DEPRICATION OF THE CRIMINAL BAN

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Abstract: In the article, based on the analysis of theoretical views and legislative practice, a hypothesis is put forward about the existence of such a phenomenon in legal regulation as the devaluation of the criminal ban. The effectiveness of criminal law and its impact on the state of crime is an urgent issue not only for Ukraine but also for any country in the world. Excessive attention to the criminal law on the part of the legislator and attempts to resolve socio-political and economic issues by adjusting the criminal legislation cause, the strengthening of the criminal ban, which ultimately leads to such a negative phenomenon as the devaluation of the criminal ban. The publication identifies areas where such devaluation is possible and provides relevant examples. The article attempts to identify measures to stop the devaluation of criminal prohibitions, among which the most appropriate is considered to be compliance with the principle of ultima ratio. The article considers the current content of this principle in the criminal law doctrine. Human dignity is stated as an ultima ratio measure, and compliance with this principle will stop the devaluation of criminal prohibitions.

Keywords: Ultima coefficient, 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 gives any measure of criminal law influence such a force of potential legal restrictions that, it would seem, should cause reluctance to violate the criminal prohibition as the commission of a criminal offense.

It is not for nothing that the generally accepted doctrine of modern criminal law in Ukraine is the goal of prevention in the structure of the general goal of punishment. Part 2 of Article 50 of the Criminal Code of Ukraine provides that the punishment is aimed not only at punishing but also at correcting convicted persons, as well as at preventing new criminal offenses committed by both convicted persons 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 properly justifying the effectiveness of the use of appropriate tools. The situation can be described by a catchphrase attributed to the Russian writer M. Saltykov-Shchedrin: "severity... laws are not mitigated by the obligation to comply with them." Is this situation acceptable in the modern criminal-legal system of the state? This is unacceptable. In this article, the authors will put forward and try to justify the hypothesis that the unjustified establishment of a criminal ban 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 could not find works that would address the problems that make up the content of the proposed hypothesis; however, there is no reason to claim that there is no scientific and theoretical basis for substantiating its argumentation. V. Kholina, V. Grischuk, E. Streltsov, V. Tulyakov, P. Fris, and other scientists were engaged in 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 studied.

3. PROMOTION AND JUSTIFICATION OF THE HYPOTHESIS

Despite the different levels of development of criminal legal systems, different socio-economic conditions, scientists from different countries generally agree that modern criminal legal regulation is in crisis and ineffective; thus, Ukrainian and foreign scientists point to the excessive use of criminal law to regulate life in society. The practice of using criminal law to solve social issues, which was often determined not by their reality and the possibility of harming 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, the current criminal legislation is simply "cluttered" and brought to excessive proportions. The Code is full of unnecessary norms, created most often by the introduction of special bodies or criminalization without objective necessity [14, p. 56]. In other words, the slogan became ―As much criminal law as possible! ‖ In this regard, it is possible to call this orientation of state policy 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 contributing to the stabilization of public relations, criminal law itself generates instability, as noted in the literature [8, p. 67]. At the same time, a crisis of values is asserted, which makes the strengthening and expansion of criminal repression quite natural and even normal (although, of course, there is no justification for this). This inevitably leads to a review of possible strategies for 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 (since it will further weaken the criminal law system), or whether it is a side effect of the inability of society to seriously discuss and solve social, economic and political problems [8, p.69].

Thus, it has become a bad tradition in Ukraine to change the criminal law before each important choice to "ensure the stability of democratic principles and procedures in Ukraine..." [7]. On July 16, 2020, we again received an amended criminal law regulation of liability for electoral offenses-the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving Electoral Legislation" was adopted, which entered into force on July 23, 2020, and amended Articles 157-160 of the Criminal Code of Ukraine. According to the author of these terms, criminal liability for violations of the electoral 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, given the changes made, it further complicates the situation; moreover, the Verkhovna Rada has forgotten about the existence of part 6 of Article 3 of the Criminal Code of Ukraine, which states that changes to the legislation of Ukraine on criminal liability can only be made by laws on amendments to this Code and/or the criminal procedure legislation of Ukraine, and/or the legislation of Ukraine on administrative offenses, which were amended, by the way, in May 2020.

The crucial question, then, is whether there is a certain limit to the legitimate exercise of punitive power by the State. Where is the protection of legitimate goods more rationally and justifiably transformed into excessive punitive legislation? Criminal law is only a part of the right to security, which cannot be secured by any other means. Otherwise, it loses its own identity, becomes an all-encompassing mega-right, which is hardly justified. In other words, as noted in the literature, criminal law is not a panacea, but an "ultima ratio" (the last argument); moreover, we should not expect more from it than it can give [1, p. 146].

An interesting characteristic of the modern criminal law of Serbia is that it completely overlaps with the modern Ukrainian criminal law, which can already be determined by the European trend in the development of the industry. In particular, it is noted that today criminal law and the entire criminal justice system (including the police) are becoming an increasingly urgent problem, as they, instead of protecting the most important humanistic values, begin to threaten these values; moreover, if we consider the fact that criminal law, which has grown to an incredible size, is often unable to perform its basic functions, then the only rational solution is to get rid of it as soon as possible. Hypertrophied criminal law, more and more showing the features of a systemic crisis, less and less conforming even to legal and technical norms, is beginning to cause greater harm to both individual citizens and society as a whole; therefore, it should be replaced by a better criminal law (both technically and materially) - one on which a public consensus can be reached [8, p. 69-70]. The Serbian scientist 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, the criminalization of new criminal activities instead of decriminalization, the flexibility of traditional constitutional obligations (going beyond the letter

of the law, the prohibition of the analogy of law, the legal norms of argumentation), the rejection of the principle of the last argument (ultima ratio), the creation of legal benefits subject to broad interpretation (especially universal legal benefits).), broad preliminary criminalization through the registration of attempts and preparatory actions for crimes, as well as through the widespread introduction of torts to create a concrete and abstract danger, and, finally, the weakening of the separation of 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 principle of ultima ratio? According to the apt expression of V. Tulyakov, it can turn into a criminal law-a set of social norms about crime, crime, and reaction to it, which in their essence, jurisdiction, orientation, 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 obvious that the most typical options for the possible transformation of positive criminal law into anti-value, criminal law include the following:

4. abuse of judicial and law enforcement agencies in the application of criminal law measures;

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 main institutions.

6. the use of criminal law as a means of competitive counteraction;

7. the use of criminal norms as a means of political struggle;

8. violation by the legislator of the doctrinal principles of criminalization of human actions (inconsistency with natural law, democratic goals, and urgent needs of progressive social development; lack of social conditionality of criminal law norms; inadequate, inharmonious, or untimely reflection of the prevailing social needs and interests; abuse of criminal law measures in the regulation and protection of public relations, excessive "severity" or "softness", ambiguity of criminal law norms, etc.);

The current criminal law expansionism taking place in our country calls into question the legitimacy of criminal law, makes it less suitable for combating crime, and threatens its complete collapse. Also, criminal law expansionism considers some basic principles of criminal law as an obstacle and seeks to relativize and eliminate them, refusing to see them as the achievements of a centuries-old 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].

Modern criminal law knows of cases of prohibitions, the necessity of which is more than doubtful. In other words, attempts by the state to interfere in areas that may be regulated outside the scope of criminal law have the opposite effect: a ban arises that is not applied in practice since it is perceived by society as excessive, and therefore, its existence in the text of the criminal law "undermines the authority" of other criminal law prohibitions that are not excessive.

A simple example. Criminal Code of Ukraine. Article 354 of the Criminal Code of Ukraine is undergoing changes in the course of implementation in the criminal legislation of Ukraine of international legal documents ratified by our state related to the fight against corruption in 2014-

2015, which in the current version establish responsibility for giving a bribe to an employee of an enterprise, institution or organization.

The essence of the problem is that, the actions of any employee who is not a permanent subject of a corruption offense is not endowed with any additional opportunities associated with his position, and can receive remuneration for performing his professional duties without legal grounds, were criminalized. This category includes waiters, taxi drivers, employees of hotels, and other institutions that provide services, part of their earnings can be so-called "tips": the benefit is obtained for committing or not committing any actions using the position occupied by the person. Often such remuneration is paid "without legal grounds". Does this behavior reach the level of a crime? And the behavior of someone who offers, promises, or gives such "advice"? This also entails criminal liability. In our opinion, the application of such a criminal ban is an effective means of combating corruption.

In such cases, another deep and at first glance not obvious idea seems to be fair: that the flexibility of constitutional ties and the destruction of the boundaries between police and criminal law, which merge in such a field of law as the" law of public safety", poses a threat to the freedom of society [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 character: it negatively affects the authority of the state, causes clearly "subjective" activity of the law enforcement system [11, p. 60].

The non-application of a criminal prohibition in cases where it should be applied devalues Verona the preventive effect of criminal prohibitions in general. If the facts of non-application of the criminal law to a criminal offense are known, then this calls into question the "threat" of applying the criminal law to other criminal offenses.

The following case should be mentioned. During the election campaign for the election of the President of Ukraine in 2019, one of the top officials of the law enforcement system of Ukraine on the air of the national TV channel, misinterpreting the provisions of the criminal law in force at that time, stressed the punishment for disclosing the will of the voter, saying that in this case, elements of the crime under Article 159 of the Criminal Code of the Russian Federation "Violation of the secrecy of voting" will be involved. What was the surprise of the citizens when one of the presidential candidates took the appropriate 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 since they "reduce the value" of the criminal ban.

Attempts to find a scientific equivalent to the processes occurring in the field of criminal law regulation have led us to the economic sciences, which use the terms "devaluation" and "inflation", which essentially mean the depreciation of money in the economy relative to certain more stable values. The term "devaluation" seemed more appropriate to us. Devaluation (from the Latin De - prefix, meaning downward movement, and Latin Valeo - meaning) is an economic concept and means the official decrease in the gold content of the currency or the depreciation of the national currency to gold, silver, foreign currency. According to the open dictionary of Wikipedia, in modern conditions, the term is used for situations of significant depreciation of the national currency to "hard" currencies (usually the US dollar, euro) [4]. Extrapolating this definition, we will highlight the main feature of the devaluation of the criminal ban: the

reduction of the prohibitive influence on the behavior of the addressees of criminal law regulation.

Where such a negative phenomenon as the devaluation of the criminal ban finds its place in the criminal law regulation. The following considerations will help us answer this question. As stated in the doctrine, criminal law seems to play a dual role in public life. First, he criminalizes a certain act and then begins to "fight" it. And this is not surprising. First, a human act is identified, which, according to the degree of public danger, encroaches on the most important existing values, and then criminal legal measures are proposed to counteract this act [9, p.104]. In other words, the devaluation of the criminal prohibition can be objectified both in criminalizing certain behavior and in punishing it.

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

Thus, the manifestations of devaluation are:

9. the existence of a too severe punishment that is not applied (life imprisonment or long terms and a sentence of 5 years of imprisonment with a probationary period of three years).

10. the existence of a prohibition that is not applied or is applied selectively and very rarely (Article 354, Article 126-1, Article 146-1, etc.);

So, on the website of the Zhytomyr Prosecutor's Office, as an achievement, it is reported that police officers accused of beating an innocent person were sentenced to such a punishment. Even at first, the prosecutor's office's attitude to this news was unclear, but then it became clear that it was presented as an achievement. Which is very strange. The following example is another example of unjustifiably high fines that can somehow devalue the ban. According to the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine concerning the introduction of a Single Register of Persons Convicted of Crimes against sexual Freedom and Sexual Integrity of a Minor, and strengthening responsibility for crimes committed against sexual freedom and sexual Integrity of a minor", the most severe of all possible penalties in Ukraine is life imprisonment for repeated rape of a person under the age of fourteen. The rationale for such a legislative decision is briefly based on the need to strengthen criminal liability; however, the ineffectiveness of the harshest penalties for rape was described by Jean-Paul Marat [5].

Indeed, whether such a burden will have the opposite effect: rapists can start killing their victims because they have nothing left to lose. The criminal legislation of Ukraine does not provide for a more severe punishment than life imprisonment. This effect of the changes made by their authors was not expected.

4. PROBLEM SOLVING AND CONCLUSIONS

Only strict compliance with the principle of ultima ratio can be a measure that can positively affect the level of devaluation of criminal prohibitions.

Ultima ratio regum (lat., from Lat ultimus — "last", "final" and Lat. — ratio — "mind", "manner", "method", literally-the the last argument of the king) - an inscription on French cannons, which was engraved during the reign of Louis XIV, from about 1650. Today, it is used

to describe the last resort, or an action in a conflict of interest, when all other, more moderate, or ethically wiser methods of the solution have been used to no avail. This sentence often justifies aggressive (military) actions if all previous attempts to resolve the conflict were unsuccessful (the historical origin of the term) [18]. The term is used in criminal law in the same sense.

What is meant by the principle of ultima ratio in the criminal law doctrine, which is defined as its 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 last resort (measure) of state influence on the violator when all other means are exhausted or there is such a danger. Proponents of this principle believe that the corresponding legislative goal can also not be successfully achieved using civil or administrative law. The principle of ultima ratio, by liberal ideas, allows us to conclude that criminal law, as the most serious form of state interference in the legal sphere of citizens, should be applied only when the use of other means seems hopeless. Critics already anticipate repeated violations of this principle and accuse the legislator of using criminal law not as the last, but as the first, and sometimes the only means of influence (abuse of rights). In particular, it is noted that taking into account the above, criminal law has been the ultimate ratio in the ability of the state to influence crime since ancient times. This rule has always established that criminal law, for all its usefulness, should be applied only when the State has exhausted all possibilities of influencing 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 entire complex of its 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 tool of the State for the protection of legal benefits, it follows that it should be used only as a last resort. The application of criminal law in comparison with other actions of the State is mostly subordinate. When switching to criminal law, this means the following: if the legislator applies criminal measures without being convinced that it is impossible to use other means, he violates the principle of ultima ratio, thereby causing dissatisfaction with the criminal legislation [15, p. 121-122]. Linking the principle of ultima ratio to the principle of proportionality is a very popular idea in the European doctrine of criminal law [19]. This is difficult to deny since the principle of proportionality can be applied in any area of law in which a certain authorized entity, such as a legislator or judge, must ensure: first, a balance between private and public interests (the principle of balance); second, the determination of a reasonable balance between the legitimate restriction of human rights and freedoms and the goal achieved by applying such a restriction (the principle of restriction) ... In this regard, the principle of proportionality is of particular importance in criminal law as the principle of limiting the "normative freedom" of the state in criminalizing actions [17, p. 104-105]. We believe that this is exactly the case with the ultima ratio.

However, it should be emphasized that in Ukraine the principle of ultima ratio as an independent principle is not highlighted in the criminal law doctrine; nevertheless, the phenomenon that reflects this principle exists objectively, although sometimes it is denoted by different terms. So, in particular, it is necessary to support the opinion that scientists in the context of the principles

of criminalization speak about the same thing, calling the same circumstance of social conditionality in different ways: the principle of "last argument", "economy of repression", — the insufficiency of other protective 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 rather be considered as detailed rules arising from the principle of proportionality [16, p.78]. Also, although the author emphasizes the comprehensive importance of the principle of proportionality for criminalization in the part that is not related to finding a balance between private and public interests, it is worth talking about the manifestation of the principle of ultima ratio.

What does "last resort" even mean? This means that to eliminate, reduce the scale and number of certain events, 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 to develop and implement such measures, it is necessary to understand the content of what is happening, its main features, the prerequisites for its occurrence, etc. and only then create a reasonable plan to overcome these events, turn the planned events into real events, and give them a purposeful character. 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 responsibility depend on empirical knowledge. We can deduce the following most important rule for determining the measure of intervention in criminal law: anyone who satisfies the need for the application of punishment without recourse to empirical knowledge acts unreasonably. In other words: criminal law and the definition of criminal liability measures, which are not controlled and controlled by science, risk becoming a simple tool for meeting irrational needs in the application of punishment [15, p. 130]. As modern legal practice shows, the state often accepts amendments to the Criminal Code of Ukraine without proper justification of their necessity; moreover, to propose a new criminalization or punishment without empirical research is an arbitrary act of officialdom, the consequences of which are negative. The main issue in determining the content of the ultima ratio is the definition of its criterion: what should be taken as a basis when deciding on criminal liability, choosing the measure of the influence of the criminal law. The criminal law doctrine of Ukraine has developed provisions that are recommended for consideration when resolving this issue; thus, the various indicators contain information suitable for a comprehensive analysis of the specific situation and for deciding on the rationality of criminalization/decriminalization. In particular, they include:

- the sufficiency of the evidence bases for the actual implementation of the principle of inevitability of criminal liability and punishment;
- historical continuity of legal norms;
- statistical observation of certain events, facts, encroachments that cause or threaten to cause harm to man, society, state;
- the ineffectiveness of other legal measures of influencing such violations;
- their geographical distribution in the country/region;
- political and socio-economic expediency;

- the possibility of adequate establishment of relevant prohibitions in the norms of criminal law;
- the attitude of the population to the criminalization/decriminalization of a certain act or phenomenon;
- the real possibility of resource provision of implementation of changes in the Criminal Code of Ukraine, etc.;
- compliance of Ukrainian legislation with the standards of international law [2, p. 109–110].

In our opinion, this approach reflects the quintessence of the achievements of the Soviet science of criminal law. The content of these requirements, in general, is not in doubt, but there is no doubt that not all of them embody the principle that we have analyzed. Ultima ratio refers only to "the ineffectiveness of other legal measures to address such violations"; however, neither this nor other studies suggest ways or means measure the "effectiveness/inefficiency" of interventions.

Another Ukrainian scientist points out the need to consider a set of factors, noting that in a broader sense, the processes of criminalization require a substantive study of several provisions, for example:

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

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

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 studying 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 is not conservative, but rather archaic. Paying tribute to the research of previous generations of scientists in the field of criminal law doctrine, we believe that this approach does not meet the challenges and tasks that criminal law has to solve, 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

allows you to check how limited the prosecution is, to control the use of punitive power by the state, and to compare criminal laws [15, p.131]; thus, human dignity will become an ultima ratio measure, and following this principle will stop the devaluation of criminal prohibitions.

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