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III.2. THE PRINCIPLE OF SUBSIDIARITY OF CRIMINAL LAW AS A PREREQUISITE FOR SUSTAINABLE CRIMINALIZATION

The significance and justification of the principles limiting criminalization

An important feature of the sustainability of the legal system of a democratic state is the compatibility of the legal regulation established by various branches of law. Thus, the pursuit of a sustainable legal framework naturally presupposes the need for legislation to avoid competition and conflict between different legal regulations. With regard to criminal law in the framework of a sustainable legal system, it is essential that criminalization processes do not lead to an unjustified invasion of the normal positive legal relationships that citizens follow in their daily lives.

Perhaps every lawyer and any other well-educated person understands that criminalization is a sharp way to solve problems in society, and is associated with intensive restrictions on human rights and freedoms. Intensive criminal law-making and constant retaliatory punishments, based solely on the idea of deterrence, have strong side-effects: overcrowded prisons; and an "army" of convicted, socially excluded and semi-loyal citizens prone to recidivism. Therefore, the need to follow certain restrictive principles in criminal law no longer requires proof. The legal and criminological axiom has therefore become the view that criminal liability, by its very nature, is the last of all possible legal remedies that a democratic society can take against various public wrongs. In the legal debate, it is agreed that a legitimate act of criminalization must be based on evidence of the danger to society of the conduct being criminalized, the importance of the legal good to be protected, and the necessity, effectiveness and utility of criminal liability. Unfortunately, in reality, criminal legislation often does not comply with these provisions. This situation is identified in a number of legal studies that provide various examples of excessive and unjustified criminalization around the world. Thus, the search for principles and criteria for criminalization is still one of the most pressing issues in modern criminal law.

The author of this chapter fully agrees with expression that "the application of criminal law always has to rely on a 'limiting principle,' lest it grows into a nightmare" (Kaiafa-Gbandi 2011,

p. 17). The following statement is also undisputed: "After all, the more conduct that constitutes a criminal offence (allowing the state authorities to interfere), the more individual freedom is cut back" (Ouwerkerk 2012, p. 230). There are many examples in legal practice where a poorly grounded criminal law directly affects human destinies. Any under-discussed or ambiguous criminalization can lead to unnecessary criminal proceedings against individuals, and even the fact of judicial acquittal only partially offsets the damage suffered by the artificially accused person.

The essence of the question of the restrictive principles of criminalization is revealed by the following statement: "The crucial question for any theory of criminalization is whether latter range of offences really belong within the criminal law: or should they be formally separated off, into a distinct realm of non-criminal 'regulatory' or 'administrative' violations …" (Duff *et al.* 2014, p. 4). During the last two decades, numerous legal texts have been written about the limiting principles of criminalization, and almost all of them state that in reality the legislature often does not follow them (Luna 2005; Ashworth 2008; Husak 2005; Ouwerkerk 2012; Krey and Windgätter 2012; Smith 2013; Vaccari 2014). Therefore, the phenomenon of excessive criminalization and the question of what to do with it is still one of the most pressing problems in modern criminal law. In the vastness of the legal literature, the opposite idea can also be found, namely that there are no convincing and effective principles limiting criminalization and that only deterrence of future crime actually justifies current penal practices (Tadros 2011). This sounds like a kind of pessimistic admission that the theory of criminalization is generally unnecessary, and the legislature has unlimited powers in the field of criminal law, because, as practice shows, all excessive criminalization is based precisely on preventive purposes. In this context, I consider the following expression to be very accurate:

> Academic writings about criminalization theory should have a purpose beyond our internal discussions: ideally, they should help to make political decision somewhat more rational. Their decisions are mostly based on gut reactions, typically emotional responses to incidents that were reported in the media. … The essential point is to provide structures for thinking about criminalization. (Hörnle 2019, p. 211)

In my opinion, the principles limiting criminalization have not lost their relevance, despite the frequent examples of their being ignored. Even in cases where criminalizing laws are criticized for not complying with the restrictive principles, these principles have nevertheless been the subject of discussion in the legislative process. Thus, the theory of criminalization is slowly performing its function and there is no reason to abandon its further development.

There is no doubt that the essential constitutional principles (proportionality of legal remedies, rule of law, protection of human rights, legal certainty, equality, etc.), which naturally limit the use of repressive measures in a democratic state, are also an integral part of the theory of criminalization. In this context, the following provisions formulated by the Constitutional Court of the Republic of Lithuania should be mentioned:

> The measures established by the state for violations of law must be proportionate (adequate) to the violation of law, they must be in line with the legitimate and generally important

objectives sought, they may not restrain a person more than necessary in order to reach these objectives; there must be a fair balance (proportionality) between, on the one hand, the pursued objective to punish the violators of law and to ensure the prevention of the violations of law and, on the other hand, the measures chosen for reaching this objective. (Rulings of 6 December 2000, 31 January 2011, 15 March 2017)

A law may recognize as criminal acts only such acts that are truly dangerous and by which harm is really inflicted on the interests of persons, society, or the state, or if threat occurs where, due to such acts, the said damage will be inflicted. (Rulings of 8 May 2000, 10 June 2003, 16 January 2006, 15 March 2017)

Crimes are violations of law by which human rights and freedoms as well as other values protected and defended by the Constitution are grossly violated. (Ruling of 29 December 2004)

Every time when it is necessary to decide whether a particular act is a crime or another violation of law, it is very important to assess what results may be achieved when applying other measures (administrative, disciplinary, civil sanctions, or measures of public influence, etc.), which are not linked with the application of criminal punishments. (Rulings of 13 November 1997, 10 November 2005, 15 March 2017)

The classical principles of criminal law (*nullum crimen nulla poena sine lege, lex retro non agit, non bis in idem*) should also be considered part of the theory of criminalization, because without observing these principles it is simply impossible to create a legitimate definition of a criminal offense. At the same time, certain special principles and ideas of sustainable criminalization are highlighted in the theory of criminal law. Among the most important are the German concepts of subsidiary protection of legal goods (*Rechtsgüterschutz*) and criminal liability as a last resort (*ultima ratio*), which oblige the legislator to base criminalization on evidence of the importance of a legal value, which needs additional protection, and the inadequacy of other (less severe) measures to respond to assessed wrong. The principle of utility is also distinguished, according to which the importance of arguments regarding the need, control costs and efficiency should be evaluated in the criminalization process. The literature on these issues is enormous (for reviews of the above theories and their originators, see: Dubber 2005; Jareborg 2004; Dambrauskienė 2017), and the aforementioned ideas seem to have already become part of the European legal culture.

As a limiting principle of criminalization, the common law tradition emphasizes the *harm principle*, under which "the state may criminalize only harmful wrongs – conduct that is both wrong and harmful (or risks harm) to others," and when such criminalization seeks "to prevent private and public harms" (Tomlin 2014, p. 280, 283). This idea, sourced from British legal philosophers John S. Mill (*On Liberty*, 1859) and Herbert L. Hart (*Law, Liberty and Morality*, 1963), aims to limit criminalization of behavior that is unacceptable to morality alone or that harms only the person who does so. It is argued that such criminalization violates the freedom and autonomy of the individual. In terms of its content and legal purpose, the harm principle is considered as analogous to the

German *Rechtsgüterschutz* (Peršak 2007, pp. 105–106; Chiesa Aponte 2007, p. 131; Dubber 2005, p. 683; Micheletto 2021, p. 261). The legal literature also mentions: the principle of minimum criminalization, according to which "the decision should not be taken without an assessment of the probable impact of criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control" (Ashworth 1999, pp. 67–68); the idea that criminalization should be directed only at wrongdoings that are serious enough to justify the public censure inherent in conviction and punishment (Ashworth 2008, pp. 408–410); and the principle that only public wrongs must be criminalized when "society is not prepared leave the matter to the victim to seek compensation" (Clarkson 2001, p. 2). It has even been proposed that the concept of public wrongs be given the status of a master principle of criminalization. According to this point of view, the only reason to criminalize a type of conduct is if it constitutes a public wrong that violates the polity's civil order (Duff 2018, pp. 275–277). However, I have to agree with those who do not support such an idea, stressing that this criterion is too abstract to have a real impact on the legislature and that an effective theory of criminalization must not be limited to one principle (Hörnle 2019, p. 210).

The theorists of Lithuanian criminal law usually mention the following special principles of criminalization which should be taken into account by the legislator.

First, the dangerousness/harmfulness of the offence and the principle of criminal liability as a last resort (Bluvšteinas 1994; Švedas 2012; Fedosiuk 2012; Pranka 2012; Dambrauskienė 2017).

Second, the social sphere of undesirable activity and its suitability for criminalization. After all, it goes without saying that criminalization is not the right way to deal with marital infidelity, prostitution, drug addiction, alcoholism, smoking and other similar unwanted behavior. Lithuanian criminologists also oppose the criminalization of extremely rare behavior, which is only possible theoretically, as well as widespread negative habits in society which are not considered unacceptable in people's minds (Bluvšteinas 1994; Justickis 2001; Švedas 2012).

Third, the significance of the protected legal good, the subject matter of the deed, and the importance of preventing such acts (Bluvšteinas 1994; Pavilonis 1996).

Fourth, there are also suggestions to take into account the procedural and utilitarian aspects of criminalization, namely whether procedural measures are effective in proving the commission of an offense or whether the investigation and disclosure of such offenses will not require a disproportionate effort and resources in relation to the seriousness of the offense (Poškevičius *et al.* 2000; Justickis 2001).

Fifth, the appropriate legal technique for defining criminal offenses. Sustainable criminalization is not possible without ensuring that the definition of a criminal offense is clear and consistent and does not run counter to fundamental principles of criminal law. Whatever the legitimate aims of the legislature, they will not be achieved if the definition of a criminal offense is formulated with ambiguous, vague or unlimited legal features (Fedosiuk 2014). Therefore, the definitions of offenses must consist of a uniform and precise legal wording, if necessary giving their interpretation in the norms of law, giving priority to formal legal features over those that need to be interpreted, and using only such features that can be proved (Švedas 2012).

In the theory of Lithuanian criminal law, the idea of the subsidiary nature of this branch of law has only recently become the object of research, exclusively as an idea accompanying the con-

cepts of protection of legal goods and *ultima ratio* (Fedosiuk 2012; Dambrauskienė 2015; 2017). However, in my opinion, this principle is more than just a shadow of other well-known concepts, so it is worth examining it in more detail. This chapter is intended to develop the above-mentioned principle, which, together with other ideas, is aimed at giving criminalization processes more rationality and coherence.

The concept of the principle of subsidiarity of criminal law as a limitation on criminalization

The idea that, among other things, criminalization processes must comply with the principle of subsidiarity, that is, only to assist other branches of law in achieving regulatory objectives, is often mentioned in the works of scholars of the democratic world, but there are different opinions about its place in the theory of criminalization and its effectiveness in influencing legislative powers. The very term *subsidiarity* is derived from the Latin word *subsidium*, which means *aid*. The concept of subsidiarity in the social sciences is mentioned when there is a hierarchy of social instruments used – in other words, when a particular mean is used only to the extent that other means are not sufficient to achieve the same purpose. Thus, subsidiarity can be seen as an ancillary nature of a particular social measure. This is how subsidiarity is understood in law. In civil law, for example, subsidiary liability means that the debtor is liable to the creditor in addition to the principal debtor – then and to the extent that the principal debtor fails to fulfill their obligations.

The principle of subsidiarity of criminal law means that the legal measures of this branch of law (criminalization, punishment, conviction) are supplementary to the regulation of other branches of law. Considering the over-regulated modern social order, talking about the subsidiarity of criminal law with regard to informal means of social control has, I think, no practical significance.

The originators of the idea of subsidiarity as a limitation of criminalization (Hans-Heinrich Jescheck, Ewald Brandt, Günther Jakobs, Claus Roxin, Jürgen Baumann, Arthur Kaufmann, Thomas Vormbaum, Günther Stratenwerth, Cornelius Prittwitz and others) based it on the general principles of the social state, the rule of law, the proportionality of legal measures, as well as the purpose of criminal law in protecting legal goods fragmentarily and as a last resort (*ultima ratio*). Arguing with the provided arguments is hardly possible and absolutely unnecessary.

Thus, the content of the subsidiarity principle is quite broad and can be revealed in the light of various legal theories and ideas. Despite this, a significant number of modern scholars examine the subsidiarity of criminal law only as a synonym of the principle of *ultima ratio* (Herlin-Karnell 2010; Karsai 2013; Kotlán 2016). For example, Karsai (2013) defines the principle of subsidiarity as follows:

> In every modern democratic society, the subsidiarity of criminal law is an acknowledged principle, which entails that criminal law and responsibility based on criminal law shall apply only if the infringement of the legal interests in question cannot be dealt with by way of measures of other – less severe – legal regulations (p. 55).

There are also examples where the content of the principle of subsidiarity, corresponding to the *ultima ratio*, is established even in criminal legislation. For example, the "principle of subsidiarity of criminal repression" is formulated in the Criminal Code of the Czech Republic (Act of 8 January 2009), which reads as follows: "Criminal liability of an offender and criminal consequences associated with it may only be applied in socially harmful cases where application of liability according to other legal regulations does not suffice" (Article 12(2)). The fact that such a rule is enshrined in the text of law is a great achievement of legal theory. On the other hand, such an understanding of the principle of subsidiarity as nothing more than *ultima ratio* raises doubts about its independent normative status and function (Jareborg 2004, p. 534), and makes its further analysis redundant as it would have no real additional methodological significance for the legislator.

It is sad to admit that legislative practice shows that the political majority in parliament is able to overcome any known legal principles limiting criminalization, which are naturally characterized by a high level of abstraction and are not resistant to populist arguments. Indeed, with all due respect to the grand theory of *ultima ratio*, those who do not expect legislation to be directly based on it in practice (Husak 2005, p. 545) have good reason to think so. Activists of criminalizing laws are likely to find it easy to argue that certain unwanted behavior is extremely harmful and that only the strictest legal measures can help. It is noteworthy in this context that, in Lithuania, no legal discussion on criminalization is possible without reference to the principle of *ultima ratio*, but in real decisions the influence of this idea on the legislator is rather limited. Lithuanian criminologist Justickis sadly remarks on this: "The principle of *ultima ratio* often has the status of a kind of "theoretical principle," a "noble desire." It is seen as something to be talked about but not done" (Justickis 2011, p. 122). Even in a country with such a liberal criminal policy as the Netherlands, lawyers complain that the legislature disregards the principle of last resort, which in Dutch literature is usually referred to the subsidiarity principle (Ouwerkerk 2012). Of course, the lack of practical applicability does not eliminate the great ideological importance of the principle of last resort in the theory of criminalization. To me, despite the similarities, the principle of subsidiarity with its reference to the complementarity of criminal law instruments is nevertheless a separate and more practical way of explaining the limits of criminalization.

Personally, I am more convinced by the position that derives the subsidiarity of criminal law from the theory of the protection of legal goods (*Rechtsgüterschutz*), namely that criminal law cannot defend any "own" legal values that are not recognized by the general legal order (Vormbaum 1995, p. 757). In my opinion, it is precisely this aspect that allows us to develop the principle of subsidiarity of criminal law, and to give it a certain autonomy and practical application in legislation. Of course, there are skeptics who generally disagree that the principle of subsidiarity in relation to the protection of legal goods can be convincingly justified. Here, Jareborg's question is relevant: "And why could not a certain interest or value be protected only by criminal law, in which case its recognition as a legitimate *Rechtsgut* would not be prior to the criminalization?" (Jareborg 2004, p. 532). However, it is not clear what example could prove this thesis. As I see it, any search in criminal legislation for at least one norm protecting some exceptional value assigned exclusively to criminal law is unlikely to yield results. An elementary analysis of the values protected by the criminal legislation shows that they are all nothing more than details of the values recognized by the Constitution and other branches of law. In the debate, it is sometimes heard that the protection of

a person's sexual freedom and inviolability and the prohibition of rape (or similar actions) are an exclusive sphere of criminal law, but this statement is also easily refuted. After all, these values are an integral part of constitutionally protected human freedom, inviolability and dignity.

From my point of view, the idea of subsidiary protection of legal goods comes naturally and is logically grounded. After all, a sustainable legal order in a democratic society is not based on the fear of punishment, but on rules that promote public awareness, creativity and development, based on the freedom and initiative of individuals. In the words of Schünemann (2004):

> In the end, the principle of subsidiarity is grounded in the social contract, according to which each citizen only wishes to relinquish as much freedom as is essential for the necessary protection of freedom between the citizens… Primarily, a citizen must retain the right to deal with his legal goods. Only where his efforts are inadequate does he require intervention by the state (pp. 567–568).

Thus, in the legal order of a democratic society, which cares about human rights and freedoms and where the state naturally has an interest in limiting its powers to use repression, the function of criminal law in protecting legal goods must not exceed the space of a "watchdog." The absence of its own area of protected legal goods, in turn, justifies the selectivity, fragmentation and exclusivity of criminalization as a method, when criminal law only joins non-criminal legal regulation and becomes an additional element in the field of social control (Vormbaum 2012, pp. 667-668; Dambrauskienė 2017, p. 81).

Of course, the theory of subsidiary protection of legal goods is at an excessively high level of abstraction, as it requires a debate about which legal goods need additional protection. The practical application of this theory presupposes such viscous stages as: the identification of legal good affected by the conduct; the assessment of whether this good is important enough to be protected by criminal law; the question of whether the conduct harms or endangers the identified legal good in a significant way, etc. (Micheletto 2021, p. 246). In such a discussion, anyone can easily get lost. Here, Jareborg (2004) sadly notes:

> In German legal scholarship, ideas and doctrines about *Rechtsgüter* have played a central role in the discussion of the legitimacy and limits of criminal law. Personally, I see the doctrines concerning *Rechtsgüter* as a blind alley; something must be wrong when almost 200 years of intensive intellectual activity seem to have resulted in more confusion than clarity. The literature is enormous (pp. 524–525).

Hörnle (2019) puts it even more strongly: "It is not only a thin concept, but also so thin as to be an empty concept. The notion of a 'good' does not give any guidance at all – every state of affairs could be labeled this way" (p. 211). Such pessimism in relation to this famous theory is possibly caused by the fact that in the actual process of criminalization, the features of an act claiming to fall within the scope of criminal protection are much more important than the uniqueness of the legal good sought to be protected. Thus, criminalization is mainly determined by such features of the deed as the prohibited item (drugs, forged documents, fake money, explosive materials, child

pornography), dangerous mode of operation (violence, threats, deception, various types of abuse), serious consequences or their risks (death, injury, substantial damage), intent and malicious purpose, carelessness, etc. The mosaic of these features indicates the appropriateness of the deed to be criminalized. This is the legal language by which criminal law joins the protection of legal goods. Therefore, in the context of the principle of subsidiarity, it is more worthwhile to discuss the compatibility of criminalization with other legal regulation than to focus on the importance of specific legal goods. I believe that this direction of analysis of the principle of subsidiarity of criminal law can help reduce the level of theoretical abstraction and make ideas limiting criminalization more applicable in legislation.

The principle of subsidiarity of criminal law as a methodology for legislation

I would think that the most productive and methodologically significant aspect of the principle of subsidiarity of criminal law lies in the provision that criminalizing norms must be harmonized with the regulation of other branches of law and not create any competitive legal protection. The idea is simple, practical and easy for lawmakers to understand. In more detail, this interpretation of the principle of subsidiarity provides certain specific recommendations to the legislator when criminalizing acts.

First, the norms of criminal law should not prohibit conduct which is unequivocally permitted under the regulation of other branches of law.

Second, when criminalizing certain conduct that is illegal under the primary regulation, the legal means available in this branch of law and their effectiveness should be properly assessed. In other words, unlawful acts that fall exclusively and without gaps within the scope of regulation of other branches of law should not be criminalized.

Third, in a situation where the legal consequences of a certain illegal behavior are regulated in another branch of law, but the available legal means are obviously not proportionate to the harmfulness of such behavior and not sufficient to ensure its prevention, the criminal law norm should lay down clear additional criteria for the application of criminal liability. In other words, in such cases the general criterion of unlawfulness alone is not sufficient for criminalization.

What is permitted outside criminal law cannot be criminalized

The first aspect of the compatibility of criminalization is probably the easiest to understand. The sustainability of the legal system and order is simply not possible if criminal law prohibits conduct that is obviously permitted outside criminal law. This would bring nothing but legal chaos to society. There have been such situations in Lithuania in the past. For example, when free market laws came into force in Lithuania in 1990, and thousands of people began to engage in various businesses, even before 1995 the criminal legislation provided for imprisonment for a crime known only in

Soviet law – speculation, that is for the purchase and resale of goods for profit. The conclusion is that criminal legislation must always respond in a timely manner to changes in primary legislation and adjust its own regulation accordingly.

With regard to the conflict of criminal law with other legal regulations, it should be noted that, according to the Criminal Code of Republic of Lithuania, it is not forbidden to own or watch pornographic content (in relation to non-child pornography), but the elementary sharing (regarded as distribution) of such items already entails criminal liability (Article 309). Such a provision had some meaning when there was no internet and no legal circulation of pornography. However, knowing that in modern reality everyone can freely find non-child pornography legally displayed on the internet, the above-mentioned criminal regulation contradicts the general legal order in which residents of Lithuania really live. In connection with this, it is possible to ask what the purpose is of criminally prosecuting a Lithuanian citizen for sending a pornographic photo to a friend if an unlimited amount of pornography is freely available on the internet.

There may also be situations where certain undesirable behavior is not regulated outside criminal law and does not have a clear legal status. For example, in some countries the phenomenon of prostitution is neither prohibited nor legalized (Estonia). Society is constantly faced with unwanted events that are not legally regulated. For example, quite recently in Lithuania there was a sharp discussion about the responsibility of persons who help families to give birth at home. In the absence of special primary regulation (legal or not), such persons were nevertheless accused of illegal economic activity, but the criminal case ended in acquittal (Judgment of the Supreme Court of Lithuania No. 2K-7-102-222/2018). After the legal regulation of the aforementioned activities was adopted, the ideas of criminal prosecution of such persons naturally disappeared.

The conclusion is that in order to criminalize unregulated deviation, it is necessary to identify its danger to legal interests that are protected in the legal order outside criminal law. In any case, situations where criminal law is the sole basis for considering such conduct to be illegal should be avoided.

Illegal acts that fall exclusively and without gaps within the scope of regulation of other branches of law should not be criminalized

The principle of subsidiarity is clearly violated when criminal liability simply begins to compete with measures of other branches of law that have been specifically designed against the wrong being assessed and are even more effective. This is particularly true when criminal law invades branches of law that provide for coercive recovery measures, primarily in the area of tax administration and enforcement of civil judgments.

For example, Lithuanian criminal law is clearly not harmonized with the field of tax administration. In this context, it should be recalled that tax law generally distinguishes between the following forms of taxpayer behavior in reducing the tax burden: 1) tax planning (legal activity); 2) tax avoidance (unlawful, but not criminal activity); and 3) tax evasion (criminal activity). The essential feature of tax evasion is that the taxpayer deliberately conceals from the tax authority the real circumstances on which fair taxation depends, so that the determination of the actual circumstances

requires powers available to the prosecution authorities, which the tax administrator simply does not have. Meanwhile, in the case of tax avoidance, the taxpayer does not falsify data relevant to taxation, but simply provides the tax administrator with a version of the content of taxable transactions that is not in line with the principles of taxation (Fedosiuk 2017, p. 64). Tax avoidance does not fall within the scope of criminal liability in a democratic world and is overcome by the legal means and procedures available to the tax authorities. The principle of subsidiarity in this context requires that the criminal justice must be able to distinguish between tax planning, tax avoidance and tax evasion, as well as to ensure that criminal liability would be applied only for the unlawful tax burden reduction which corresponds to the concept of tax evasion. However, notwithstanding that there are different words in the Lithuanian language to name *tax avoidance* and *tax evasion*, the norms of the Lithuanian Criminal Code (in original version) criminalizing the illegal reduction of the tax burden (Articles 220–221) use the term *avoid*, thus sending the wrong signal to law enforcement. In my estimation, this is a clear breach of the principle of subsidiarity, which creates legal uncertainty in a very important area of the legal order. I believe that the use of the concept of tax evasion in criminal law texts would provide more certainty and protect criminal justice from some unnecessary criminal proceedings.

The principle of subsidiarity is also violated by the norm of the Lithuanian Criminal Code which criminalizes failure to pay declared taxes on time (Article 219). The only condition mentioned in this criminalization, which seems to justify the application of criminal liability, is that the taxes are not paid after the tax administrator reminds the debtor of this and sets a time limit for the performance of the obligation. In reality, however, this condition does not create any subsidiary ground for criminal liability, as the tax authorities have been given all possible legal means of enforcing recovery of the taxpayer's tax arrears (Articles 105–106 of the Law on Tax Administration of the Republic of Lithuania). Naturally, the enforced recovery of tax arrears (together with a fine) makes the application of criminal liability illogical and even unlawful due to the violation of the principle of *non bis in idem*. The principle of subsidiarity would not be infringed if criminalization were based on a completely different approach, namely that the debtor acted maliciously, such as by deliberately emptying accounts or bringing assets offshore, and where justice would be achieved only through criminal proceedings.

The effectiveness of the provisions of civil procedure for enforced recovery should also not be ignored in the criminalization process. For example, Lithuanian courts are forced to decide on the difference between the grounds for applying criminal liability and the grounds for applying coercive recovery measures when the debtor intentionally fails to comply with a court decision in a civil case. This problem is created by the content of Article 245 of the Criminal Code, which without any additional criteria establishes criminal liability for failure to comply with a court's decision.

The courts remedy this shortcoming by interpreting the content of the criminal law restrictively and on the basis of the principle of *ultima ratio*:

> Taking into account the purpose of criminal liability as a last resort, the application of Article 245 of the Criminal Code may be justified in such a case if the debtor, having the opportunity to fulfill his property obligation, maliciously avoids it and has created such a legal

situation that enforcement of the judgment has become largely impossible. (Judgments of the Supreme Court of Lithuania Nos. 2K-69/2014, 2K-228-788/2019)

The test of subsidiarity is also not passed by Article 164 of the Criminal Code, which, without any additional criteria, criminalizes evasion of the duty as established by a decision of a court to maintain a child. The norm simply lacks references to the particularly malicious nature of such conduct, which would draw at least some distinction between the grounds for criminal liability and the enforcement of a judgment in a civil case. As a result, the courts are forced to interpret this norm narrowly and to include in the legal construction a feature of special malice, which is not present in the text of the law. In that regard, the case-law emphasizes that the basis for criminal liability for that act arises only after an unsuccessful attempt to enforce the obligation to maintain the child by civil proceedings, that is to say, where the debtor knowingly creates such a situation (Judgment of the Supreme Court of Lithuania No. 2K-9/2014).

Of course, it is good that courts have the legal means to apply laws wisely and, in unclear cases, to follow generally accepted legal principles, not just the ambiguous texts of laws (Frøberg, 2013; Ažubalytė and Fedosiuk 2021), but this does not negate the poor quality of laws and their non-compliance with the principle of subsidiarity of criminal law.

The need for additional criteria indicating the seriousness of the act intended to criminalize

This aspect of the principle of subsidiarity means that the invasion of criminalization into another legal regulation that sets "its own" legal means against the unlawful deed should not be based solely on this unlawfulness. In the absence of additional criteria indicating the seriousness of the act, the definition of an offense will pose problems for its application in practice. Specific terminology naturally inherent in describing criminal behavior (dangerous means of operation, serious harm, malicious purposes, etc.) is highly desirable in definitions. There are many examples in Lithuanian criminal law where definitions of crimes are formulated without complying with this provision.

An obvious example of such legislation, the removal of which from Lithuanian law is still delayed, is Article 206(1) of the Criminal Code, which *inter alia* criminalizes the use of a loan (in the amount of €7,500) not in accordance with its purpose. It should be noted that in civil law such non-compliance with the contract is unlawful, but the Civil Code of the Republic of Lithuania clearly sets out the legal consequences of such a breach – the lender shall be entitled to request the borrower to repay the amount of loan prior to the term and pay the interest (Article 6.877(2)). It is not clear what the legal logic is for criminal liability for this breach of civil contract, as the criterion of €7,500 does not really indicate such a necessity. Thus, the legislature actually leaves the issue of the delimitation of criminal and civil liability to the court, which must somehow overcome that competition. There is also Article 195 of the Criminal Code without any additional criteria criminalizing the infringement of the exclusive rights of the owner of a patent or design, as well as the right of a legal person to a name. Thus, the criminal and civil protection of these values is

in full competition. It is clear that if the principle of subsidiarity were remembered in the preparation of the above-mentioned criminalization, the Criminal Code would simply not have such norms.

In this context, Article 167 of the Criminal Code should also be mentioned, according to which it is an offense to unlawfully collect information about a person's private life. The reference to the unlawfulness of such an action seems to indicate the limits of criminalization. On the other hand, any attempt to find an answer as to what specifically becomes unlawful regarding the collection of information about a person's private life puts us in a great deal of legal uncertainty. Questions of how, in general, a person may have a legitimate interest in another person's private life; what are the limits for journalists in seeking out information about the lives of public figures; in which cases does a person's privacy become important to society and does this justify an interest in it; and what aspects of a person's privacy fall under criminal law protection, are far from easy to answer.

The above-mentioned subsidiarity provision was also not met by criminalizing the unlawful use of another person's electronic means of payment or electronic identification data (Article 215 of the Criminal Code), as well as the unauthorized access to an information system (Article 198-1 of the Criminal Code). The only criterion for this criminalization is an indication that these acts are unlawful. However, banks, when issuing payment cards and electronic data to customers, oblige them not to pass on these cards and data to any other person. This is explicitly stated in the banks' publicly available rules and agreements with customers. In this regard, the use of a spouse, parent or other relative's card or accessing their electronic accounts at their request is unlawful. Obviously, it would be utter nonsense to persecute a son who bought food for his mother at a grocery store and paid for it with her card, or made an electronic payment on her behalf without any bad intentions. Such artificial allegations have not become the practice solely because of the case law in which it has been clarified that if another person's card or special data for electronic payment has been used with the permission of the owner and without any malicious intent, no criminal liability is incurred (Judgments of the Supreme Court of Lithuania Nos. 2K-389/2013, 2K-509/2014, 2K-44-788/2019).

The wording of additional criteria for the application of criminal liability (as opposed to mere illegality) in a criminal law provision must be clear and specific. Ambiguous criteria only complicate the problem. For example, a long-standing problem that Lithuanian courts are constantly faced with is the question of the difference between criminal engagement in undeclared economic activity and the same administrative violation. Article 202(1) of the Criminal Code seems to specify the following criteria: "large-scale" or "in the form of a business." The large scale of such an activity is explained in the law and is clear, but it is not possible to consistently explain what it means to engage in economic activities "in the form of a business," because economic activities are nothing but business. This problem has been repeatedly reported in the legal literature (Fedosiuk 2013, pp. 308–310; Dambrauskienė 2017, p. 251), but the legislature is in no hurry to rectify the situation, so again the courts themselves take the interpretation that this criterion must show a higher degree of danger compatible with the purpose of criminal law (Judgments of the Supreme Court of Lithuania Nos. 2K-574/2011, 2K-515/2014). On the other hand, in the absence of clarity, the prosecutor can easily prosecute any small informal entrepreneur on the basis of the "business-like" criterion, and courts are often forced to decide on the differences between the grounds for criminal and administrative liability.

In summary, a rule of criminal law should not be limited to referring to the unlawfulness of certain conduct in a sense of primary regulation, but should specify the additional criteria on the basis of which it has been decided to criminalize such unlawful conduct. Failing this, the problem is transferred to the courts, which have to solve the problem of competition of criminal law with other legal regulations. The outcome of criminal proceedings in such cases is always difficult to predict. This is presumed to be incompatible with the principle of legality in criminal law (*nullum crimen sine lege*), which requires that criminal conduct be formulated in such a way that its content is clear to all persons.

The subsidiarity principle and non bis in idem

Non-compliance with the principle of subsidiarity in criminal legislation creates preconditions for proceedings that violate the principle of *non bis in idem*. It should be noted that in Lithuania there is a Code of Administrative Offences, full of various punitive prohibitions and establishing its own procedures, as well as the Law on Tax Administration, which establishes liability for tax avoidance and appropriate procedural norms. According to the case law of the European Court of Human Rights, the reference to the administrative nature of the violation does not, in itself, exclude its classification as "criminal" in the autonomous sense of the Convention of Human Rights – thus, the combined application of criminal and administrative liability (or duplication of proceedings) for the same facts is incompatible with the principle of *non bis in idem* (for example, *Sergey Zolotukhin v. Russia*, 10 February 2009, No. 14939/03; *Šimkus v. Lithuania*, 13 June 2017, No. 41788/11). The same position was expressed by the Constitutional Court of the Republic of Lithuania (Rulings of 15 March 2017 and 10 November 2005) and the Supreme Court of Lithuania (Judgments Nos. 2K-226/2014, 2K-360-976/2018, 2K-36-697/2019, 2K-167-788/2015, 2K-109-788/2016, etc.). Notwithstanding these provisions, in reality, the duplication of administrative and criminal proceedings on the same objective facts is quite common, as many of the rules in the above-mentioned branches of law are simply in competition with each other. Courts are constantly faced with the need to address the issue of how to remedy a breach of the principle of *non bis in idem*, as it becomes clear during criminal proceedings that a person has already been punished administratively for the same offence. For example, a person who has been administratively punished for misconduct in a public place later becomes a defendant in a criminal case for a breach of public order.

There are also more serious cases of *non bis in idem* infringement. For example, when criminalizing such a topical legal phenomenon as unjust enrichment in Lithuania, competition with the tax administration has not been considered. Without detailing the legal features of unjust enrichment in national criminal law (Art. 189-1), the essence of this crime is that the person owns property whose sources cannot be substantiated. According to the definition, the minimum threshold for such assets must exceed €25,000. Without mentioning all the problematic aspects of such criminalization (there are many of them), when assessing its compatibility with the tax administration provisions we see that the Law on Tax Administration gives the tax administrator the power and obligation to tax unclear income and impose a fine, and such practices are quite common. In practice, this leads to a situation where criminal proceedings for unjust enrichment begin after the tax office

imposes a fine on the owner of the property for the same fact. Although prosecutors have argued that the principle of *non bis in idem* does not preclude the duplication of such proceedings, the Supreme Court of Lithuania has ruled to the contrary:

> In the criminal case A. A. was held criminally liable for part of the same essential facts which gave rise to the tax investigation and the final decision of the tax administrator to find a breach of tax law and to impose a fine on him; according to the nature and severity of the infringement and the sanction, the tax proceedings are equivalent to criminal proceedings. Therefore, … the conviction of A. A. under Article 189-1 of the Criminal Code violated the principle of *non bis in idem*. (Judgment of the Supreme Court of Lithuania No. 2K-48-648/2022)

The competition of administrative and criminal prohibitions in the Lithuanian legal system is so wide that naming all the examples would take up a great deal of scope. However, what has already been said allows us to conclude that compliance with the principle of subsidiarity of criminal law presupposes that the prohibition of double jeopardy enshrined in the Convention on Human Rights and national law is not infringed in practice. Conversely, uncoordinated criminalization creates the preconditions for unauthorized duplication of proceedings.

Conclusions

The principle of subsidiarity of criminal law means that the legal measures of this branch of law (criminalization, punishment, conviction) are supplementary to the regulation of other branches of law. Compliance with this principle in criminal legislation is a necessary condition for ensuring the sustainability and compatibility of criminalization in the legal regulatory system.

As regards the autonomy of the principle of subsidiarity from other principles limiting criminalization, as well as its applicability and significance in legislation, its most productive and methodologically significant aspect is the provision that criminalizing norms must be harmonized with the regulation of other branches of law and must not create any competitive legal protection. This interpretation of the principle of subsidiarity provides certain specific recommendations to the legislator when criminalizing acts.

First, the norms of criminal law should not prohibit conduct which is obviously permitted under the regulation of other branches of law.

Second, when criminalizing certain conduct that is unlawful under the primary regulation, the available legal means and their effectiveness should be properly assessed. In other words, unlawful acts that fall exclusively and without gaps within the scope of regulation of other branches of law should not be criminalized.

Third, in a situation where the legal consequences of a certain unlawful behavior are regulated in another branch of law, but the available legal means are obviously not proportionate to the harmfulness of such behavior and not sufficient to ensure its prevention, the criminal law norm should lay down clear additional criteria for the application of criminal liability indicating the seri-

ousness of the act that it is intended to criminalize. In other words, in such cases the general criterion of unlawfulness alone is not sufficient for criminalization.

Non-compliance with the principle of subsidiarity in criminal legislation creates the preconditions for excessive criminalization and for proceedings that violate the principle of *non bis in idem*.

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