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CONCEPTS, GROUNDS, AND CRITERIA OF CRIMINALIZATION AS A METHOD OF CRIMINAL POLICY

Oleksandr Ostrohliad,
Ph.D. in Law, Associate Professor, Senior Lecturer at the Department of Law and Law Enforcement, Zhytomyr Polytechnic State University (Zhytomyr, Ukraine);
Professor at the Department of Law and Public Administration,
HEI "King Danylo University" (Ivano-Frankivsk, Ukraine)
ORCID ID: 0000-0003-0003-3075
oleksandr.ostrohliad@ukd.edu.ua

Abstract. The author, based on a theoretical analysis of the main approaches to understanding the concepts of "method of criminal policy" and "criminalization" and their basic characteristics, defines the concepts of "ground" and "criterion" of criminalization and specifies their content. Using logical-semantic and comparative legal methods, it was established that the ground for criminalization is the cause, a phenomenon that makes a specific act penal. Thus, the ground for criminalization is the socially dangerous behavior of a person that must be subject to a criminal prohibition, or the property of specific behavior to cause significant harm to social values; the criteria of criminalization are the grounds for assessing, determining, and measuring, that is, the values of parameters which make a particular behavior penal. The study of other characteristics of criminalization (conditions, principles, methods, etc.) as a method of criminal policy also seems promising.

Key words: criminal policy, method of criminal policy, criminalization, ground for criminalization, criterion of criminalization.

Introduction. The issue of methods (ways) of implementing criminal policy is more likely one of the most controversial in the theory of criminal policy since it is characterized by a variety of approaches and confusion of concepts.

It should be immediately noted that the ambiguity of approaches to the conceptual framework within the understanding of the methods (ways) of implementing criminal policy is probably the most notable because most researchers ignore the relevant issue or indirectly consider it in other searches. Many problems also arise as classifications of criminal policy methods are used with a different number of elements, so those researchers who use fewer elements try to "squeeze" into them all possible options for implementing criminal policy that is hardly justified.

The same situation occurs when analyzing each specific method of implementing criminal policy. Every researcher who has dealt with the issue concerned presents own vision of the conceptual framework, which does not contribute to the continuity of scientific research in the works of other scientists.

As a result, it is relevant both from the scientific standpoint and the practice of further implementation to define the key characteristics of the "criminalization" concept, i.e., "ground criminalization" and "criterion of criminalization".

The purpose of the article is to formulate a theoretical argumentation for understanding criminalization as a phenomenon and process; its grounds and criteria as a method of criminal policy in Ukraine. To implement the goal, the author set the task to characterize individual interpretations of the mentioned concepts, to develop the unity of terminology based on the provisions of the modern Ukrainian language and scientific works devoted to the topic under consideration, and define the concepts "ground for criminalization" and "criterion of criminalization".

Materials and research methods. The paper relies on the provisions of the explanatory dictionary of the modern Ukrainian language and scientific literature. The methodological basis consists

of general scientific and specific scientific methods, in particular, logical-semantic (for defining and deepening the conceptual framework: "criminalization", "ground for criminalization", and "criteria of criminalization"), comparative legal method, and analysis (when examining the opinions of Ukrainian and foreign scientists).

Results and discussions. It is advisable to begin considering the grounds and criteria of criminalization with the concept of a method (way) of implementing criminal policy and determining the place of criminalization in the system of these methods.

The terms used to summarize what should be understood as the method (way) of implementing criminal policy are diverse enough. Thus, N. A. Lopashenko discusses the concept of "method of criminal policy", which includes criminalization, decriminalization, penalization, depenalization, differentiation, and individualization of criminal liability. At the same time, she notes that other authors attribute the same concepts to the content base of criminal policy and its principles and explain one method through another (Lopashenko, 2009: 34).

The same concepts (criminalization, decriminalization, penalization, and depenalization), A. A. Mytrofanov regards as "the main directions of criminal policy in Ukraine", omitting differentiation and individualization and adding the support of of international cooperation in combating crime using national criminal law means (Mytrofanov, 2004: 56).

Without analyzing all the approaches and concepts in detail, it is necessary to refer to the Great Explanatory Dictionary of the Modern Ukrainian Language, which can assist in defining a method (way) of criminal policy (more – Ostrohliad, 2013: 182-186) to establish what concepts should cover the above terms.

Accordingly, the method (way) of implementing criminal policy is a system of techniques for practical actualization and implementation of criminal policy. In other words, the methods (ways) of implementing criminal policy are tools which help criminal policy counteracts crime (crime prevention).

As for the reasons the relevant combination of methods (ways) should be used, it is worthwhile to note that they have much in common in the Ukrainian language, since they are defined as a technique or system of techniques. For our understanding of the techniques or tools of implementing criminal policy, they are both acceptable, and they should be employed in the following phrase "method (ways) of implementing criminal policy" that will ensure the unity of further research.

Therefore, criminalization, decriminalization, penalization, depenalization, differentiation, and individualization of criminal liability are the methods (ways) of implementing criminal policy. "Criminalization" is pivotal among them: it is a sort of trigger, the beginning of the fight against crime, and all other methods are somehow connected with it.

The concept of criminalization

It should be immediately noted that the methods (ways) of implementing criminal policy are interrelated: one affects the other and changes it. Scientists often confuse some concepts because the distinction is complicated by common features. Therefore, the development of theoretical provisions of methods (ways) of implementing criminal policy is important.

According to Kudriavtsev V. N., the first and main "meeting" of crime with the state and the law enforcement system occurs when a criminal law is drafted, that is, in the process of criminalizing socially dangerous acts. It is the content of the criminal law that will specify which acts dangerous for a person, society, or the state are regarded as criminal and types of punishments (although it is penalization – O.O.), as well as other criminal law measures for committing crimes. The scope and content of the criminalization of socially dangerous acts ultimately determine the nature of the strategies that would be most effective given the current crime situation in the country (Kudryavtsev, 2003: 20).

As a result, in V. F Prymachenko's opinion, modern domestic scientists mainly distinguish two concepts of criminalization:

– Criminalization in a broad sense provides for enshrining in the criminal law not only elements of a new crime (crimes) body and the corresponding specific legal forms regarding sanction (sanctions) and other penal consequences. In the case concerned, penalization and differentiation of criminal liability also include criminalization.

– Criminalization in the narrow sense provides for the consolidation in the criminal law of only features of a new crime (crimes) body. As for punishment, there is only a statement that a particular crime (crimes) is penal, and the specifics of punishment are solved in the course of penalization, which is beyond criminalization (Prymachenko, 2017: 193-194).

Once again, as V.F. Prymachenko emphasizes, each concept has its shortcomings and advantages and an argument for recognizing its right to exist. However, it is seen that the traditional idea of criminalization is more justified, and it is worthwhile to join it (Prymachenko, 2017: 194).

It is the approach that will be discussed below. As already noted, there is a variety of approaches to the concept of criminalization in the scientific literature. For example, Dudorov O.O. marks that criminalization is a term that in criminal law denotes the process and outcome of classifying acts as crimes. In other words, criminalization is the identification of socially dangerous manifestations of human behavior; the recognition by the state of the option and necessity of applying criminal liability measures and enshrining the signs of socially dangerous acts declared crimes in the criminal law (Dudorov, 2017: 51). According to Zhumaniiazov M.A., criminalization is the specification of acts dangerous to the individual or the state and their recognition as crimes by establishing a prohibition on their commission in the criminal law (Zhumaniyazov, 2006: 152). Following Mitrofanov A. A., criminalization is the process of establishing socially dangerous types of human behavior, recognizing the admissibility, possibility and expediency of criminal law struggle against them, and enshrining specific types of human acts as criminal and penal in the criminal law (Mytrofanov, 2004: 62). P. L. Fris defines criminalization as the process of identifying socially dangerous types of human behavior, recognizing at the state level of the need, possibility and expediency of criminal legal struggle against them, and defining them in the law on criminal liability as crimes (Fris, 2014: 20), etc.

Thus, several generalizations can be made from the presented definitions of criminalization: 1. Criminalization is a process of identifying socially dangerous behavior, as well as 2. An outcome of the relevant process, that is, the attribution of acts to the category of crimes.

Accordingly, the following research stage should clarify what exactly affects the process which results in making socially dangerous (harmful) behavior criminally punishable.

Grounds and criteria of criminalization

In studying criminalization as a method of criminal policy, a lot of questions about the interpretation of the grounds, causes, criteria, conditions, prerequisites, and principles of criminalization arise, since the relevant topic is full of varied opinions as nowhere else.

To define the concepts under consideration, we turn to the Great Explanatory Dictionary of the Modern Ukrainian Language, which will further arrange approaches and establish the unity of terminology.

As a result, it follows:

– ground: 1. The lower supporting part of any object and structure; base. 2. The main thing something is based or relies on. Scientific basis. The fact that interprets and justifies the actions, behavior, etc. of someone (Velykyi tlumachnyi slovnyk, 2009: 966);

– cause – 1. A phenomenon that drives or triggers another phenomenon. 2. Reason, ground for any actions, deeds (Velykyi tlumachnyi slovnyk, 2009: 1111);

– reason – Ground (real or fictional), the cause of any actions, deeds (Velykyi tlumachnyi slovnyk, 2009: 1140);

– criterion – the basis for assessing, **defining,** or classifying something, a measure (for example, safety criterion – the established values of the parameters and characteristics of the consequences

of an accident, according to which the safety of a potentially dangerous object is justified) (Velykyi tlumachnyi slovnyk, 2009: 588);

– condition – 1. Mutual oral or written agreement about something; contract, agreement. 2. Requirement, proposal put forward by one of the parties who agree on something, as well as when concluding an agreement, contract. 3. (pl.) Mutual obligations of the parties to the agreement proposed for the conclusion, compliance with the agreement, contract. 4. (pl.) Any proposals for payment, benefits, etc. put forward by a person or organization that gives someone a job, premises, etc. 5. (of what, less often for what someone is impelled to) **A necessary circumstance that allows for the implementation, creation, and formation of something, or contributes to something.** 6. Circumstances, peculiarities of reality under which something happens or is carried out. 7. Rules that exist or are established in a particular area of life, activities that ensure the adequate functioning of something. 8. Data collection, the provisions underlying anything (Velykyi tlumachnyi slovnyk, 2009: 1506);

– prerequisite – (of what, for what) Precondition for the existence, emergence, action, etc. of something (Velykyi tlumachnyi slovnyk, 2009: 909).

– method – a certain action, **technique, or system of techniques** that makes it possible to do, implement or achieve something; one that serves as **an instrument, means, etc. in any business, action** (Velykyi tlumachnyi slovnyk, 2009: 1375).

Thus, the concepts' details are feasible for further research. In this case, it is essential to refer to the classification of reasons and grounds well-known in law for initiating a criminal case (initiation of criminal proceedings) and thus determine that the basis for criminalization is the cause, the phenomenon that makes a particular act criminally punishable, and the reason of criminalization may be some formal grounds that require amendments in criminal law, e.g., the requirements of the international community. The criteria of criminalization are the grounds for assessing, **determining, and measuring**, that is, the values of the parameters with which behavior must comply to become criminally punishable. Grounds for criminalization – the necessary circumstances that make it possible to carry out criminalization and provide the option of combating undesirable behavior using criminal law means. The method of criminalization is a **technique or system of techniques** that allows carrying out it.

It is necessary to warn that all the above concepts should be used together, because, for example, only a ground for criminalization is not enough if its conditions are not met, etc.

Let's start with criminalization.

Accordingly, we can agree with the statement, as indicated in the Encyclopedia of Criminal Law, that there is only one basis for criminalization, i.e., the existence of socially dangerous behavior that requires a criminal law ban (Entsiklopediya ugolovnogo prava, 2005: 75). It should be emphasized that there is an approach to quitting the concept of public danger, although its nature and characteristics are widely used, therefore, the concept of "harm" is increasingly employed instead of the concept of public danger. As a result, if we consider the provisions of the Draft Criminal Code of Ukraine (CCU) (Proiekt Kryminalnoho kodeksu Ukrainy, 2022), the basis for criminalization is the ability to cause harm to social values through a particular behavior.

As highlighted by Dudorov O.O. and Khavroniuk M.I., the only reason for criminalization of acts is the appropriate degree and nature of their public danger, which is characterized by their ability to cause essential (and not any other) harm to objects of criminal law protection (and not to any other objects). In the absence of such a degree and nature, it is necessary to point at groundless criminalization. The social danger of actions is not hard and fast concept. It is constantly subject to re-assessment under the influence of negative or positive factors (essential circumstances) that objectively determine the need for criminalization (or, conversely, decriminalization) of a particular act (Dudorov, Khavroniuk, 2014: 66).

The same provision is indirectly supported by Ye. A. Streltsov, who says that the initial step in creating the necessary legal conditions for a corresponding public reaction to criminal behavior is the

definition of the concept of a specific crime. After that, it is important to clarify its elements, which, in turn, become the basis of criminal liability. Thus, to recognise an act as criminal, it must always **have a "necessary and sufficient" public danger** (the author's mark – O. O.), "stability" in the commission, general prevalence, etc. (Streltsov, 2018: 75).

Yepifanova Ye.V. convinces that criminalization occurs along with the origin of the act's public danger, and decriminalization is observed in its absence. Public danger is a necessary objective-subjective category, which is the criterion for criminalization and decriminalization of acts, as well as the basis for categorization of crimes. The relevant category is dependent on and derived from the criminal policy of the state. Public danger is the capacity of an act provided for by the criminal law to cause harm to a person, property, the state, and other objects (interests) protected by the criminal law. Criteria of public danger may change over time. The state, proceeding from its interests and the legitimate interests of citizens and legal entities whose rights it protects, identifies the degree of social danger for a particular act. The consequence of such an analysis is the criminalization or decriminalization of acts (Epifanova, 2008: 31).

Consequently, there must be specific criteria for the criminalization of public danger or the ability to cause harm. In other words, the criteria of criminalization are characteristics that answer the question of why a particular kind of behavior is socially dangerous or can harm social values.

Beliaieiev N. A. holds that criminal policy develops criteria of criminalization, following which the legislator chooses from all socially dangerous human acts those that must be attributed to crimes. The process of implementing criminal policy is manifested in the legislator's definition of a set of features in the presence of which the act is recognized as a crime, that is, in the creation of a Special Part of the criminal legislation (Belyayev, 1986: 134-135).

As H. Kolobov notes, the analysis and assessment of the grounds for criminalization complete those stages of the criminalization process which result in the solution of the main and central issue – the admissibility, possibility and expediency of establishing a criminal law ban. At the next stage – formulation of the criminal law norm – there is a need to take into account a number of other factors. We call them the criteria of criminalization (Kolobov, 2000: 107).

Although it should be mentioned that there is a kind of mixing of stages, first we establish the basis for criminalization, compliance with the criteria, and then determine the conditions and methods of criminalization.

The main thing is to determine the nature and degree of social danger inherent in a specific offense. Action that, in the legislator's opinion, poses a danger to the interests of society is prohibited by criminal law and becomes unlawful (Severyn, 2016: 325).

According to H. Kolobov, the criteria of criminalization are the circumstances that characterize the objective and subjective properties of criminalized acts and are subject to introduction in law-making for the creation of optimal models of criminal law norms. The criteria of criminalization may relate to the act, consequences, situation, the subject of the crime, the subjective party, and the victim. Even a cursory look at the current criminal legislation makes it clear that among criminalization criteria, there is a dominance of such circumstances as the severity of consequences, the likelihood of their occurrence, the nature of the violation of the relevant rules, etc. These criteria, without doubts, should be regarded in the criminalization process. However, consideration of socio-psychological signs as a criterion is equally important for consolidation of a criminal law ban (Kolobov, 2000: 107).

M. M. Lapunin states that the term "criteria of criminalization" is used in the legal literature. The criteria of criminalization should be regarded as a synonym for crime-forming elements, with which it is worth agreeing. They are as follows: 1) the nature of the act itself (violation of unconditional legal prohibitions); 2) the method of committing the act (violence, deception, bribery, etc.); 3) the consequences resulting from socially dangerous behavior; 4) the attitude of the subject of undesirable socially dangerous behavior to the consequences of such behavior and the act itself; 5) the motiva-

tion of undesirable behavior, indicating its public danger, or persecution ensuing from such behavior, indicating the public danger of the act's purpose (Lapunin, 2006: 171).

The same approach is found in the Encyclopedia of Criminal Law with the following crime-forming elements: 1) the nature of the action itself, which is expressed in the violation of unconditional legal prohibitions. 2) the method of committing an act, which is most often criminal – violence, deception, in particular, documentary bribery, etc. 3) consequences resulting from socially dangerous conduct in the form, for example, of harm to health, major harm, or other serious consequences. 4) the attitude of the subject of undesirable socially dangerous behavior to the consequences resulting from such an action; 5) the motivation of undesirable behavior, indicating its public danger (selfish or other personal interest) or persuing objectives as a result of such an action that indicate the public danger of behavior (for example, non-payment of taxes or concealing prohibited activities) (Entsiklopediya ugolovnogo prava, 2005: 88-89).

Lopashenko N. A. names the following crime-forming elements: 1. The nature of the act itself, which is expressed in the violation of unconditional legal prohibitions. Bright examples of such crimes available in the current CC are attacks on the person (murder, harm to health, rape, etc.), theft, such economic crimes as both types of legalization (laundering) of money assets or other property acquired by criminal means, acquisition or sale of property deliberately obtained by criminal means, coercion to commit a deed or refuse to commit it, counterfeiting, manufacture or sale of counterfeit credit or payment cards and other payment documents, terrorism, banditry, bribery, etc. 2. The way of committing an act, often criminal – violence, deception, including deception, documentary, bribery, etc.; taking out a loan, abuse in the issuance of securities, damage to land, illegal hunting, coercion to testify, etc. 3. Consequences resulting from socially dangerous behavior, in the form, for example, of harm to health, great harm, or other drastic consequences. Such crime-forming elements are rightly defined today as criminal for many actions of an ecological nature (water pollution, atmospheric pollution, violation of the rules for subsoil protection and use, etc.). They, together with other crime-forming featutes, were used by the legislator in describing the elements of abuses in the issuance of securities, illegal actions in bankruptcy, deliberate and fictitious bankruptcy, etc. 4. The attitude of the subject of undesirable socially dangerous behavior to the consequences resulting from such behavior and to the act itself. Thus, only intentional infliction of mild and moderate harm to human health is criminal; only deliberately false testimony entails criminal liability, etc. 5. Motivation of undesirable behavior that indicates its public danger (selfish or other personal interest), or persecution as a result of such behavior that indicates the public danger of the act's objective (for example, non-payment of taxes or concealment of prohibited activities). The above features are used by the legislator in the criminalization of such acts as the substitution of a child, violation of the rules for the manufacture and use of state countermarks, deliberate and fictitious bankruptcy, abuse of office, obstruction of justice and preliminary investigation, etc. (Lopashenko, 2004: 298-299).

It draws attention to the fact that legislation clearly expresses a tendency according to which the number of crime-forming elements is often associated with the danger of action: the higher the danger, the less crime-forming signs is used by the legislator, and vice versa. To criminalize behavior that is not acute in terms of public danger, the legislator almost always, with rare exceptions, applies two or more crime-forming elements at the same time. That is fully justified to achieve the goals of criminal policy and is consistent with the principles of criminalization (Lopashenko, 2004: 300).

It is essential to stress that in the scientific literature, there are other approaches to understanding the criteria of criminalization. For example, Bieliaiev N. A. says that the most important criteria for deciding whether to classify a particular type of human behavior as a crime are: 1) assessment of the behavior as socially dangerous; 2) recognition of the behavior as contrary to morality and condemned by the overwhelming majority of citizens; 3) statement of the fact that combating such behavior is feasible only through the use of criminal punishment, and the use of other coercive measures and con-

victions for achieving the specific purpose is insufficient; 4) establishment of the fact that punishment by its objective qualities can ensure the achievement of the relevant goals set by the state (Belyayev, 1986: 80).

As can be seen from the above list, the first item can be attributed to the ground or precondition of criminalization, and others are nothing but the conditions of criminalization, that is, these are the circumstances that allow carrying out criminalization and provide for the possibility of combating undesirable behavior using criminal law means.

Conclusions. Thus, some conclusions and generalizations can be drawn from the study:

– criminalization as a method (way) of implementing criminal policy is considered in the scientific literature as a process of identifying socially dangerous behavior, as well as as as a result of this process, that is, classifying acts as crimes;

– the ground for criminalization is a cause, a phenomenon makes a certain act criminally punishable. Accordingly, the ground for criminalization is individual socially dangerous behavior that requires a criminal law prohibition, or the capacity of behavior to cause significant harm to social values;

– the criteria of criminalization are the grounds for assessing, determining, and measuring, that is, the values of the parameters that a certain behavior must meet to become criminally punishable. Such criteria include: the nature of the action itself, which is expressed in violation of unconditional legal prohibitions; the method of committing a deed, which is often criminal; harmful consequences resulting from socially dangerous behavior; the attitude of the subject of undesirable socially dangerous behavior to the consequences resulting from such an act; motivation of undesirable behavior, indicating its public danger, etc.

Further research in this area may relate to other characteristics of criminalization, as a method of criminal policy, i.e., conditions, principles, etc., as well as highlight other challenging characteristics of this and other methods.

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