Tulyakov V.A.[♦]

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Levels of criminal legal regulation

Abstract: On the basis of thesis of multidimensionality and multi-level of existence of criminal legal bans is considered an idea on wide understanding of criminal law: from individual up to supranational level. It is concluded interlink of indicated model with concept of providing of security of person, society and state.

It is suggested the ways of subsequent development of branch at help of joining of the measures of coercion, compensation and stimulation in several of law-realization levels.

Keywords: dynamics and statics of criminal law; levels of criminal legal regulation; criminality.

Right to execute and pardon, bear responsibility for committed deed is the last argument of state in maintaining of the stability and law and order, ensuring the rule of law. Right on its nature, social danger of a deed, publically powerful features of law enforcing and usage of coercible, strict punitive measures that sanctioned by court is the most severe kind of state coercion [1]. Last century the ideas of a gradual emasculation of the legal form, transformation of the criminal legal prohibition into non-existence were very popular. Crime had to be dead, criminality of person to be neutralized with measures of social protection, and criminal law had to be disappeared in the measures of social control and encouragement.

♦ **Tulaykov Vyacheslav Alekseevich** – Doctor of Law, Professor, Corresponding Member of NAPrNY, Honored Worker of Science and Technology of Ukraine (Ukraine). E-mail: tuliakov@onua.rdu.ua

The reality had surpassed expectations. Ideas of socialization of punishment and criminal legal measures had been realized in practice of genocide of Hitler's and Stalin's camps. The right of state to punish (as guarantee of social security) had substituted with abuses of power and outright tortures. Even now, after 50 years of persistent fight for human rights of man and citizen, we have a new dilemma: it occurs as it were a loss of state, accordingly, criminal law is dissolved in processes of transition and limitation of sovereignty to supranational political and legal forms.

Public thought also does not fall behind in explanative attempts of any social order: from apologia to make absolute the right of state and dictatorship of proletariat to punish up to glorification of total de-regulating of social control, to replace the prisons with unique correctional institutions of medical and educational nature; from prohibition of privatization of criminal process and constriction a vertical powers up to making absolute a significance of the institutions of mediation and rehabilitation justice. In pursuit of political order the scientific thought has stopped to play a role of the factor stimulating a development of right.

Casuistry in opposite of systematization, keenness with situational ideas and private theories a counterweight to creating of explanatory models, extreme commitment, results-oriented work, empiricism and dogmatism as main elements of research methodology have in advance led to imbalance of idea and expected social result. There need no to remember like a substantiated with fight for human rights in counterweight of totalitarianism of the past, manipulation with principle of law supremacy and slogan "all is freely permitted except what is specifically prohibited" has led to total abuses with rights in post-soviet states, to mass anomy, imbalance of systems of public power and governing, formation of compensational mechanisms by organized crime and corruption practices, when performance of decisions were suitable to carry out through compensational mechanisms (institution of "onlooking", "authorities") then through a system of public services.

The principle of inevitability of punishment ("a thief has to be imprisoned") is compensated with usefulness of criminal activity, forming of the two types of

criminal legal norms: positive (for everybody) and valuably (for himself). In addition, the second type of criminal legal law understanding based on an idea of usefulness, admissibility of criminality among family, group of "their", "close", visualizing on family and corporative contacts.

It leads to emasculation of criminal legal ideology, mass corruption, absence of unity of law enforcement, violation of regime of lawfulness and anomy, and further - crisis of criminal legal regulation in state's level. Realities of epoch adds fuel to the fire.

Today we are clashing with situation, when simultaneously and parallel is existing a few layers of criminal legal regulation. There were expressed in literature quite curious ideas about some of them, some are in process of theoretical comprehension and designing [2], and other ones are only an object for future scientific discussion.

Determination of crime and punishment for it is a prerogative of state in positivist understanding of law. But transmission in other levels of law-understanding opens few other planes for analysis.

A.I. Veinik points out that "it may assume that there are existed unlimited a lot of various qualitative levels of substance that constitute the Universe. This assumption can be neither confirmed nor refuted" [3, p. 31]. Multilevel nature and multidimensionality of criminal legal form have also rather complex character that might not always be explained. We are either concentrated in metric planar analysis of law's dogma or are immersed in the research processes of law-understanding and law-realization, which have discrete nature. As result the analysis of law's existence is conducted as minimum in the two planes (material and informational, static and dynamic), but it would be more right spoken also about third component - energetic, spiritual one that realized in individual acts of law enforcement, performing of potential or clearly expressed criminality of person.

In its time an individualized nature of existence of criminal law had been characterized by H.V.F. Hegel in notion of "non-law - crime". It should be said

that this plane requires an additional research from standpoint of characteristics of modern measurement of juridical anthropology.

From binary position (statics - dynamics, positive law - law as value) criminal law is multidimensional and is realized in plane of its manifestations of outside in individual, social and institutional levels with purpose of provision of homeostasis "person - society - state" through description, creation, guarantee and ensuring of a system of security of the objects of criminal legal protection.

At this approach a deed inside of micro-social group, tribal formations that live in territory of a certain state or has a sign of extraterritoriality (common law American Indians, community rules of conduct, religious norms of closed micro-social group and etc) might be recognized as criminal offence.

Traditional legal conscience of Cossacks was closely linked with religion. Notion of crime of the Slavs was differ from notion of mountain people. If crime had been understood by the mountain people like causing of harm then the Russians understood crime like a sin, deed against laws of conscience and truth. Any common law is an ethnic, its norms are disseminated not so much at a certain territory as at specific people [4].

Deed might be recognized as criminal at level of ethnos, people. Specialists in area of survey of the Slav law point out that main element of the Slav sense of justice are feeling of fairness and injustice, duty and responsibility, solidarity, which distinguishes the Slav legal conscience from the western that directed to formal lawfulness [5, p. 15].

Criminal is a provided by criminal law socially danger deed committed in specific conditions of place and time of concrete state.

Criminal is named a body of the deeds of conventional nature, when agreements of states, non-governmental (supranational) structures and formations create a legal constructs recognized as crimes ex officio.

So, we distinguish the following kinds of law in various levels:

- at level of social group: micro-criminal law - a body of the norms initially determining criminality and punishment of deeds from standpoint of ethnic or

institutional structure, tribe (patriarchal families, cultures of micro-social group, community);

- at society level: criminal law like a value, law and non-law;

- at the level of state: "classic" theory on crimes and punishments in combination of coercive force of state;

- at the level of international formations of institutional nature (corporation, cartels, international associations, organizations up to transnational organized criminal groups): criminal legal aspects of lex mercatori, lex sportive, lex medicinae, lex criminali etc., which are an instrument of providing an effectiveness of institution's functioning;

- at the level of interstate formations: supranational criminal law of European Union that, in opinion of specialists, is an instrument for neutralization of the gaps in a system of national protection from criminal offences the human rights and freedoms of man and citizen;

- at the international level: the international criminal law for crimes of international character and the law for international crimes.

Out-qualification matters "crime and punishment" are remained aside in process of abuse of law by state and governmental structures, in international level ("adequate" responses to terrorism, out of jurisdictional preventive detention) and national level (abuse of power, mass violations of human rights, tortures).

This classification also does not consider "the dynamic" characteristics of criminal law performing in process of interpretation and law-realization.

As for mentioned layers, we note that in the top levels of social interaction the transit crime, as result of global process of turnover of human resources, raw and capitals, requires just out-jurisdictional solutions. Actions of terror and piracy, which are caused by disproportions of modern development, are required not less adequate solutions in the level of international community. Lesser levels are remained as a subject of impact through initial socialization, formation of legal conscience and ensuring law and order in the group threatened by possible or real application of coercive measures.

In real life there is existed only national criminal law.

An issue of providing an unification of indication the deeds as criminal and punishments for their commission at the level existing interstate formation has not yet resolved until now. This is confirmed by numerous juridical instruments (conventions, agreements, plans of actions, road maps) in the interstate level that are absolutely ignored by supranational, local legal (non-legal) systems in sphere of capitals turnover, medicine, sport, organized crime. This reduces confidence of society to adopted decisions.

It is possible that those scientists are right who assert that proposed supranational criminal law as panacea is a perverse in its nature. It entails alterations in existed law enforcement practice engendering additional criminal legal risks, leads to changes in institutional structure of society. Its effectiveness is reduced solely to procedural forms of international cooperation. It might be difficult to image the jurisdictional unit of the signs of corpus delicti of international crime that distinguishes on sufficient criteria from known ever to Romans characteristics of the elements of corpus delicti of crime in national law (even with definitive elements of concept of mens rea this does not give new knowledge in the theory of law understanding). Unlike distributed ideas the national criminal law fulfills law-established function, that is directly and indirectly impact on state of entire legal system of a country [6, p. 228]. This is not typical for the concept of transit crimes and control over them.

Moreover, transit crimes (in our opinion this term more correct reflects a gist of supranational on nature deeds than used term "transnational" crimes, which in force its amorphousness and relativism hides than opens the problem) require unification of applied terms and unity of sanctions, but not establishing other supranational mechanisms of bureaucratic control and legal regulation. Unfortunately, an experience of activity of the International Criminal Court serves as confirmation to said. During its existence it could not be an effective compensatory mechanism of fight against crimes in international level. There working out only the systems of international social control and unification legal

assistance (European warrant of arrest), but not justice, rather not material law, which at the international level has a clearly expressed character of objective imputation.

Globalization of criminal justice is a response on globalization of modern world order. However it must not dominate in formation of bans and punishments. Absence of world government, sovereignty of national jurisdictions nullify any attempts of solutions of these matters, more precisely, determine of establishing of visible activism in prejudice of its effectiveness and social value.

Certainly, as before the future criminal law will be formed on the base of local legal traditions and models with consideration of the two trends: privatization of criminal legal relations in sphere of responsibility's regulation for criminal deeds and less grave crimes and prisonisation of common-criminal criminality at gradual convergence of coercive measures and mechanisms used in different cultures.

Addressing to a victim and application other criminal legal measures of reacting entails unloading of the system, its humanization. Toughening of sanctions in respect of common-criminal offenders fulfills a deterrent function.

Gradual erosion of publicity, a return of presuming the primacy of an individual, private over the state and public are obvious. This is clearly seen in the modern criminal legal works. But, as rule, everything is limited with indication on development of ideas of rehabilitation justice, mediation and reconciliation in criminal law and process. We are also watching an establishment of institutions of compensation and restitution in criminal legislation and law of Holland, France, Finland, Moldova, and Poland, when compensation of caused damage to a victim is carried out in frames of criminal legal relations and replaces a punishment. But, this idea has not yet received the final doctrinal formulation in the Ukrainian criminal legal science. The criminal legal norms are remained in unchangeable kind as defenders and custodians of an eternal and unshakable interests of state, society and victims. Though this situation should be changed. We wrote previously that in order to provide social integration of the control over

criminality, the Criminal Code of Ukraine shall doctrinally be written for victims but not for law enforcement bodies.

Therefore, at formulation of a concept of criminal offence and distinguishing of a category of deeds are necessary the following actions:

- description of particularities of the mechanisms of criminalization, penalization, decriminalization and de-penalization with considering of multilevel existence of criminal legal norms;

- conduction of systematic analysis of offences and deeds, which might be classified as criminal;

- clear indication in significance of harm, ensuring of security of individual and social interests, sovereignty of state for criminalization in national law (public agreement in supranational criminal law) and sequential decriminalization and de-penalization all other deeds;

- separation of an institution of a victim in a system of Common part of the Criminal Code of Ukraine, formulation of the norm, at which the criminal offences are recognized the deeds, the cases on which are only instituted on complaint of a victim;

- establishing of an institution of criminal legal restitution and criminal legal compensation in the system of Common part of the Criminal Code of Ukraine, transmitting to "multi-road system" of the state legal reaction in crime;

- limitation of judicial discretion at assignment of punishment due to formalization of the rules of punishment's assignment at condition of reconciliation with a victim, commission of crime by official, repeated crime commission, in complicity etc.;

- limitation a number of blanket and referenced dispositions in the norms of the Special Part of the Criminal Code of Ukraine, limitation of a number of special norms oriented in the rules of punishments' assignment;

- limitation qualified and especially qualified signs in corpus delicti of crimes due to formalization of a process of punishments' assignment.

In other side, formulation of criminal legal concept of "common" criminal and criminal legal measures of reacting in his activity is an actual and significant. The concept of socially danger identity, the single criterion of which is a negative public assessment his criminal activity, should be restored in national literature and practice. An experience of the USA, Germany, Great Britain, San-Marino and many others states testify about usefulness of application of criminal legal measures of security and social protection to common and professional criminals.

Thus, stability and rigidity of common criminal ban in addition with humanization and diversification of responsibility for criminal offences will largely determine the future development of the system and branch.

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