with whether shamanism or charlatanism can be defined as cultural heritage (culture). The legal concept of intangible cultural heritage was introduced by the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage[14], according to which an intangible heritage means the practices, ideas, messages, knowledge and skills—as well as the instruments, objects, artefacts and cultural space associated with them—that communities, groups and, in some cases, individuals recognise as part of their own cultural heritage. This intangible cultural heritage, handed down from one generation to the next, is continuously reproduced by communities and groups in relation to their environment, the impact of nature and their history, and provides them with a sense of identity and continuity, thus contributing to increasing respect for cultural diversity and human creativity. Intangible cultural heritage includes, but is not limited to, the following areas: oral traditions and transmissions (Schniter 2018), performing arts (Whatley 2013), social practices, rituals, festive rites (Aktürk and Lerski 2021), knowledge and practices about nature and the universe (Borges and Botelho 2008) and knowledge and skills for traditional craft production (Blake 2017).

2.5. The Concept of Shamanism, Charlatanism and Barbaric Practices

Another remaining issue hereis the definition of shamanism, charlatanism and barbaric practices. Shamanism is a practice in which a shaman or quack (charlatan)[15] is introduced into a state of otherworldly consciousness in order to be able to see and interact with otherworldly beings, which in belief is the soul of the world, being the source of transcendent energy (Singh 2018). The occurrence of shamanic practices was widespread throughout the world (Harner 1980, p. 40). Shamans performed an important function in primitive societies (Wasilewski 1979, pp. 13–14). The linguistic etymology of the word shaman (shamanism) includes the prefix sha- (Ewek: knowledge). Therefore, translations often include shaman as "one who knows"[16]. With little medical awareness of the public's ability to combat certain diseases and with the key role of beliefs in community life, the shaman was a key individual in both the scientific and, for the given conditions of

development, the religious sphere. Although nowadays, the role of shamans is rather ludic in nature, the belief in their supernatural powers is still alive in many, including highly developed countries, especially in cases where conventional medicine fails to produce satisfactory results. In short, shamanismandcharlatanism are activities performed by a shaman (charlatan) for a specific purpose (healing, communing with spirits, predicting the future, etc.). Since these practices often included (and include) behaviours commonly regarded as abhorrent, drastic or monstrous, they are referred to as barbaric practices (starvation, beating, deprivation, cannibalism, self-mutilation, use of animal entrails or human remains, pouring blood, performing rituals on graves, etc.).

As history shows, social development has favoured the disappearance of such practices (Metelska 2016, p. 166). However, as mentioned, these practices are widespread, to a very small extent, in many countries (Doyle White 2016), including those at the top of the ladder of civilisational development. The phenomenon itself, however, is not typified as a specific type of crime (Bojarski 1982, pp. 46–47). This does not, however, exclude the responsibility of shamans (charlatans) for violating(or exposing to violation) certain legally protected values such as life, health or the right to undisturbed peace after death and the right to burial[17]. Obviously, practitioners do not benefit from the special circumstances, excluding the unlawfulness of an act or omission provided for doctors. It is noteworthy that the contemporary activities of shamans are based on the voluntary submission of the willing to rituals or the voluntary adherence to 'recommendations'. The naivety and credulity of a large part of society should be considered here. However, should it justify a specific criminal law response to the indicated practices? Although shamans are keepers and administrators of traditional medical knowledge, the application of this knowledge in practiceisoften contradictory to the state of modern medicine, even if it sometimes brings the intended result (e.g., the disappearance of cancer) does not exempt shamans from criminal liability in case of violation (exposure to violation (Hryniewicz 2012, p. 122)) or incitement to violation of legally protected goods (e.g., for the sake of tradition). This does not depreciate the importance of shamans in the cultivation of traditional knowledge, in particular, the use and extraction of herbs or other medicinal substances. However, hiding behindasocial position in order to avoid responsibility for their actions cannot be condoned. As an aside, it should be clarified that shamans owe their social function to (sometimes to this day (Atkinson 1992, p. 315)) the scientific function of religion (Yang 1991, p. 49), which is disappearing with socio-technological development.

2.6. The Protection of Intangible Culture at International and Local Levels

The protection of intangible cultural heritage[18] at the international level was established at the 31st session of the UNESCO General Conference held in Paris on 2 November 2001. It adopted the UNESCO Universal Declaration on Cultural Diversity (Declaration)[19]. It states that cultural diversity as a source of exchange, innovation and creativity is as essential to mankind as biodiversity is to nature. In this sense, it constitutes the common heritage of humanity and must be recognised and affirmed for the benefit of present and future generations (Article 1). It was also noted that, in our increasingly diverse societies, it is becoming necessary to ensure the harmonious interaction and willingness to coexist of individuals and groups characterised by cultural identities that are at once plural, diverse and dynamic. Policies that promote the integration and participation of all citisens are a guarantee of social cohesion, the vitality of civil society and peace. Defined in this way, cultural pluralism is a political response to the existence of cultural diversity. Inherent in the democratic context, cultural pluralism fosters cultural exchange and the development of creative capacities that enrich social life (Article 2). Article 4 of the Declaration indicates the limits of the protection of cultural diversity, stressing that the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It imposes an obligation to respect human rights and fundamental freedoms, especially the rights of persons belonging to minorities and the rights of indigenous peoples. No one may invoke cultural diversity to violate human rights guaranteed by international law or

to limit their reach. With regard to the question of the legal protection of superstitious practices, it seems worthwhile to draw attention to Article 7 of the Declaration, according to which every creation draws on the roots of a cultural tradition but develops in contact with other cultures. Therefore, heritage, in all its manifestations, should be preserved, valued and transmitted to future generations as a testimony to human experiences and aspirations in order to enrich creativity in all its diversity and to build a genuine dialogue between cultures.

The Declaration preceded the enactment of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation, which took place in Paris from 3 to 21 October 2005 at its 33rd session[20]. The Convention introduced the analogous solutions adopted in the Declaration. However, crucial to the issue of the legal protection of superstitious practices using parts of human cadavers are the passages in the Preamble which state that this Convention was adopted in recognition of the importance of traditional knowledge, and in particular, the knowledge systems of indigenous peoples, as a source of intangible and material wealth and of its positive contribution to sustainable and balanced development, and the need to ensure its adequate protection and promotion, as well as the need to take steps to protect the diversity of cultural expressions, including the diversity of the contents contained therein, especially in situations where cultural expressions are in danger of disappearing or being severely reduced. It is worth pointing out at this point that the aforementioned preamble of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage also emphasises that this Convention was undertaken in recognition that communities, in particular indigenous peoples (Byrd and Heyer 2008, p. 2), groups and, in some cases, individuals, play a significant role in the creation, protection, maintenance and restoration of the intangible cultural heritage, thereby contributing to the enrichment of cultural diversity and human creativity and recognising the far-reaching impact of UNESCO's activities on the development of normative acts aimed at the protection of cultural heritage, in particular the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. Thus, the aforementioned acts considered it necessary to protect intangible cultural heritage. It was pointed out that cultural expressions, as well as the cultural activities, goods and services of indigenous peoples, should also be protected[21], insofar as they do not violate or limit human rights and fundamental freedoms as set out in the Universal Declaration of Human Rights or guaranteed by international law.

Turning to the legal basis for the protection of intangible cultural heritage in the Central African Republic and the Democratic Republic of the Congo (Zaire) as sources of law, it is necessary to point to the Charte Culturelle de l'Afrique adopted by the Organisation of African Unity (l'Organisation de l'UnitéAfricain), at its 13th session in Port-Louis (Mauritius) on 2 to 5 July 1976 (Charter of 1976)[22] and the Charte de la Renaissance Culturelle Africaine adopted by the African Union (Union africaine), at the 6th session of the conference in Khartoum, the Republic of Sudan, on 23 and 24 January 2006 (Charter of 2006)[23]. In the 1976 Charter, the preamble emphasised that every human community is necessarily governed by rules and principles based on its traditions, language, way of life and thought, all its genius and its own personality and that every culture comes from the people and any African cultural policy must necessarily enable the people to develop in order to enhance their responsibility for the development of their cultural heritage. All people have an inalienable right to organise their cultural life in accordance with their political, economic, social, philosophical and spiritual ideals. Reference was also made to the historical past, pointing out that domination at the cultural level had depersonalised some African peoples, falsified their history, systematically denigrated and countered African values, attempted to gradually and officially replace their language with that of the coloniser and colonisation had fostered the emergence of an elite too often acculturated and acquired for assimilation and that there had been a serious rupture between this elite and the African masses. It was also pointed out that a strong promotion of the support of African languages and

carriers of cultural heritage, including what is authentic and universally shared, should be provided without delay. The autonomy and sovereignty of minorities (the granting of national subjectivity (l'affirmationd'une identitérnationale) must not be at the expense of the impoverishment and subjugation of other cultures existing in the same state) was indicated as the limit of the protection of intangible cultural heritage. Moreover, the need to reject any element that impedes progress (rejeter tout élément qui soit un frein au progrès) was also pointed out.

The 2006 Charter largely reiterates the axioms cited in the 1976 Charter. However, it indicates that it aims to promote in each country the dissemination of science and technology, including traditional knowledge systems[24], conditioning a better understanding and preservation of cultural and natural heritage and developing all the dynamic values of African cultural heritage that promote human rights, social cohesion and human development.

2.7. Limits of Legal Protection of Cultural Diversity

Article 2 of the Convention for the Safeguarding of the Intangible Heritage indicates that, for the purposes of this Convention, attention will be given only to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as meeting the requirements of mutual respect between communities, groups and individuals, and the principles of sustainable development. On this basis, three limitations to the protection of intangible cultural heritage can be distinguished: human rights, the coexistence of different cultures and the principles of sustainable development. It is pointedout (Barcik and Srogosz 2014, pp. 303–48; Wiącek et al. 2021, pp. 105–23) that a catalogue of human rights is described in the Universal Declaration of Human Rights adopted at the third session of the UN General Assembly in Paris, 10 December 1948[25], as well as the Convention for the Protection of Human Rights and Fundamental Freedoms adopted in Rome on 4 November 1950 (with subsequent protocols)[26]. In addressing the issue of religious practices involving the use of human remains, it is necessary to consider whether such behaviour violates the rights of the deceased (assuming that the deceased can be ascribed rights[27]) and, if so, whether such rights fall within the catalogue of human rights and thus fall within (or rather would fall within[28]) the cognisance of, in this case, the African Court on Human and Peoples' Rights. It seems that the use of human remains, among others, in the reality of European culture, can be considered in the category of violation of reputation[29]. In view of the respect for the dead that is embedded in the beliefs of African cultures, and thus ingrained in the social consciousness of African societies (Sokolewicz 1986, pp. 5–19, 181–271; Zajączkowski 1965, pp. 118–48), consideration from the point of view of violating the reputation of the dead seems to be pointless. Thus, the justification for criminalising the behaviour outlined in the provisions in question does not seem to have a basis in the protection of human rights, considering that epidemiological safety considerations do not fall within the catalogue of human rights.

Another constraint on the protection of intangible cultural heritage in the form of the performance of rituals using human remains is respect for other cultures and the inviolability of their coexistence. This issue, in the case of the practices in question, seems to be relevant. The key issue here is whether the deceased whose remains are to be used has given his or her consent or whether his or her relatives (in the broad sense) do not object. It will be unacceptable from the point of view of the comments made earlier regarding human rights to use the human remains of persons specifically murdered for this purpose or of persons (or their relatives) for whom such use of the remains would constitute a posthumous infringement of personal rights.

A third constraint on the protection of intangible cultural heritage isthe principles of sustainable development, as described, inter alia, in the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development meeting in Rio de Janeiro from 3 to 14 June 1992[30]. According to Principle 22 of the Declaration, indigenous peoples and their communities, as well as other local communities, play a significant role in the management and development of the environment because of

their experience and traditions. States should recognise and properly support the identity, culture and interests of communities and enable them to participate effectively in achieving sustainable and balanced development. This guarantee of supporting local cultures is, however, limited by other principles of the considering declaration primarily related to the protection of natural heritage. Thus, the practices in question involving the use of human corpses will not be acceptable when they degrade the environment, particularly drinking water reservoirs, or have a negative impact on epidemiological safety (e.g., digging up graves or transporting the body for cannibalistic (anthropophagic)[31] acts).

Finally, it is worth noting that the 2006 Charter identifies as a limitation to the protection of intangible culture any element that impedes progress (tout élément qui soit un frein au progrès). The introduction of such a construction must be assessed critically. It poses many problems of interpretation. It would have to be decided whether the inhibition of development is only to slow down or prevent development, what development is, whether the element under examination inhibits development directly or only indirectly, etc. Thus, the provision is a rubber-stamp regulation, whichmeansthatitis not implementable in the application of law (Warylewski 2009, p. 128).

3. Discussion

3.1. Law and Social Acceptance of Practices

Law is a manifestation of the degree of civilisational development of society. Materially, it is a set of rules restricting individual freedom. However, no rule will be respected without the existence of a conscious need to apply it. Coercive measures may be used, but they will never completely eliminate the psychological need to confer a higher value on the norm opposite to the established legal rule and thus to disobey the latter. The law is realistically a reflection of the existing state of affairs, which is often the reason for the underdevelopment of civilised societies. However, no development can take place through legislation that is axiologically contrary to the prevailing value system. Any change should take place inthe way of building the civilisational awareness of the members of the community.

The acceptance of certain social phenomena, even if repulsive for ethical, moral as well as aesthetic reasons, is the right of each group to externalise itself, to respect the identity and the need to belong of its members, legally protected as long as the given society allows it. Ifin a given human community, certain behaviours have been treated in the course of the historical process and are still treated as socially acceptable, criminal law measures cannot be introduced to eliminate them. Firstly, the goal of introducing such a regulation will not be achieved. The enacted provision will remain a dead matter. Secondly, even if the state is extremely repressive towards the behaviour in question, it will be practised undetectably, which will contribute to the functioning of the so-called grey area, which, in the long run, weakens the perception of the state and its authority. Thirdly, artificial regulation (which does not correspond to the prevailing hierarchy of values) contributes to an increased sense of belonging to a particular group and, thus, to the creation of an inner need for the group (and the customs in question) to persist, to strengthen it and even to make it grow. The norm to be eliminated and the need to preserve it become the supreme axiom. The only right way seems to be to build civilisational awareness. This is a long and costly process, but its effects in the long term seem to at least compensate for the outlay incurred. In a society where there is an intrinsic need not to practice a particular custom, there is no need for measures to eliminate it, as the phenomenon will disappear per desuetudo on its own. Social ostracism and the alienation of individuals still practising them, which will occur itself with the internal need to reject the behaviour in question, appear to be the most effective means of combating negative social phenomena. It is also worth emphasising that the growth of civilisational awareness in a given society is of a permanent nature, as is, for example, culture. The role of the state, therefore, remains to support and consolidate desirable values and not to create laws to eliminate existing contrary values artificially.

The law does not function without its social acceptance. The mere fact of its enactment and implementation does not make it a tool capable of shaping social attitudes, regardless

of the means used to do so. It should, therefore, be postulated that the law should be treated as a regulatory tool rather than one that shapes civilisational awareness. The latter function should be performed by the law only in extreme situations, with the protection of goods and values of fundamental importance for the functioning of society, creating an elementary sense of security and guaranteeing an unfettered possibility of development.

3.2. Effectiveness of Legal Regulation and Its Social Acceptability

As indicated above, social acceptance of the legal regulation of a given sphere of life is a key factor determining the effectiveness of the implementation of the functioning of the law. Thus, the introduction of a legal regulation, when analysing its effectiveness, will always lead either to its non-application or to the implementation of the value created by it. The lack of social consent for the introduction of a given issue (in a democratic state of law) will result in the non-implementation of the introduced regulation. It should be borne in mind that the law is applied by people who are part of a given community. Therefore, as part of this community, if the members of society do not agree with the will of the legislator, the law will be dead because both those who apply it and those to whom it is to be applied will not recognise it as binding and will disregard it in the process of applying the law[32]. The second situation is when the legislator achieves the goal of the introduced regulation, which is the creation of a new socially desirable value, which will be described in detail in the following section. As an aside, it should be pointed out that in the situation when a division of society occurs, the final solution to the social conflict will be either resignation from the introduced regulation or its dissemination and internalisation by a part of the society originally opposed to it.

3.3. Law as a Determinant of Social Values

Law, under certain conditions, may become a determinant of the values that determine social life. It may both create or eliminate a new value, as well as strengthen or weaken existing values or increase the value of other values unrelated to the introduced regulations (an increase in social activity in relation to other values)[33].

The legislator's interference with the existing system of values by way of legislation may take place in several ways. The first is a direct confrontation with socially binding axioms by interfering with their structure througha normative act. The second possibility is the introduction or modification of the relevance of other norms related to the one the legislator wants to change.

The effectiveness of the legislator's attempts to influence the prevailing system of values is conditioned by a number of factors, and it is impossible to unambiguously indicate which of the indicated ways is more effective[34]. The idealistic is a state in which the law is regarded as the highest axiom in society. Such a situation seems to be evident in the observance of formal and legal rules by public administration bodies and courts[35]. When the law is highly respected in societyandis held in high esteem (a rule has been developed according to which the law should be respected above other values), then the creation of new values by direct means seems to be acceptable in terms of the potential effectiveness and efficiency of the interference in question. Such situations, however, seem to be rare, as the law is a social institution created in further stages of social development, so as a value, it is not primary. Therefore, artificial interference with an existing value system should converge with other systems of valid values. Otherwise, the law, although valid, will be dead (Echrlich 1912).

Artificial (legal) interference with the existing value system can be supported by two systems of influence on the addressees. The most popular of these is the system of punishment and reward. In a state wheresociety has not yet developed the necessity to apply a norm imposed by law, the legislator gratifies its observance. It is indicated (Michalak 2005, pp. 80–82) that the reward system brings greater benefits, particularly in the long term. However, the problem arises whether gratification can be dispensed with in the future. S. Kawalec and E. Pytlarczyk note that certain economical phenomena, e.g.,

increases in wages or social benefits, are perfectly elastic but only unilaterally (increasing). This means that they can grow indefinitely without causing social tensions, but their reduction can produce negative economic and social consequences (Kawalec and Pytlarczyk 2016, pp. 251–53).

As noted earlier, the most effective means of introducing new values into the social discourse is through an education system primarily based on demonstrating the long-term benefits of adhering to a given norm (not necessarily through legal means). The effectiveness of changing worldviews in a society through positive or negative motivation will largely be based on the economic calculus of its members, in the sense that the new (modified) norm will be adhered to because it will be profitable (reward or no punishment). In such a state, no community will be able to function effectively in the long term. However, it should be borne in mind that human behaviour will always be based on an economic calculus. The difference between compliance with a norm for the sake of reward or the avoidance of punishment and compliance based on the awareness that by doing so it is possible to develop not only the individual but also the wider members of a shared community is apparent, and, it seems, the latter should be pursued.

3.4. Law as a Tool for Shaping Public Awareness

With regard to the contested legal regulations, it should be stated that they constitute an instrument creating social needs, but they do so in a negative way (through prohibitions-criminal law). As indicated above, such a way is not effective and contributes more to creating a ground for pathological behaviour and even reinforcing the psychological need for socially negative phenomena. I consider the main objective of the law to be the creation of a society that respects the values to which every human being is entitled by virtue of merely being human. No individual functions independently in isolation from society. It is, therefore, the task of the latter to create for individuals the conditions enabling their self-fulfilment, one expression of which is artistic expression and, more broadly, culture. As long as the behaviour in question of individuals or groups of individuals finds social authorisation, the law cannot interfere with it in order to protect other values. If the need to combat the phenomena in question arises, and the individuals themselves are not in a position to eliminate it, only then should legal solutions be introduced with a view to annihilating them. When applying legal measures, their gradation should be borne in mind, in particular, that criminal law is always the ultima ratio. The elimination of superstition by criminal law is unacceptable in a democratic state. If there is a tendency towards the easy dissemination of ideas generally regarded as the product of the fantasies of those who proclaim them, measures should be taken to curb such a tendency and not simply to raise doubts about their 'adherents' by censuring their creators. Culture and, above all, religion will continue to have a real impact on the social system for as long as there is a belief in its scientific nature, which there is not. However, while respecting the right to express oneself, as long as this does not (objectively) harm anyone, one must concede the right to legislators making legal decisions based on the views presented by society, even if they are based on superstition[36]. Thus, it appears that combating shamanism by criminal law is an excessive interference of criminal law in social relations in the countries under study. It contributes (slightly) both to the destruction of national identity, the disappearance of indigenous culture and the creation of situations that extremely threaten security.

It is also worth noting that law enforcers are people who are part of a community and, therefore, also represent its value system. This places such people in a moral conflict in the form of a choice, between work (fulfiling one's legal obligations) and social identity (treating the combated customs as part of one's personality).

In considering the issue at hand, the question of social Darwinism, controversially, must also be brought into play. This problem is complex and places the legislator in an ethical–moral conflict. On the one hand, the individual's freedom of self-determination is placed on the scales of justice, and on the other, society's concern for the development of that individual (and even his or her survival). It should go without saying that the current

state of human psycho-physical development rejects the possibility of allowing laissez-faire from the get-go condemning its practitioners to certain extinction. Another issue becomes apparent here, whether the criminal law is intended to protect the individual from other individuals or also from himself. The latter, as history has shown, is not the right solution[37]. The protectionist approach of the state in terms of the individual's relationship to himself must, therefore, be rejected. Restrictions on freedom should, therefore, be primarily driven by the individual's internal motives, and the law should direct the individual towards a course of conduct less harmful to him or her, but it must never compel him or her to do so (unless this has negative consequences for society).

4. Results

To conclude, one should strongly oppose the introduction of criminal law regulations combating the products of cultural heritage in the form of superstition or practices called barbaric. Sometimes the legislator tries too hard to impose on society the hierarchy of values existing in more developed countries, forgetting that the law does not work if it is based on assumptions that are not compatible with the prevailing system of values. Such regulations only have a negative impact on social development. Such examples are known from history (Kissinger 2014; Kapuściński 2016). Although the regulations analysed do not relate to the aspects fundamental to the functioning of the state, the analogy with the examples given above is undoubtedly visible. Although it may seem controversial to postulate the need to protect religions and practices contrary to the assumptions of modern science and medicine, there should be no doubt standing against the legislator's mindless imposition of a value system alien to society. However, without questioning the need to eliminate certain phenomena from society, it should be assumed that any changes in this regard should be made through positive motivation and not repression. Social change, including cultural change, happens on its own as a result of society's growing civilisation awareness. The fact that today there is no need to ban certain practices in developed countries is not that they are objectively less harmful or can be less so, but that society's attitude to them is ludic rather than scientific, as is the case in underdeveloped countries. It is worth pointing out that in Europe, as late as the 1950s, the practice of treating a toothache with a dead person's finger or hiding a dead infant's hand in one's pocket (Fischer 1921, pp. 217–24), not to mention Nazi practices, was still alive (Engelking and Grabowski 2018). If criminal law regulation was not necessary for Europe to combat such pathological beliefs, the same effect can be achieved in other countries, including those in Africa.

It was highlightedthat the right of freedom of religion is not an absolute value and superior to other rights. The axiological basis of religion isconstant (Pieczewski and Matera 2017, p. 72) while its forms of expression are changeable[38]; thus, the sole fact of faith and freedom to practice it is protected by law, but not always the form of its practice(Tarabout 2018, p. 8). It has been shown that the eradication of phenomena rooted in culture, including faith, should not take place through criminal law but through the internalisation of certain norms. This does not mean accepting the practices in question or endorsing them but only emphasizing (supported by examples from history[39] and practice[40]) that the detachment of the law from the social reality in which it is supposed to function will result in the law being unapplied and thus ineffective. Hence, it should be concluded that combating practices that violate rights and freedoms should be performeddifferently than by criminalizing them. Such practices are acceptable as long as they are accepted in a given society. This is because members of this group do not consider them immoral or repugnant, and cultural norms are not subject to evaluation in moral terms (Saucier 2018).

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Notes

1 https://www.refworld.org/docid/47d92c122.html (accessed on 28 October 2022); (Bernault 2006, pp. 212–18).

2 Criminal Code of Republic of Central Africa. Available online: https://acjr.org.za/resource-centre/penal-code-of-the-central-african-republic-2010/view (accessed on 28 October 2022). Author's translation.

3 Criminal Code of Democratic Republic of the Congo (Zaire). Available online: https://wipolex.wipo.int/en/text/492211 (accessed on 28 October 2022). Author's translation.

4 Articles 58 and 60 constitute the responsibility of the accomplices and the accessaries (*complices*).

5 Genesis of the concept of "culture" derived from the Latin language—from the verb *colo*, *colere*, meaning to cultivate. Related to this expression is the Greek πελομαι '(pelomai), meaning' to be moved, to deal with something, to cultivate. In Latin, *cultura* was originally related to the cultivation of the land, but over time this meaning has been expanded to include anything that can be "cultivated" in any way. So it also concerns the rational development of man and nature (Krąpiec 1999).

6 As A. Weber wrote: *culture is situated outside the sphere of adaptation requirements, where the shaping of our life begins by setting goals for it, which cannot be derived from the need for further existence or better satisfaction of natural life needs* (Weber 1897, p. 570).

7 (Daszkiewicz 2019, p. 201). According to Stefan Czarnowski, culture is "[. . .] the entirety of the objectified elements of social achievements, common to a number of groups and, due to their objectivity, established and capable of expanding spatially" (Czarnowski 1956, p. 20), in turn, for A. Kroeber, culture is "[. . .] transferred and produced contents and models of values, ideas and other symbolically significant systems, which are factors shaping human behavior, and products that are the product of behavior" (Kroeber and Parsons 1958). However, as E. Taylor points out that, culture, or civilization, is a complex whole that includes knowledge, beliefs, art, morality, laws, customs, and other abilities and habits acquired by people as members of society(Taylor 1898).

8 See note 7 above.

9 Culture is the refinement or sophistication of all spiritual and physical forces of man or of the whole people, so that the word means both enlightenment and ennoblement of reason by liberation from superstition, as well as refinement, refinement and refinement of morals (Adelung 2018).

10 The principle of Greek culture is not individualism, but humanism. It had a second, narrower, but deeper meaning: to educate man in his proper character, true humanity. This is genuine Greek paideia [. . .] (Jaeger 2001, p. 38). M. Arnold spoke of culture as intellectual curiosity, as a selfless pursuit of perfection, as a sphere of moral and aesthetic values, contrasting with the ugliness of coal and steel civilization, with the ethics of pursuing material wealth and political power. Arnold's culture encompasses all the best that has been thought and said in the world (Matthew 2018, p. 18) while J. Lelewel, understood the culture of man's habituation, his religious and moral education, his social arrangement, his character, activity of abilities, aesthetic animation in art, and supported by philosophy, his industry, his rational, scientific and literate fruits (Lelewel 1826, p. 21).

11 Available online: https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 26 November 2022).

12 There is no example of contemporary criminalization of Voodoo practices. Nevertheless criminalization of these practises in history was a violation of right to freedem to religion (Metraux 1989, pp. 20–33).

13 Cannon, W. *op. cit*., p. 173.

14 https://niematerialne.nid.pl/Konwencja_UNESCO/Tekst%20Konwencji%20o%20ochronie%20dziedzictwa%20niematerialnego/ (accessed on 28 October 2022).

15 The concepts of shaman and quack (charlatan) are similar in content, but their cultural etymology is different. While the powers of the shaman were understood to be something positive, in the case of a charlatan, these powers were only to be learned tricks for deceptive purposes (Brock 2009, p. 19). Thus, while the shaman often has positive connotations, the term quack is understood pejoratively. It is worth noting that the first mention of a charlatan comes from the 16th century, i.e., the period in which science, not faith, became the basis for understanding the world (Stratmann 2010, p. 23).

16 ibid, p. 20.

17 https://www.poszukiwanimagazyn.pl/znachor-uslyszal-wyrok-za-jego-rada-rodzice-zaglodzili-dziecko.html (accessed on 28 October 2022).

18 The issue of the protection of cultural (material) heritage was raised in the Convention on the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972 by the United Nations General Conference for Education, Science and Culture at its seventeenth session. https://www.unesco.pl/fileadmin/user_upload/pdf/Konwencja_o_ochronie_swiatowego_dziedzictwa.pdf (accessed on 28 October 2022).

19 https://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Dekl_o_roznorodnosci.pdf (accessed on 28 October 2022).

20 See note 14 above.

21 Article 4 of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[22] https://www.leganet.cd/Legislation/Droit%20administratif/Culture/Charte.culurelle.pdf (accessed on 28 October 2022). Author's translation.

[23] https://au.int/sites/default/files/pages/32901-file-02_charter-african_cultural_renaissance_fr.pdf (accessed on 28 October 2022). Author's translation.

[24] Traditional knowledge refers to knowledge, skills, techniques and practices that are developed, preserved and passed down from generation to generation within a community and which are often an integral part of its cultural or spiritual identity (https://www.wipo.int/tk/fr/tk/ (accessed on 28 October 2022)).

[25] https://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf (accessed on 28 October 2022).

[26] https://www.echr.coe.int/documents/convention_pol.pdf (accessed on 28 October 2022).

[27] More: (Moon 2019, pp. 39–58).

[28] The Central African Republic and the Democratic Republic of the Congo (Zaire) have not ratified the 1998 Protocol to the Organization of Africa Unity (OAU) of the African Charter of Human Rights.

[29] In terms of granting the deceased the right to reputation (good name), and thus its protection under Article 8 of the European Convention on Human Rights, the opinions of the ECtHR were inconsistent, includingin the judgments: of 9 December 2014 in case Dzhugashvili vs. Russia (41123/10); of 21 November 2013 in case Putistin vs. Ukraine (16882/03); of 12 January 2016 regarding Genner vs. Germany (55495/08); of 22 November 2011 in case John Anthony Mizzi vs. Malta (17320/10); of 9 September 2016 in case Madaus vs. Germany (44164/14); of 23 May 2016 in case Editions Plon vs. France (58148/00).

[30] The Rio Declaration on Environment and Development adopted at the United Nations Conference "Environment and Development" at its meeting in Rio de Janeiro from 3 to 14 June 1992. Available online: https://libr.sejm.gov.pl/tek01/txt/inne/1992.html (accessed on 28 October 2022).

[31] Anthropophagic acts are penalized in the Criminal Code of the Democratic Republic of Congo (Zaire): Article 60. Any act of anthropophagy (*d'anthropophagie*), any transfer or separation of parts of the human body and/or human bones for a fee or free of charge shall be punished with forced labor. Article 62 Without prejudice to the application of penalties for murder or manslaughter, he shall be punished with a penalty of six months to three years and a fine of one hundred to one thousand zaire, or only one of those penalties who provoked or prepared acts of anthropophagy (*préparé des actes d 'anthropophagie*), will take part in them, or will be found in possession of a body (*chair*) designated for acts of anthropophagy.

[32] Judgment of the Polish Constitutional Tribunal of 30 July 2014, file ref. K 23/11, Lex: OTK-A 2014/7/80 on the use of information taken in the performance of unambiguous and operational activities in the preparatory proceedings (wiretapping).

[33] It was noticable after the publication by the Constitutional Tribunal of the judgment of 22 October 2021 in the case with reference numberK 1/20, https://www.pap.pl/aktualnosci/news%2C756451%2Ccelem-ostatnich-wydarzen-w-polsce-jest-rozbicie-narodu-i-upadek-rzadu.html (accessed on 28 October 2022).

[34] More: (Stefaniuk 2011; Kunysz 2014).

[35] See note 17 above.

[36] In Iceland, a court ruling suspended the construction of the road that was to connect Reykjavik with the Álftanes Peninsula until the elves allegedly living in the disputed area moved (https://podroze.gazeta.pl/podroze/7,114158,15276849,islandzki-sad-zdecydowal-drogi-nie-bedzie-bo-to-moze-zdenerwowac.html (accessed on 28 October 2022)).

[37] Recognition of suicide as a crime in Ireland in 1993. Contributed to the increase in the number of suicides, https://www.oireachtas.ie/en/debates/debate/dail/1993-05-05/20/ (accessed on 28 October 2022).

[38] ibid, p. 80.

[39] (Metraux 1989, p. 22).

[40] (Tarabout 2018, pp. 4–5).

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