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Concept of a criminal offence and crime: comparative legal analysis

Problems connected with the classification of criminal acts have always represented significant interest for the legislator and law enforcer of every modern state. In article analyzed the newly adopted criminal legislation of the Republic of Kazakhstan, as well as issues occured in the application of criminal law about liability for criminal delinquency. On the basis of criminal legislation's analysis of Austria, England, Belgium, Holland, Spain, Switzerland, France and other foreign countries, the issues connected with such relatively new concepts as criminal delinquency and offences are considered. Their comparative-legal analysis is conducted.

Keywords: criminal offence, criminal infraction, criminal violation, public danger, criminal code.

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During the years of independence Kazakhstan has already become a legal society, where the supremacy of law is enhanced every day, and democracy has gained irreversible character.

In these circumstances, a significant step in the criminal-legal policy of the country towards the formation of legal state was the adoption of the new Criminal code of the Republic of Kazakhstan in 2014, which entered into force on 1 January 2015.

Criminal acts in the new Code have been stipulated as criminal offences. This is due to the fact that taking into account the international experience was enacted a two-tier system of criminal acts, consisting of crime and criminal offence, united by a common concept of the criminal infractions as defined in art.10 of the Criminal Code of the Republic of Kazakhstan:

«1. Criminal infractions shall be divided into crimes and criminal offences depending on the level of social danger and penalty.

2. A crime shall be recognized as committed guilty socially dangerous action

(action or omission), prohibited by this Code under threatening punishment in the form of a fine, correctional labour, restrictions of freedom, imprisonment or the death penalty.

3. Criminal offence shall be recognized as committed guilty action (action or omission), not presenting a great social danger, infliction insignificant damage or threatens to cause harm to the person, organization, society or the state, for commission of which is provided a penalty in the form of a fine, correctional labour community service, arrest.

4. Action or omission shall not be a criminal infraction, although formally containing the signs of any action, provided by the Special Part of this Code, but by virtue of insignificance not representing social danger.» [1; 11].

The doctrine about criminal act is one of the main branches of the science of criminal law. The views, ideas and concepts by which is guided the legislator when establishing prohibitions, that is, by creating a model of the «crime», runs through the entire criminal law. On the basis of the substantial unity of these norms, it is necessary to analyze and evaluate science-based predictions about effectiveness of their application, each time guided by considerations of validity and reasonability. In our country criminal law is a mechanism of legal regulation. By influencing to the behavior of citizens, to the activities of state bodies and public organizations through the mechanism of legal regulation, the state provides the decision of actual problems in fighting against crime and its manifestations.

Among the works specially devoted to the topic «concept of crime» is a monograph by N.D. Durmanov [2]. A.A. Piontkovsky paid great attention to the definition of the crime in a criminal law [3]. Indicated problem in the criminal literature has previously been examined in characterizing the various institutions of criminal law (G.Z. Anashkin, A.A. Gertsenzon, I.I. Karpets, M.P. Karpushin, C.G. Kelina, M.I. Kovalev, G.L. Krieger, N.F. Kuznetsova), or in the analysis of certain categories of crimes (Z.O. Ashitov, B.C. Beisenov, V.C. Prokhorov, P.A. Fefelov, M.I. Yakubovich, et al.) and only recently acquired an independent character (N.I. Zagorodnikov, P.C. Kardaev, V.P. Korobov, L.N. Krivochenko, A.I. Martsev, A.V. Naumov, A.B. Sakharov, et al.).

Deep and thorough study of this problem in Kazakhstan scrutinized a doctor of law, professor E.A. Ongarbayev. On this topic he defended his doctoral thesis «Theoretical problems of classification of

crimes by Criminal law of RK». The author comprehensively explored the concept of «crime», theoretical bases of classification of crime, specific categories of crime and their importance in criminal, criminal executive and criminal procedural law, which are directly reflected in his monograph «Classification of crime and its legal value» [4].

The concept of criminal acts play central, pivotal role in any legal system. So, national criminal law is a part of international criminal law, therefore we try to conduct a comparative analysis of the notion of criminal offense under the criminal laws of such foreign countries as Germany, Spain, Switzerland, France, Austria and Turkey. Comparative analysis is an important tool in the study of the priorities, trends and perspectives of different models of legislation and «... doesn't only have a cognitive interest, but also facilitates enhancement ... of the criminal law ...» [5; 60].

In this regard, it should be noted that the idea of separation of crime and offence is carried out in the legislation of many countries, such as Austria, England, Belgium, Holland, Spain, the Republic of Latvia, Republic of Lithuania, Switzerland, Germany, France, and is being actively discussed in Russia, Ukraine, and other countries. In some countries, the category of «offence» is allocated within the limits of criminal law (legislation), and in other countries — in the separate normative acts. In some countries accepted special legislative acts about offences. This, for example, the laws: Republic of Serbia «About offences» (2007), Republic of Slovenia «About offences» (2002), Republic of Croatia «About offences against public order and peace» (1990), Czech Republic «About offences» (1990). In general we can state an increase in the number of countries on the current stages, which have included the category of «offence» to their legislation.

As it is known, the classification of the criminal act originated in the French criminal law and accepted in most countries belonging to the continental legal family. Criminal code 1810 (Imperial Penal Code) consolidated trinomial type of the criminal act: crime – délit – contravention. The trinomial type of the criminal act was reflected in the German Criminal code of 1871, dividing all the criminal acts depending on their severity into three groups: a crime (Verbrechen), an offense (Vergehen) and violation (Übertretung). The trinomial type of the criminal act determined the form of punishment for the committing specific criminal acts: crimes punished by death penalty or convict prison, offenses — by prison, and violations were punished with a short-term arrest or a fine.

Criminal Code of France does not contain the concept of a criminal act, but only confirms existing under French law the classification of offences, introducing a new criterion of their differentiating — the gravity of the offence [6; 49].

So, with the opening of the institutes included in the First book (General provisions), the terms «crime, offense» are often used. The Second book is called: «About crimes and offences against the person», the Third book «About the property crimes and offenses», the Fourth book — «About crimes and offenses against the nation, the state and public peace», the Fifth book — «Other crimes and offenses», et al. For example, article 113-7. — French Criminal law applies to any crime, as well as to any offense to be punished by imprisonment, committed by a French citizen or a foreigner outside the territory of the Republic, if the victim had French citizenship at the time of committing criminal acts [6; 73, 74].

In the chapter «Preliminary order» was fixed the division of criminal acts according to the punitive measure into violations, offenses and crimes. *A violation* was an act, which was punished by the police according to the law. *The offence* was considered to be a criminal act involving corrective punishment. And, finally, *the crime* was admitted as a criminal offence that assumes a painful or shameful punishment [7; 94]. Thus, the crime was recognized as the act prohibited by the criminal law under the threat of punishment.

The process of criminal law reform carried out in Germany in 1974–1975 replaced trinomial type of the criminal act by binomial: a crime (Verbrechen) and an offense (Vergehen) that is conserved in the criminal law of Germany up to date.

The Chapter II of the General part of the criminal code of Germany is called «Explanation of terms». In §12 of this chapter is contained a truly formal concept of crime and offence. There are emphasized two types of criminal acts: the crime and offence.

(1) Crimes are wrongful acts for committing of which the minimum punishment is imprisonment for a term of one year or more.

(2) Offences are wrongful acts for committing of which the minimum punishment is imprisonment for a shorter term or a fine [8; 125].

In the Criminal Code of Germany, Austria and Switzerland is accepted the binomial categorization of criminal acts: crime and offence. The Austrian Criminal code as well as German contains a formal definition of criminal act. The Austrian Criminal Code accepted binomial categorization of criminal acts: the crime and

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offence 11. It is based on one criterion — the size of the punishment. On the basis of § 17 of the Austrian Criminal code crimes are deliberate criminal acts which are punishable by life imprisonment or imprisonment for a term exceeding three years. All other criminal acts, including committed by negligence, are offences. Precisely, offences take the majority part of criminal acts, under the criminal code of Austria.

The concept of «violation» (Übertreten), which is met in the literature and in judicial practice, is not legal, because it is an administrative offense [9; 91].

According to the article 9 of the Criminal Code of Switzerland socially dangerous acts are divided into two types:

The crime is considered to be a criminal act punished by convict prison. Offence — is a criminal act punishable with jail as the most serious type of punishment [10; 75].

The Criminal Code of Spain contains a formal definition of criminal act, according to which crimes or offences are punishable by law acts or omissions committed with intent or by accident (article. 10 CC) [11; 48].

In Turkish criminal code there is no concept of crime, «according to the legislative gradation, all criminal acts are divided into crimes and offences. The crimes are considered in the Second, and offences — in the Third book of the Code. Under the criminal law of many countries, most of the offences relate to administrative offences, however, the Turkish criminal law doctrine is based on the assumption that crimes are classified according to the type of punishment considered by law. In such circumstances, it can be stated that the offences in the Code are classified into three groups: the first includes heavy imprisonment and heavy monetary penalty, the second — imprisonment and monetary penalty and the third easy imprisonment and easy monetary penalty» [12; 24, 25].

The effectiveness of the institute of criminal offense is confirmed by international practice. Moreover, it is recognized by many foreign and soviet criminologists.

An enactment of the institute of criminal offences to our legislation allows for a wider use of the principle of criminal policy, directed to the saving of criminal repression.

Criminal offence is a special kind of criminal delinquency, well-known for foreign criminal law, distinguished from administrative offences, as well as from the actual crimes.

The study of crime problems under the category of «Criminal offence» allows to say that the use of simplified procedure during the investigation or consideration of criminal cases in the court, has a positive effect on the entire judicial system, in particular, it permits to make a fair decision, to reduce the volume of investigation or consideration of criminal cases, which positively affects on the quality of investigation or consideration of the case. The positive experience of several foreign countries confirms the effectiveness of simplified procedure.

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Қылмыстық теріс қылық және қылмыс түсінігі: салыстырмалы-құқықтық талдау

Қылмыстық әрекеттерді жіктеуге байланысты мәселелер әрқашан да қазіргі кез келген мемлекеттің заң шығарушы және құқық қолданушы органдары үшін елеулі қызығушылық тудырады. Мақалада Қазақстан Республикасының жаңадан қабылданған қылмыстық заңдары талданып, қылмыстық құқық бұзушылық үшін жауапкершілік туралы қылмыстық-құқықтық нормаларды қолдану тәжірибесіндегі сұрақтар зерттелген. Австрия, Англия, Бельгия, Голландия, Испания, Швейцария, Франция, сондай-ақ басқа да шет елдердің қылмыстық заңдарын талдау негізінде қылмыстық құқық бұзушылық және теріс қылық сияқты жаңа ұғымдармен байланысты мәселелер қарастырылып, оларға салыстырмалы-құқықтық талдау жүргізілген.

Кілт сөздер: қылмыс, қылмыстық теріс қылық, қылмыстық құқықбұзушылық, қоғамдық қауіп, қылмыстық кодекс.

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Понятие уголовного проступка и преступления: сравнительно-правовой анализ

Проблемы, связанные с классификацией преступных деяний, всегда представляли значительный интерес для законодателя и правоприменителя любого современного государства. В статье проанализировано вновь принятое уголовное законодательство Республики Казахстан, а также изучены вопросы, возникшие в практике применения уголовно-правовых норм об ответственности за уголовные правонарушения. На основе анализа уголовного законодательства Австрии, Англии, Бельгии, Голландии, Испании, Швейцарии, Франции, а также других зарубежных стран рассмотрены вопросы, связанные с такими относительно новыми понятиями, как уголовные правонарушения и проступки, дан их сравнительно-правовой анализ.

Ключевые слова: уголовное преступление, уголовный проступок, уголовное правонарушение, общественная опасность, уголовный кодекс.

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