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DEVALUATION OF CRIMINAL PROHIBITION

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Abstract:The article, based on the analysis of theoretical views and legislative practice, hypothesizes the existence of such a phenomenon in legal regulation as the devaluation of criminal prohibition. The effectiveness of criminal law and its impact on the state of crime is a topical issue not only for Ukraine but also for any country in the world. Excessive attention to criminal law by the legislator and attempts to resolve socio-political and economic issues by adjusting criminal law raises the increase of criminal prohibition, which ultimately leads to such a negative phenomenon as the devaluation of criminal prohibition. The publication identifies the areas where such devaluation is possible and provides relevant examples. The article attempts to single out measures to stop the devaluation of criminal prohibitions, among which compliance with the ultima ratio principle is considered the most appropriate. The modern content of this principle in the criminal law doctrine is considered. Human dignity is stated to be a measure of the ultima ratio, and compliance with this principle will stop the devaluation of criminal prohibitions.

Keywords: ultima ratio, criminal law regulation, inflation and devaluation, human dignity, criminal prohibition.

1. INTRODUCTION

Undoubtedly, criminal law belongs to those areas of public law that are endowed with the most powerful arsenal of restrictions on human rights and freedoms. The very nature of this branch of law is such that it endows any measure of criminal law influence with such force of potential legal restrictions, which, it would seem, should cause reluctance to violate the criminal prohibition as to commit a criminal offense.

It is not in vain that the generally accepted doctrine of modern criminal law in Ukraine is the purpose of prevention in the structure of the general purpose of punishment. Part 2 of Article 50 of the Criminal Code of Ukraine stipulates that punishment is aimed not only at punishment, but also at correcting convicts, as well as at preventing new criminal offenses committed by both convicts and other persons.

However, the socio-political processes taking place in Ukraine in recent years show the use of the possibilities of criminal law regulation as an attempt to resolve certain social conflicts without proper justification of the effectiveness of the use of appropriate tools. A situation can be characterized by a catchphrase attributed to the Russian writer M. Saltykov-Shchedrin, "the severity… of laws is mitigated by the non-obligation to comply with them". Is such a situation acceptable in the modern criminal law system of the state? It is obviously unacceptable. In this article, the authors will put forward and try to substantiate the hypothesis that the unjustified establishment of a criminal prohibition leads to a phenomenon that can be described by the economic term ‘devaluation’.

2. THE STATE OF SCIENTIFIC DEVELOPMENT OF THE PROBLEM

The authors of the article have not been able to find works that would address the problems that make up the content of the hypothesis put forward. However, there is no reason to claim the lack of scientific and theoretical basis to substantiate its argumentation. V. Holina, V. Hryshchuk, Ye. Streltsov, V. Tuliakov, P. Fris and other scientists dealt with the problems of the effectiveness of criminal law regulation in the broadest sense. However, it is from this point of view that the effectiveness of criminal prohibition in the modern criminal law doctrine has not been investigated.

3. PUTTING FORWARD AND SUBSTANTIATION OF THE HYPOTHESIS

Despite the different levels of development of criminal law systems, different socio-economic conditions, scholars from different countries generally agree with the view that modern criminal law regulation is in crisis being clearly ineffective. Thus, Ukrainian and foreign scholars point to the excessive use of criminal law to regulate life in society. The practice of using criminal law to address social issues, which was often determined not by their reality and the possibility of harm to society, but by the negative assessment of certain factors by the state leadership, which passed to us since Soviet times, actually turned the Criminal Code into a constitutional law, which it should not be. As a result, current criminal law is simply “cluttered”, and increased to excessive proportions. The Code is full of unnecessary norms, created most often through the introduction of special bodies or by criminalization without objective need [14, p. 56]. In other words, the slogan has become “As much criminal law as possible!” In this regard, there is an opportunity to call this orientation of public policy as criminal law expansionism. An extremely important segment of the legal system has become a zone of uncertainty and instability, a source of new conflicts and problems. Instead of facilitating to stabilize social relations, criminal law itself generates instability, as it is noted in the literature [8, p. 67]. At the same time, a crisis of values is asserted, which makes the intensification and expansion of criminal repression quite natural and even normal (although, of course, there is no justification). This necessarily leads to a revision of possible strategies of criminal law response in the context of its expansion and limited organizational, legal, and other resources. One can argue for a long time whether it is correct to call the expansion of criminal law a strategy (because it will further weaken the criminal law system), or it is a side effect of society’s inability to seriously discuss and solve social, economic and political problems [8, p. 69].

Thus, in Ukraine, it has become a bad tradition to change criminal law before each important election in order to “ensure the sustainability of democratic principles and procedures in Ukraine…” [7]. On July 16, 2020, we again received an amended criminal law regulation of liability for election offenses – the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Improve Electoral Legislation" was adopted, which entered

into force on July 23, 2020 and amended Articles 157-160 of the Criminal Code of Ukraine. In the opinion of the author of these terms, criminal liability for violations of election law has so far been an example of non-compliance with the *ultima ratio* principle and a clear example of ineffective criminal law regulation, but, taking into account the inserted changes, it further complicates the situation. Moreover, the Verkhovna Rada forgot about the existence of Part 6 of Article 3 of the Criminal Code of Ukraine in which it is stated that changes to the legislation of Ukraine on criminal liability may be made only by laws amending this Code and / or the criminal procedure legislation of Ukraine, and / or the legislation of Ukraine on administrative offenses, which were changed, incidentally, in May 2020.

The crucial question, therefore, is whether there is a fixed limit to the legitimate exercise of punitive power by the state. Where is the protection of legal benefits more rationally and justifiably transformed into excessive punitive legislation? Criminal law is only a part of the right to security that cannot be provided with any other means. Otherwise, it loses its own identity, becomes a comprehensive mega-right, which is hardly justified. In other words, as noted in the literature, criminal law is not a panacea but "*ultima ratio*" (the last argument). Moreover, you should not expect from it more than it can give [1, p. 146].

The characteristics of modern criminal law of Serbia is interesting, it is completely superimposed on modern Ukrainian criminal law that can already be determined by the European trend of development of the industry. In particular, it is noted that today criminal law and the entire system of criminal justice (including the police) is becoming an increasing problem, because they, instead of protecting the most important humanistic values, begin to threaten these values. Moreover, if we take into account the fact that criminal law, which has grown to incredible proportions, is, in fact, often unable to perform its basic functions, the only rational solution is to get rid of it as soon as possible. Hypertrophied criminal law, which increasingly demonstrates features of the systemic crisis, being less and less in line with even legal and technical standards, begins to cause greater harm to both individual citizens and society as a whole. Therefore, it should be replaced by a higher quality criminal law (both in technical and substantive terms) – the one, on which you can reach a public consensus [8, p. 69–70]. A Serbian scholar is also supported by a professor from Germany, who notes that the signs of modern criminal law should be (or are) the following: the extension of criminal law to new areas, criminalization of new criminal activities instead of decriminalization, flexibility of traditional constitutional obligations (going beyond the letter of the law, prohibition of analogy of law, legal standards of argumentation), rejection of the principle of the last argument (*ultima ratio*), creation of legal benefits that are subject to wide interpretation (especially universal legal benefits), extensive preliminary criminalization through registration of attempts and preparatory actions for crimes, and also through the widespread introduction of torts to create a concrete and abstract danger and, finally, weakening the division between criminal and police law through the allocation of preventive purposes of punishment [15, p. 112–113].

What happens to criminal law when its objective form is formed in violation of the *ultima ratio* principle? According to the apt expression of V. Tuliakov, it can turn into criminal non-law – a set of social norms about crime, criminality and reaction to it, which in their essence, jurisdiction, direction and / or dynamics of implementation violate human rights and freedoms, protected by the Constitution of the state and relevant international acts, recognized by the international community [13, p. 9]. At the same time, it is clear that the most typical options for the possible transformation of positive criminal law into anti-value, criminal non-law include the following:

1) violation of the doctrinal principles of criminalization of human actions by the legislator (inconsistency with natural law, democratic goals and pressing needs of progressive social development; lack of social conditionality of criminal norms; inadequate,

inharmonious or untimely reflection of dominant social needs and interests; abuse of criminal measures in regulating and protecting of public relations, excessive "severity" or "softness", ambiguity of criminal norms, etc.);

2) abuse of judicial and law enforcement agencies in the application of criminal measures;

3) the use of criminal norms as a means of political struggle;

4) the use of criminal norms as a means of competitive counteraction;

5) non-application of criminal norms for political reasons [3, p. 35–36].

Unfortunately, each of these characteristics is inherent in modern Ukrainian criminal law, which requires an immediate response from the state, aimed at meaningful reform of its basic institutions.

Modern criminal law expansionism, which is taking place in our country, calls into question the legitimacy of criminal law, makes it a less suitable means of combating crime and threatens its complete collapse. Besides, criminal law expansionism considers an obstacle to some basic principles of criminal law and seeks to relativize and eliminate them, refusing to see in them the achievements of centuries of civilization. Scientists have long and aptly noted the following trend: the abolition or blurring of the boundaries of criminal law is much more dangerous than the abolition of criminal law itself [8, p. 71].

Contemporary criminal law knows the cases of prohibitions emergence, the need for which is more than doubtful. In other words, the state's attempts to intervene in areas that can be regulated outside the scope of criminal law have the opposite effect: a ban emerges, which is not actually applied in practice because it is perceived by society as excessive, and therefore by its existence in the text of the criminal statute "undermines authority" of other criminal law prohibitions that are not excessive.

A simple example. The Criminal Code of Ukraine. Article 354 of the Criminal Code undergo changes during the implementation in the criminal legislation of Ukraine of the international legal instruments ratified by our state, related to the fight against corruption in 2014-2015, which in the current version establishes liability for bribery of an employee of an enterprise, institution or organization.

The essence of the problem is that in fact the actions of any employee who is not a regular subject of a corruption offense, is not endowed with any additional opportunities related to his position and may receive remuneration for the performance of their professional duties without legal grounds turned out to be criminalized. This category includes waiters, taxi drivers, employees of hotels and other institutions providing services, the component of their earnings may be the so-called "tips": the benefit is obtained for "committing or not committing any action using the position that the person occupies". Often such remuneration is paid "without legal grounds". Does such behaviour reach the level of a crime? And the behaviour of the one who offers, promises or gives such "tips"? It also entails criminal liability. In our opinion the use of such a criminal prohibition is an effective means of counteracting corruption.

In such cases, another profound and at first sight unobvious idea, that the flexibility of constitutional ties and the destruction of the boundaries between police and criminal law, which merge in such an area of law as "law of public safety", is a threat to the freedom of society appears fair [15, p. 114]. Therefore, we should agree with the following statement: the adoption of laws in which criminal prohibitions are only declared but not enforced, not only has a so-called virtual nature: it negatively affects the authority of the state, raises an explicitly "subjective" activity of the system of law enforcement agencies [11 , p. 60].

The non-application of a criminal prohibition in cases when it should be applied, depreciates, devalues the preventive action of criminal prohibitions in general. If the facts of

non-application of the criminal law to a criminal offense are known, this calls into question the "threat" of the application of the criminal law to other criminal offenses.

The following case should be mentioned. During the election campaign for the presidential election in 2019, one of the highest officials of the law enforcement system of Ukraine on the national TV channel, misinterpreting the provisions of the criminal statute in force at that time, he stressed the punishment for disclosing the voter's expression of will, announcing that in this case there will be entailed elements of the crime under Article 159 of the Criminal Code "Violation of the secrecy of voting". What was the surprise of the citizens when one of the presidential candidates committed the corresponding actions and there was no reaction from the state.

Such situations are dangerous for the organization of proper criminal law regulation and significantly reduce its effectiveness, because they "reduce the value" of criminal prohibition.

The attempts to find a scientific equivalent to the processes taking place in the field of criminal law regulation led us to economic sciences, which use the terms "devaluation" and "inflation", which essentially mean the depreciation of money in the economy concerning certain more stable values. The term "devaluation" seemed more appropriate to us. Devaluation (from the Latin *De* – a prefix, which means downward movement, and the Latin *Valeo* – meaning) – a concept of economics and means — the official lowering of the gold content of the currency or the depreciation of the national currency against gold, silver, a foreign currency. According to the open dictionary Wikipedia, in modern conditions the term is used for situations of significant depreciation of the national currency in regard to "hard" currencies (usually the US dollar, euro) [4]. Extrapolating this definition, we will highlight the main feature of the devaluation of criminal prohibition: the reduction of prohibitive influence on the behaviour of the addressees of criminal law regulation.

Where such a negative phenomenon as the devaluation of the criminal prohibition finds its place in the criminal law regulation. The following considerations will help us to answer this question. As stated in the doctrine, criminal law seems to perform a dual role in social life. Initially, it criminalizes a certain act, and then begins to "fight" it. And this is not surprising. At first, a human act is revealed, which according to the degree of public danger encroaches on the most important values that exist, and then criminal law measures are proposed, which are aimed at counteracting this act [9, p. 104]. In other words, the devaluation of a criminal prohibition can be objectified both in the criminalization of certain behaviour and in its penalization.

The definition of these spheres is supported in criminal law doctrine. Thus, in particular, it is noted that in the case when the dissatisfaction is directed against individuals, it is aimed at the exaggerated need for punishment or the need to create new, but completely unnecessary corpus delicti. If dissatisfaction concerns legislative tendencies, sentencing and execution of punishment, it usually hides "excess of criminal law" or "excessively severe punishment" [15, p. 112].

Thus, the manifestations of devaluation are:

a) the presence of a prohibition that does not apply, or is applied selectively and very rarely (Article 354, Article 126-1, Article 146-1 and others);

b) the presence of too severe a punishment, which is not applied (life imprisonment or long terms and the sentence of 5 years of imprisonment with three years of probation). Thus, the website of the Zhytomyr Prosecutor's Office reported as an achievement that police officers accused of beating an innocent person were sentenced to such a punishment. Even at first the attitude of the Prosecutor's Office to this news was not clear, but then it became clear that this is presented as an achievement. Which is very strange.

The following example is another example of unreasonably high penalties, which can devalue the ban in some way. According to the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Introduction of the Unified Register of Persons Convicted of Crimes against Sexual Freedom and Sexual Inviolability of a Minor and Strengthening Responsibility for Crimes Committed against Sexual Freedom and Sexual Inviolability of a Minor" for repeated rape of the person, who has not reached the age of fourteen, the most severe of all possible punishments in Ukraine has been established – life imprisonment. The substantiation of such a legislative decision is briefly based on the need to increase criminal liability. However, the ineffectiveness of the most severe punishments for rape was described by Jean-Paul Marat [5]. Indeed, whether such a burden will lead to the opposite effect: rapists can start killing their victims, because they have nothing to lose from now on. Ukraine's criminal law does not provide more severe punishment than life imprisonment. Obviously, such an effect from the changes made by their authors was not expected.

4. PROBLEM SOLVING AND CONCLUSIONS

Only strict adherence to the ultima ratio principle can be a measure that can have a positive effect on the level of devaluation of criminal prohibitions.

Ultima ratio regum (Latin, from Latin – *ultimus* – "last", "ultimate" and Latin – *ratio* – "mind", "manner", "method", literally – *the last argument of the king*) – an inscription on French cannons which was engraved during the reign of Louis XIV, approximately since 1650. Today it is used to describe the last method of solving a problem, the last means or action in a conflict of interest, when all other, more moderate or ethically wiser methods of solving, have been used without result. This sentence often justifies aggressive (military) actions, if all previous attempts to resolve the conflict were unsuccessful (historical origin of the term) [18]. In fact, this term is used in criminal law in the same sense.

What is meant by the principle of ultima ratio in criminal law doctrine, which is defined as its own criminal law content? Answering this question, we note that the ultima ratio can be viewed from different angles. For example, the science of criminal law names the requirements that apply to "correct" and "legitimate" criminal laws. Thus, laws, by general definition, must comply with the principle of ultima ratio, they must be the latest remedy (measure) of state influence on the violator, when all other remedies are exhausted or there is such a danger. Supporters of this principle believe that the relevant legislative goal cannot also be successfully achieved by means of civil or administrative law. The principle of ultima ratio in accordance with liberal ideas makes it possible to conclude that criminal law, as the most serious form of state intervention in the legal sphere of citizens, should be used only when the use of other means seems hopeless. Critics already anticipate repeated violations of this principle and accuse the legislator that criminal law is used not as the last, but as the first, and sometimes the only means of influence (abuse of rights). In particular, it is noted that considering the above mentioned, criminal law since ancient times is the ultima ratio in the state's ability to influence crime. This rule has always established that criminal law, for all its usefulness, should be applied only when the state has exhausted all possibilities to influence the relevant phenomenon, event, act, etc. Only after that the state has the opportunity to "transfer" the act to the category of criminal, and the person who committed such acts – to the category of criminals, taking into account the full range of inherent direct and indirect consequences (considers, but not through the principle, but as if everything is clear) [10, p. 41].

In this case, the principle of ultima ratio can be considered as an expression of the principle of proportionality, according to which the mildest of all suitable means should be

used. Since criminal law is the most serious instrument of the state to protect legal benefits, it follows that it should be used only as an ultimate measure. The use of criminal law in comparison with other actions of the state is basically subordinate. In the transference to criminal law, this means the following: if the legislator uses criminal measures without the conviction that other means cannot be used, he violates the principle of ultima ratio, thereby causing dissatisfaction with criminal legislation [15, p. 121–122]. The binding of the ultima ratio principle to the principle of proportionality is a very popular idea in European criminal law doctrine [19]. This is difficult to deny, because the principle of proportionality can be applied in any area of law within which a certain authorized entity, such as a legislator or a judge, must ensure: firstly, a balance between private and public interests (the principle of balancing); secondly, the definition of a reasonable correlation between the legitimate restriction of human rights and freedoms and the goal to be achieved by applying such a restriction (principle of restriction) … In relation to this in criminal law of particular importance is the principle of proportionality as a principle of restraint of "normative freedom" of the state in criminalization of actions [17, p. 104–105]. We consider this exactly refers to the ultima ratio.

However, it should be emphasized that in Ukraine, the principle of ultima ratio as an independent principle is not singled out in the criminal law doctrine. Nevertheless, the phenomenon, which reflects this principle, exists objectively, although it is sometimes denoted by different terms. Thus, in particular, it is necessary to support the opinion that scientists in the context of the principles of criminalization are talking about the same thing, calling the same circumstance of social conditionality differently: the principle of "last argument", "economy of repression", "insufficiency of other protection measures" [6, p. 193]. On the other hand, it is also worth supporting the fact that the principle of proportionality is the only fundamental principle of criminalization as a process, and the subsystems of principles proposed by scientists are not principles, they can be rather regarded as detailed rules arising from the principle of proportionality [16, p. 78]. In addition, although the author emphasizes the comprehensive importance of the principle of proportionality for criminalization in the part that does not relate to finding a balance between private and public interest, it is worth talking about the manifestation of the principle of ultima ratio.

What does "last resort" mean in general? This means that in order to eliminate, reduce the scope and number of certain events, at first, it is necessary to implement a number, and possibly a whole set of appropriate socio-economic and other measures that should affect these events. There is no doubt that in order to develop and implement such measures, it is necessary to understand the content of what is happening, its main features, preconditions for its occurrence, etc., and only then create a reasonable plan to overcome these events, turn planned measures into real activities, provide them purposeful nature. It is possible that some of the planned measures will not be effective enough, then they need to be clarified, changed [9, p. 105].

It is difficult to deny the fact that criminal legislation and the determination of the degree of criminal liability depend on empirical knowledge. The next most important rule to determine the intervention measure of criminal law can be deduced: someone, who satisfies the need to apply punishment without reference to empirical knowledge, operates unreasonably. In other words: criminal law and the determination of measures of criminal liability, which are not guided and controlled by science, risk becoming a simple tool to meet irrational needs in the application of punishment [15, p. 130]. As modern law practice shows, the state often adopts amendments to the Criminal Code of Ukraine without proper justification of their need. Moreover, to propose a new criminalization or penalization without empirical research is arbitrariness of the officialdom, the consequences of which have negative nature.

The main issue in establishing the content of ultima ratio is to determine its criterion: what should be taken as a basis in deciding the criminal liability, the choice of a measure of the influence of criminal law. The criminal law doctrine of Ukraine has developed provisions that are recommended for consideration in resolving this issue. Thus, various indicators contain information suitable for a comprehensive analysis of a particular situation and decision-making on the rationality of criminalization / decriminalization. In particular, they include:

- statistical observation of certain events, facts, encroachments that cause or threaten to cause harm to man, society, state;
- historical continuity of legal norms;
- ineffectiveness of other legal measures of influencing such violations;
- their geographical distribution in the country / region;
- the possibility of adequate establishment of relevant prohibitions in the norms of criminal law;
- political and socio-economic expediency;
- the sufficiency of the evidence base for the actual implementation of the principle of inevitability of criminal liability and punishment;
- the attitude of the population to the criminalization / decriminalization of a certain act or phenomenon;
- compliance of Ukrainian legislation with the standards of international law;
- real possibility of resource provision of implementation of changes in the Criminal Code of Ukraine, etc. [2, p. 109–110].

In our opinion, this approach reflects the quintessence of the achievements of Soviet criminal law science. The content of these requirements in general is not in doubt, but also without a doubt, not all of them embody the principle that we analyzed. Ultima ratio refers only to “the ineffectiveness of other legal measures of influence on such violations”. However, neither this nor other studies offer ways or means of measuring the "effectiveness / ineffectiveness" of the measures of influence.

Another Ukrainian scholar points to the need to take into account a set of factors, noting that in a broader sense, criminalization processes require the substantive elaboration of a number of provisions, for example:

- the need to obtain a variety of information about social indicators of actions that have become the subject of study;
- analysis of economic, social, socio-psychological, legal and other sources of their "origin";
- analysis of other, non-criminal ways of influencing these acts (phenomenon);
- forecasting the consequences of criminalization of such an act (acts) in general and special terms;
- creation and adoption of a norm providing for liability for such acts;
- application of such norm in practice; analysis of the effectiveness of the application of the adopted norm and a certain period, etc. [12, p. 167].

Then the scientist continues: the recognition of a specific act as criminal and, accordingly, punitive, is not a completely arbitrary step of the legislator. Such a decision must be confirmed by the existence of a causal connection between the negative phenomena (offences) of different content and direction and the socio-legal need for state-imposed prohibitions on their commission under threat of criminal punishment. The presence of such a causal relationship largely determines the necessity and expediency of adopting the new criminal law, because such a law will be effective when it adequately reflects the negative reality of certain criminal behavior in its provisions [12, p. 167]. Thus, the condition of criminalization, which will correspond to the principle of ultima ratio, is formulated.

At the same time, it is worth supporting the position that the task of modern criminal law doctrine is to critically rethink the Soviet one and go beyond the outlined "coordinate system" in the study of this issue. The application of the classification approach in the study of the implementation of the principles of criminalization in the process of establishing a certain criminal prohibition seems not to be conservative, but rather archaic. Paying proper respect to the research of previous generations of scholars in criminal law doctrine, we believe that this approach does not meet the challenges and tasks to be addressed by criminal law, namely the effective protection of human rights [16, p. 80]. It seems that a clear limit to the exercise of punitive power by the state is human dignity, the violation of which is unacceptable. In other respects, the principles of proportionality, ultima ratio, legality and guilt form a structure that makes it possible to check how prosecution is limited and to control the use of punitive power by the state and to compare criminal laws [15, p. 131]. Thus, human dignity will be the measure of ultima ratio, and adherence to this principle will stop the devaluation of criminal prohibitions.

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