

УДК 343.575(477)

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CRIMINAL LAW POLICY OF THE STATE ON CRIMINALIZATION AND DECRIMINALIZATION OF SMUGGLING

<http://doi.org/10.23939/law2024.44.243>

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Abstract. The article discusses the issues of criminal law policy of the state regarding the criminalization and decriminalization of smuggling. It is noted that the protection of human and citizen rights and freedoms is the primary task of the state, which is implemented through its criminal and legal policy. The main methods for implementing the state's criminal and legal policy include defining a range of socially dangerous acts that the legislator classifies as criminal (criminalization) and excluding acts from the category that are recognized as criminal (decriminalization). Considering that since the adoption of the current Criminal Code of Ukraine, there have been many changes and additions to Articles 201 and 305 of the Criminal Code of Ukraine, which provide for liability for smuggling, there is a need to analyze the use of these methods in relation to the aforementioned articles. It is emphasized that the emergence of smuggling has deep roots, but it was caused by the objective consequence of the economic development of the state: material difficulties arise in the state, leading to the exchange of goods, and accordingly, these relations are connected with customs policy. However, smuggling as a violation arose in the XIV-XVI centuries, when trade and monetary relations began to develop intensively. In Ukraine, which at that time was part of Russia, legislation regarding the counteraction to smuggling began to take shape from the middle of the XVII century and continues to the present day. It is stated that in the Criminal Code of Ukraine of 2001, liability for smuggling is established by Articles 201 and 305 of the Criminal Code of Ukraine, but since the adoption of the code and to this day, changes and additions have been made to these articles seven times. According to the latest changes and additions, the name of Article 201 of the Criminal Code of Ukraine has been changed to “Smuggling of cultural values and weapons,” and the Criminal Code of Ukraine has been supplemented with new articles: Article 201-1 “Smuggling of timber and valuable tree species,” Article 201-3 “Smuggling of goods,” Article 201-4 “Smuggling of excisable goods.” Accordingly, the article provides an analysis of the mentioned changes and additions in criminal legislation.

It is concluded that by analyzing the changes that have been made since the adoption of the Criminal Code of Ukraine in 2001, it is concluded that today the legislator has significantly expanded the concept of smuggling, defining additional objects of smuggling, allocating them

into separate norms, but leaving the objective side of smuggling as the only one for all compositions, which, regardless of the object of smuggling, is expressed in the movement of smuggled goods beyond customs control or in concealing them from customs control, but establishing different degrees of criminal liability, taking into account the object of smuggling.

Keywords: criminal and legal policy; smuggling; objects of smuggling; criminalization; decriminalization; legislation on criminal liability.

Formulation of the problem. According to Article 3 of the Constitution of Ukraine, the highest social value in the state is a person, his life, health, honor, dignity, inviolability and security, therefore the protection of human rights and freedoms and a citizen is the primary task of the state, which is implemented through its criminal law policy. Considering that combating crime remains an urgent issue today, since it in any manifestation hinders the development of a modern democratic state, Therefore, the issue of improving criminal legislation constantly arises in the state, since it is the Criminal Code of Ukraine that determines which socially dangerous acts are criminal offenses and what punishments arise for their commission. Therefore, the main methods for the implementation of the criminal law policy of the state are to determine the range of socially dangerous acts that the legislator classifies as criminal (criminalization) and to exclude the act from the circle of those that are recognized as criminal (decriminalization). Since the adoption of the current Criminal Code of Ukraine, the legislator has made many changes and additions, namely, criminalized and decriminalized acts, and smuggling, for which liability is provided under two Articles 201 and 305 of the Criminal Code of Ukraine, has not passed. These innovations were dictated by the corresponding changes in the social and political life of the state. Therefore, the use of these methods requires an in-depth analysis and we will trace them to their application to Art. 201 and 305 of the Criminal Code of Ukraine. Therefore, the issue under study is relevant and timely.

Analysis of the study of the problem. An important contribution to the study of smuggling issues was made by the following scientists: Y. Suchkov, O. Omelchuk, S. Soroka, V. Kukhar, O. Prokopenko and others. However, recently many changes and additions have been made to the Criminal Code of Ukraine, which in turn has affected the process of criminal law counteraction to smuggling, which requires in-depth analysis.

The purpose of the article. The aim of the article is to study the issues of criminal law policy of criminalization and decriminalization of smuggling under the Criminal Code of Ukraine.

Presenting main material. The word “smuggling” is of Italian origin and means an action prohibited by the state in accordance with the procedure established by law. Smuggling has deep roots, which can be traced back to the works of ancient Greek and Roman historians, who, describing the concept of smuggling, understood it as the illegal transportation of goods between states. Therefore, the emergence of smuggling is caused by an objective consequence of the economic development of the state: material difficulties arise in the state, which leads to the exchange of goods, And, accordingly, these relations are associated with customs policy. Thus, smuggling originated and began its development a long time ago, but since then, when the state introduced duties on the import and export of goods. However, the concept of smuggling as an offense arose in the XIV–XVI centuries, when commodity-money relations began to develop intensively. Duty-free import and export of goods became unprofitable for states, so legislative norms were introduced that regulated the rules for the transportation of goods across state borders.

In Ukraine, which at that time was part of Russia, legislation on combating smuggling began to take shape in the middle of the XVII century. Thus, it can be noted that for a long time the concept of smuggling has been changing, responsibility for smuggling was also provided for by the criminal codes of the Ukrainian Soviet Socialist Republic, including the Criminal Code of Ukraine of 1960, which was

in force until the adoption of the Criminal Code (hereinafter referred to as the Criminal Code) of Ukraine in 2001 – April 5, 2001, which entered into force on 1 September 2001. Thus, liability for smuggling has always been provided for by criminal law in its various manifestations. The Criminal Code of Ukraine of 2001 provides for liability for smuggling in 2 articles – 201 and 305 of the Criminal Code of Ukraine. According to the first version of Article 201 of the Criminal Code of Ukraine, it was called “Smuggling”, smuggling meant the movement of goods(s) across the customs border of Ukraine outside customs control or with concealment from customs control, and the subject of smuggling was goods in large quantities (i.e. the value should exceed a thousand or more non-taxable minimum incomes of citizens) This explanation was contained in a note to the article. In addition, the items of smuggling included historical and cultural values, poisonous, potent, radioactive or explosive substances, weapons and ammunition, but the article stated that smoothbore hunting weapons and ammunition for them are not the subject of smuggling, as well as strategically important raw materials were singled out as smuggled items, for which the legislation establishes appropriate rules for export outside Ukraine. Qualified smuggling includes the actions committed by prior conspiracy by a group of persons or a person who was previously convicted of a crime under Article 201 of the Criminal Code of Ukraine.

Art. 305 of the Criminal Code of Ukraine was entitled “Smuggling of narcotic drugs, psychotropic substances, their analogues or precursors”. Smuggling in this article also meant the movement of these items across the customs border of Ukraine outside customs control or with concealment from customs control. The sign of qualified smuggling includes the actions themselves committed repeatedly or by prior conspiracy by a group of persons, as well as if the subject of these actions were especially dangerous narcotic drugs or psychotropic substances or narcotic drugs, psychotropic substances, their analogues or precursors in large amounts, the specially qualified composition of this Article includes smuggling of narcotic drugs, psychotropic substances, their analogues or precursors, committed by an organized group, as well as if the subject of smuggling was narcotic drugs, psychotropic substances, their analogues or precursors in especially large amounts. The footnote to the article stated that the concept of large and especially large amounts of narcotic drugs, psychotropic substances, their analogues or precursors, used in Section XIII of the Criminal Code of Ukraine, is determined by a specially authorized body of executive power in the field of health care.

Based on the construction of the analyzed criminal law norms of Art. 305 of the Criminal Code of Ukraine is a special provision regarding Art. 201 of the Criminal Code of Ukraine. The legislator did this in order to differentiate criminal liability. As a rule, the basis for separating an act into a special norm is a significant difference in the nature and degree of its social danger, which are provided for by the same norm, therefore there is a need for differentiated regulation of responsibility for their commission. Thus, the analysis of the above-mentioned corpus delicti makes it possible to conclude that the basis for distinguishing Art. 305 of the Criminal Code of Ukraine, it is possible to recognize certain actions with the subject of this crime, which are narcotic drugs, psychotropic substances, their analogues and precursors.

If we characterize the essence of the main objective manifestation of these corpus delicti, the criminal law indicates the movement of contraband items across the customs border in two ways: outside the customs border and with concealment from customs control.

To define smuggling, we are talking about the illegal movement of contraband items listed in Articles 201, 305 of the Criminal Code of Ukraine across the customs border of Ukraine. Therefore, smuggling should be understood as illegal actions to import into the customs territory of Ukraine or export from this territory of contraband items in any way specified in the disposition of the article and should include the actual crossing of the customs border of Ukraine.

The concept of transfer across the customs border of Ukraine outside customs control or with concealment from customs control was not provided by the law on criminal liability, but it was contained in paragraphs 4 and 5 of the Resolution of the Plenum of the Supreme Court of June 3, 2005 No. 8, where

in paragraph 4 it was stated that the illegal movement of contraband items outside customs control should be understood as the movement of these items across the customs border, bypassing the places where customs offices are located (therefore, outside the customs control zones), or outside the established time of customs clearance, or using illegal exemption from customs control as a result of abuse of office by customs officials. Paragraph 5 of the same Resolution stated that the illegal movement of contraband items across the customs border of Ukraine with concealment from customs control is the transportation of contraband items across the customs border with the help of caches (hiding places) that were specially created, as well as other means or methods that may complicate their detection, or some goods may appear to others, or submit forged documents. which are obtained illegally, or documents containing false information [1].

It should be noted that in the period from 2001 to 2024, to Art. 201 and 305 of the Criminal Code of Ukraine, a number of legislative changes and additions were made, in particular:

For the first time since the adoption of the Criminal Code of Ukraine, amendments were made to the note of Art. 305 of the Criminal Code of Ukraine by the Law of Ukraine dated 05.04.2007 No. 875-V. The note was supplemented with the words “as well as poisonous or potent substances or poisonous or potent drugs [2]. In the future, changes regarding the name of smuggled items under Art. 201 of the Criminal Code of Ukraine were introduced by the Law of Ukraine of 24.05.2007 No. 1071-V, the name of contraband items was changed, namely “radioactive or explosive substances” was replaced by the words “explosives, radioactive materials” [3]. Subsequently, according to the Law of Ukraine dated 15.06.2010 No. 2338-VI, the subject of smuggling under Art. 201 of the Criminal Code of Ukraine was expanded and Part 1 was supplemented with the words “special technical means of covert obtaining of information” [4]. The Law of Ukraine of 08.09.2011 No. 3718-VI expanded the subject of smuggling under Art. 305 of the Criminal Code of Ukraine. The legislator amended the title of the article, which became known as “Smuggling of narcotic drugs, psychotropic substances, their analogues or precursors or counterfeit medicines”, respectively, the subject was expanded, for example, counterfeit medicines in large amounts were added to Part 1, counterfeit medicines in large amounts were added to Part 2, and counterfeit medicines in especially large amounts were added to Part 3 [5]. The Law of Ukraine of 15.11.2011 No. 4025-VI narrowed the subject of smuggling under Part 1 of Art. 201 of the Criminal Code of Ukraine, excluding such smuggling items as goods, historical values, strategically important raw materials, for which the legislation establishes the relevant rules for export from Ukraine, and Part 2 of Art. 201 was supplemented with a new qualifying feature as smuggling by an official using his official position [6]. Since that time, responsibility for the smuggling of goods, historical values, strategically important raw materials was considered a violation of customs rules and liability arose under the Customs Code of Ukraine. The Law of Ukraine No. 2052-VIII of May 18, 2017 the subject of smuggling under Part 1 of Art. 201 of the Criminal Code of Ukraine, the legislator again expanded and included such contraband items as parts of rifled firearms. [7]. The Law of Ukraine of 06.09.2018 No. 2531-VIII criminalized Art. 201-3 of the Criminal Code of Ukraine entitled “Movement across the customs border of Ukraine outside customs control or with concealment from customs control of timber or lumber of valuable and rare tree species, unprocessed timber, as well as other timber prohibited for export outside the customs territory of Ukraine”. If you look into it, it's the same smuggling, But from Art. 201 of the Criminal Code of Ukraine differed in name and, accordingly, in the subject of smuggling. Part 1 of Article 201-1 of the Criminal Code of Ukraine provided for the movement across the customs border of the state outside customs control or with concealment from customs control of the following items: timber or lumber of valuable and rare species of trees, unprocessed timber, and other timber that are prohibited for export outside the customs territory of Ukraine, the qualified composition counted the same action that was committed by a person who had previously committed one of the crimes, provided for in Art. Century. 201, 201-1, 246 of the Criminal Code of Ukraine, or by prior conspiracy by a group of persons, or by an official using power or official position, or on a large scale (i.e. the value of which is one thousand or more times higher than the tax-free minimum income of citizens); Especially qualified composition includes the actions provided for in Part 1

or 2 of this Article, committed by an organized group or in a particularly large amount (i.e. – the cost of which is two thousand or more times higher than the tax-free minimum income of citizens). The concept of large and especially large size was given in a footnote to the article [8].

The concept of criminal smuggling has undergone significant changes after the adoption of the Law of Ukraine dated 09.12.2023 No. 3513-IX, as the legislator changed the title of Article 201 of the Criminal Code of Ukraine, which is now called “Smuggling of cultural property and weapons” and significantly expanded the subject of smuggling by separating it into separate articles, but the very concept of smuggling, which means movement across the customs border of Ukraine outside customs control or with concealment from customs control, remained the same for everyone criminalized norms. However, if we analyze the new title of the article and its disposition, we will see that the disposition of the article is much broader than the title, since the subject is not only cultural values and weapons, but also poisonous, potent, explosive substances, radioactive materials, ammunition (except for smoothbore hunting weapons or ammunition for them), parts of rifled firearms, as well as special technical means of covert obtaining of information. Thus, the title of Art. 201-1 began to read “Smuggling of timber and valuable tree species”, and the content of the article was left practically unchanged; The criminalized act is provided for in Art. 201-3 with the title “Smuggling of goods”, in relation to part 1, the subject of smuggling goods in a significant amount is if the total value is five thousand or more times higher than the tax-free minimum income of citizens. The qualified type includes the same action that was committed by prior conspiracy by a group of persons or by a person previously convicted of smuggling, or by an official using his official position, or in a large amount, if the total value of contraband items is ten thousand or more times higher than the tax-free minimum income of citizens. Especially qualified type includes the actions provided for in part one or part two of this Article, which are committed by an organized group. The concepts of significant and large size are defined in the footnote to the article; Criminalized act under Art. 201-4 with the title “Smuggling of excisable goods”, the subject of part 1 is excisable goods (however, electricity is not the subject of this norm and this applies to all its parts), which must be committed in a significant amount, i.e. the total value is seven hundred and fifty or more times higher than the tax-free minimum income of citizens, the qualified type of smuggling includes the same action that is committed by prior conspiracy by a group of persons or a person, who has previously been convicted of smuggling, or by an official using his official position, or on a large scale, and, therefore, the total value must be one thousand five hundred or more times higher than the tax-free minimum income of citizens. A particularly qualified type includes the actions provided for in part one or part two of this Article, committed by an organized group. The concept of significant and large size of contraband items of this criminal offense is provided for in the note to the article. Also, Article 201 of the Criminal Code of Ukraine is supplemented with a note that describes the signs of the objective side of the corpus delicti of this crime. The Note states,

1. In Art.201-1, 201-3,201-4, 305 of the Criminal Code of Ukraine, the movement of contraband items across the customs border of Ukraine outside customs control should be understood as the deliberate movement of contraband items outside the location of the customs authority or outside the working hours established for it, and without performing customs formalities or moving contraband items in case of illegal exemption from customs control.

2. In Art. 201-1,201-3,201-4, 305 of the Criminal Code of Ukraine, the movement of contraband items across the customs border of Ukraine with concealment from customs control should be understood as the deliberate movement of contraband items using caches (hiding places) that are specially adapted, as well as other means or methods that complicate their detection, or by giving some goods the appearance of others, or in the case of submitting forged documents or documents to the customs authorities as a basis for the movement of goods, which were obtained illegally, or those that contain knowingly false information, which are subject to mandatory submission of a declaration in accordance with the legislation on customs affairs, as well as if these documents and information are necessary to determine the amount of customs duties to be paid and/or to confirm compliance with the prohibitions and restrictions established by law on the movement of goods across the customs border of Ukraine.

3. For the purposes of t.art. 201, 201-1,201-3,201-4 of the Criminal Code of Ukraine, a person previously convicted of smuggling should be understood as a person who has been convicted of committing a crime under Art. Art. 201, 201-1,201-3,201-4, 305 of the Criminal Code of Ukraine [9]. In our opinion, such an explanation of smuggling methods in the Code is superfluous. Firstly, the concept of these methods has already been disclosed in the Resolution of the Plenum of the Supreme Court of Ukraine No. 8 of June 3, 2005, and secondly, it will contribute to the overload of criminal legislation, as well as questions will arise regarding the placement of explanations of concepts in relation to other articles of the Criminal Code. However, it is possible to agree with the position of the legislator regarding the content of paragraph 3 of the note, which clarifies the rules of criminal law classification of smuggling.

As can be seen from the analyzed legislation, the legislator first excluded such an item of smuggling as “goods”, and later recriminalized it again. Since the exclusion of “commodity” smuggling, there has been a constant discussion in the literature about the inexpediency of such a step, and such scholars as V. Kukhar drew attention to this, emphasizing that the consequences of amendments to the criminal legislation in this part contributed to an increase in the number and activation of illegal groups and individuals specializing in this type of criminal activity, in addition, reducing the level of counteraction to these torts, since the implementation of operational and investigative activities is usually prohibited [10, p. 411]. O. Prokopenko also noted that such a position contributed to the “shadowing” of the state's economy, lost revenues to the state budget and, accordingly, it violated the normal order of commodity relations in the domestic market of the state [11, p. 382].

In our opinion, the recriminalization of “commodity” smuggling by the legislator meets the needs of practice, since such acts were quite common, and the persons who committed them could not be prosecuted. If we analyze the construction of articles, then only Art. 201 of the Criminal Code of Ukraine consists of two parts, the rest of Articles 201-1. 201-3, 201-4, 305 of the Criminal Code of Ukraine in three parts, it is advisable to note that depending on the subject of smuggling, the legislator determines different types of punishment: so the types of punishment for Art. 201, 201-1 of the Criminal Code of Ukraine provide for deprivation of liberty, deprivation of the right to hold certain positions or engage in certain activities, confiscation of property; For Art. 201-3, 201-4 of the Criminal Code of Ukraine – fine, imprisonment, deprivation of the right to hold certain positions or engage in certain activities, confiscation of property, for Art. 305 of the Criminal Code of Ukraine, imprisonment and confiscation of property.

Conclusions. Thus, having analyzed the changes that have been made since the adoption of the Criminal Code of Ukraine in 2001, we have come to the conclusion that today the legislator has significantly expanded the concept of smuggling, defining additional items of smuggling, separating them into separate norms, but left the concept of the objective side of smuggling, which, regardless of the subject of smuggling, is expressed in the movement of contraband items outside customs control or with concealment from customs control, However, it established a different degree of criminal liability, taking into account the subject of smuggling.

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Дата надходження статті: 16.08.2024

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КРИМІНАЛЬНО-ПРАВОВА ПОЛІТИКА ДЕРЖАВИ ЩОДО КРИМІНАЛІЗАЦІЇ ТА ДЕКРИМІНАЛІЗАЦІЇ КОНТРАБАНДИ

Анотація. У статті розглянуто питання кримінально-правової політики держави щодо криміналізації та декриміналізації контрабанди. Відзначено, що захист прав та свобод людини і громадянин є першочерговим завданням держави, яке реалізується через її кримінально-правову політику. Основними методами щодо реалізації кримінально-правової політики держави є визначення кола суспільно-небезпечних діянь, які законодавець відносить до категорії кримінально-протиправних (криміналізація) та виключення діяння з кола таких, які визнаються

кримінально-протиправними (декриміналізація). Враховуючи, що з моменту прийняття чинного Кримінального кодексу України в статтях 201 і 305 КК України, які передбачають відповідальність за контрабанду, вносилось багато змін і доповнень, виникла необхідність проаналізувати використання цих методів щодо застосування до вищезазначених статей. Акцентовано, що виникнення контрабанди має глибокі корені, проте воно було викликано об'єктивним наслідком економічного розвитку держави: в державі виникають матеріальні труднощі, що веде до обміну товарами, і відповідно ці відносини пов'язуються з митною політикою, проте контрабанда як правопорушення виникло в XIV-XVI століттях, коли почали інтенсивно розвиватись товарно-грошові відносини. В Україні, яка в той час перебувала у складі Росії, законодавство щодо протидії контрабанді почало формуватися з середини XVII ст. і продовжується по теперішній час. Констатовано, що в Кримінальному кодексі України 2001 року відповідальність за контрабанду встановлена статтями 201 і 305 КК України, проте з моменту прийняття кодексу і до сьогоднішнього дня законодавцем сім раз вносились зміни і доповнення до цих статей, відповідно до останніх змін і доповнень: змінена назва ст. 201 КК України, яка звучить тепер “Контрабанда культурних цінностей та зброї”, а також КК України доповнено новими статтями: ст. 201-1 “Контрабанда лісоматеріалів та цінних порід дерев”, ст.201-3 “Контрабанда товарів”, ст. 201-4. “Контрабанда підакцизних товарів”. Відповідно в статті проведено аналіз щодо зазначених змін і доповнень в кримінальному законодавстві.

Зроблено висновок, що проаналізувавши зміни, які вносились з моменту прийняття КК України у 2001 році ми дійшли висновку, що на сьогодні законодавець значно розширив поняття контрабанди, визначивши додаткові предмети контрабанди, виділивши їх в окремі норми, але залишив єдиним для всіх складів поняття об'єктивної сторони контрабанди яка незалежно від предмету контрабанди виражається в переміщенні предметів контрабанди поза митним контролем або з приховуванням від митного контролю, проте встановив різну міру кримінальної відповідальності, з урахуванням предмету контрабанди.

Ключові слова: кримінально-правова політика; контрабанда; предмети контрабанди; криміналізація; декриміналізація; законодавство про кримінальну відповідальність.