

A.A. Biebayeva<sup>1</sup>, A.M. Kalguzhinova<sup>2\*</sup>

<sup>1</sup> Academy of Justice under the Supreme Court of the Republic of Kazakhstan, Astana, Kazakhstan;

<sup>2</sup> Karaganda University of the name of academician E.A. Buketov, Karaganda, Kazakhstan

(E-mail: ardak\_22@mail.ru, aigul.kalguzhinova@ksu.kz)

## Exemption from criminal liability in connection with active repentance

The priority direction of improving the criminal legislation of the Republic of Kazakhstan is to ensure a balance of “punitive, restorative and preventive means of criminal law regulation”. The authors comprehensively investigated the content of the norm on exemption from criminal liability in connection with active repentance, which occupies a central place in the domestic concept of restorative justice. The study was conducted on the basis of the dialectical method of cognition of social processes, using formal-legal, historical-legal, comparative-legal methods, the method of structural-system analysis. In the course of the study, the scientific works of Kazakh and Russian scientists, the current criminal legislation were studied. The main part of the article traces the history of the legal regulation of active repentance under the Criminal Code of the Kazakh SSR of 1959, the Criminal Code of the Republic of Kazakhstan of 1997 and 2014. The essence of active repentance is determined, the legal nature is revealed, the objective and subjective grounds and conditions fixed in the law are analyzed, the procedure for applying exemption from criminal liability in connection with active repentance is shown, the legal and social significance of this type of exemption from criminal liability is shown. The correlation of general and special norms providing for the possibility of exemption from criminal liability in connection with active repentance is carried out. The institutions of voluntary renunciation of a criminal offense and active repentance are differentiated. Based on the evaluation of the results of theoretical research and current legislation, conclusions are formulated regarding the incentive-stimulating potential of the norm on exemption from criminal liability in connection with active repentance.

*Key words:* criminal liability, release, active repentance, grounds and conditions of release, special types of release.

### Introduction

The provisions of the current criminal legislation correspond to the idea of restorative justice, which is gradually entering the legal reality of Kazakhstan. The concept of the legal policy of the Republic of Kazakhstan until 2030, approved by the Decree of the President of the Republic of Kazakhstan dated October 15, 2021 No. 674, provides for the need to ensure a balance of “punitive, restorative and preventive means of criminal law regulation”.

Active repentance occupies a central place among the norms of the institution of exemption from criminal liability (Article 65 of the Criminal Code of the Republic of Kazakhstan). The legal and social significance of exemption from criminal liability in connection with active repentance is very great. Even after committing a criminal offense, when there are all the factual and legal grounds for bringing the perpetrator to criminal responsibility, he is given a chance to be released from its application in case of positive behavior on his part.

\* Correspondent author. E-mail: aigul.kalguzhinova@ksu.kz

### *Materials and methods*

In the course of the study, the theoretical material of Kazakh and Russian scientists, domestic legislation, as well as materials of law enforcement activities were studied and used.

The analysis of the norms on active repentance under the criminal laws of the Republic of Kazakhstan of 1997 and 2014 is carried out.

The general scientific dialectical method of cognition of social processes made it possible to investigate the problem from the point of view of the relationship between law and social processes taking place in society that require accounting and regulation.

Private-scientific methods in most studies devoted to the institute of exemption from criminal liability are formal-legal, historical-legal, comparative-legal methods, the method of structural-system analysis, which are actively used in this article.

### *Results*

The very concept of “active repentance” is not new to domestic criminal law. The mention of “repentance” occurs (with various terminological modifications) in the Criminal Code of the Kazakh SSR of 1959, which fixed “sincere repentance” as a circumstance mitigating responsibility.

This type of exemption from criminal liability was first provided for in the Criminal Code of the Republic of Kazakhstan in 1997. The practice of its application today proves the validity and effectiveness of such a step.

In accordance with the current criminal law, a person who has committed a criminal offense or has committed a crime for the first time may be released from criminal liability, taking into account the identity of the perpetrator, his surrender, contributing to their disclosure, investigation of a criminal offense, making amends for the harm caused by a criminal offense (Part 1 of Article 65 of the Criminal Code of the RK).

The general basis for the application of this type of release is active repentance, by which in criminal law it is customary to understand the positive post-criminal behavior of a person who has committed a criminal act, “which is aimed at preventing, eliminating or reducing the actual harmful consequences of what he has done or at assisting law enforcement agencies in uncovering the committed crime” [1].

Exemption from criminal liability in connection with active repentance is a manifestation of the institution of compromise, the idea of which has long been raised in the theory of law. “Compromise in criminal law is usually understood as the possibility provided for by law to apply to a person who has committed a crime, exemption from criminal liability or mitigation of punishment in exchange for his socially useful behavior” [2].

The need for the institution of compromise is conditioned by the need to use in the fight against crime not only the methods of prohibition, coercion and the use of repression, but also to provide the perpetrator with the opportunity to be released from responsibility if certain requirements are met on his part. The possibility of compromise gives a person a chance, through socially useful actions, to neutralize the harm caused by the crime, to assist justice and thereby prove a reduction in the degree of his public danger.

The need for the institution of exemption from criminal liability in connection with active repentance is also dictated by the urgent needs of law enforcement practice and is due to the legislator's reassessment of the social meaning of the actions taken by the criminal justice authorities, taking into account the constant competition of the task of punishing all persons involved in the crime and the core of its participants — organizers, managers and other active persons. This task, as a rule, requires the cooperation of less guilty persons with law enforcement agencies. But, as practice shows, they do not always go for such cooperation, especially if they do not see favorable consequences for themselves. To solve this problem in the criminal law, the legislator needed to revise the set of initial provisions of criminal policy, norms and institutions of substantive law so that they envisage and implement the idea of compromise in the fight against crime [3; 54-55].

### *Discussion*

Exemption from criminal liability in connection with active repentance is possible if a number of objective and subjective conditions specified in Article 65 of the Criminal Code of the Republic of Kazakhstan are met. The existence of objective circumstances does not depend on the will of the perpetrator and his behavior after the commission of a criminal offense. These include the commission of a criminal offense of a certain type and nature. Subjective circumstances are directly dependent on the personality and behavior of the per-

petrator, and include; a) taking into account the identity of the culprit, b) turning himself in, c) contributing to the disclosure and investigation of a criminal offense, d) making amends for the harm caused.

A mandatory condition stipulated by Article 65 of the Criminal Code of the Republic of Kazakhstan is the commission of a criminal offense or the commission of a crime for the first time. The normative definition of a criminal offense is fixed in Part 3 of Article 10 of the Criminal Code of the Republic of Kazakhstan. They recognize a culpably committed act (action or inaction) that does not pose a great public danger, caused minor harm or created a threat of harm to an individual, organization, society or the state, for the commission of which punishment is provided in the form of a fine, correctional labor, community service, arrest, expulsion from the Republic of Kazakhstan of a foreigner or a person stateless.

Since the legislator does not associate exemption from criminal liability for a criminal offense with its commission for the first time, it should be assumed that the formally established multiplicity of criminal offenses will not affect the decision on active repentance. However, in our opinion, the multiplicity in the commission of criminal offenses indicates a stable antisocial orientation of the individual, accounting for which refers to the mandatory subjective conditions for the application of Article 65 of the Criminal Code of the Republic of Kazakhstan.

A culpably socially dangerous act (action or omission) prohibited by this Code under threat of punishment in the form of a fine, correctional labor, community service, restriction of liberty or imprisonment (Part 2 of Article 10 of the Criminal Code of the Republic of Kazakhstan) is recognized as a crime. A crime is recognized as committed for the first time if the person has not committed any criminal act before. This sign also occurs in cases where the subject has previously committed either a criminal offense or an act formally containing signs of a crime, but due to insignificance does not pose a public danger (Part 4 of Article 10 of the Criminal Code of the Republic of Kazakhstan), or caused harm in the presence of one of the circumstances precluding the wrongfulness and public danger of the act (necessary defense, reasonable risk, etc.).

A crime is also considered committed for the first time if a person has previously committed a crime, but at the same time all criminal legal consequences arising from the fact of its implementation have ceased. Such circumstances include exemption from criminal liability for a previously committed crime or cases when a person was convicted and the criminal record was withdrawn or extinguished by the time of the commission of a new crime. When assessing the commission of a crime "for the first time", judicial practice takes a similar position. In particular, in the normative resolution of the Supreme Court of the Republic of Kazakhstan "On judicial practice on the application of Article 68 of the Criminal Code of the Republic of Kazakhstan", a crime committed for the first time is understood as an act that a person actually commits for the first time, or an act committed not for the first time, but if a person was in accordance with the procedure established by law for a previously committed crime released from criminal liability or completely released from punishment, or the criminal record was extinguished or removed (Paragraph 4).

In cases of repeated or real totality of crimes, a person who has committed two or more crimes, for none of which the issue of responsibility has not been resolved, cannot be considered a person who has committed a crime for the first time. At the same time, it does not matter whether criminal prosecution is carried out in one proceeding or in independent criminal cases for each of these acts. This position is based on the fact that the multiplicity of criminal manifestations is not accidental, therefore, in our opinion, it is wrong to exempt such a person from criminal liability based on a formally defined attribute for the first time.

It should be noted that Part 1 of Article 65 of the Criminal Code of the Republic of Kazakhstan is supplemented with a provision that a person "who has committed a corruption crime for the first time can be released from criminal liability in connection with active repentance only by a court".

The subjective circumstances with which the criminal law associates exemption from criminal liability in connection with active repentance are as follows:

a) the competent authorities are obliged to assess the identity of the person being released from criminal liability, and, above all, the degree of his public danger and the likelihood of recidivism. Exemption from criminal liability is possible only in case of actual correction of the person who committed a criminal offense, when the level of its danger is significantly reduced. Therefore, applying Article 65 of the Criminal Code of the Republic of Kazakhstan, it is necessary to take into account signs indicating positive changes in the behavior of the perpetrator and confirming a small degree of his danger. These include positive characteristics of a person, his admission to work or study, the presence of children and other dependents, participation in social activities, recovery from alcoholism, drug addiction or substance abuse, revision of the attitude to work and other signs.

b) a confession is a personal, voluntary, written or oral communication of a person to the criminal prosecution body about a criminal offense committed or being prepared by him, when this person has not yet been recognized as a suspect, or he has not been detained on suspicion of committing this criminal offense (Part 1 of Article 182 of the Criminal Procedure Code of the Republic of Kazakhstan).

A confession is a reason to start a pre-trial investigation. It can be done in written or oral form. An oral statement of a criminal offense is entered in a separate protocol of its acceptance, which must contain information about the applicant, his place of residence or work, as well as a document certifying his identity. The protocol is signed by the applicant and the official who accepted the application. An oral statement made during the pre-trial investigation or during the trial is entered into the relevant protocol of the investigative action or in the minutes of the court session.

The motives for turning themselves in can be very different and do not affect the legal assessment of the actions of the guilty. These include remorse for what they have done, awareness of the full depth of the social danger of the criminal behavior committed, shame for the crime committed, fear of criminal responsibility, etc.

The behavior of a person who found out about his exposure and then appeared in law enforcement agencies is not considered as a confession.

c) facilitating the disclosure and investigation of a criminal offense. Assistance in solving a crime can be expressed in various actions. "Contributing to the disclosure of a crime is expressed in the following, — writes N.I. N.I. Vetrov, — that the person guilty of committing a crime during an inquiry, preliminary investigation or court session, in addition to admitting his guilt, reports previously unknown facts and information confirming the commission of a crime by him, exposing accomplices, or contributing to their search, the discovery of property obtained by criminal means, other objects and instruments of committing a crime" [4; 336].

The disclosure of a criminal offense is understood as the search and identification of persons involved in its implementation. At the same time, a criminal offense or a crime is considered solved if the persons responsible for their commission are identified and there is sufficient information indicating their involvement in a criminal offense or a criminal act. At the same time, an equally important stage of criminal prosecution is the investigation of a criminal offense, during which evidence is collected confirming the culprit's involvement in the socially dangerous act committed. Because of this, along with assistance in the disclosure of a criminal offense, in fact, assistance in its investigation is also required from the perpetrator.

d) the compensation for the damage caused by the offense depends on the type of damage to be compensated. It can be expressed in the provision of a monetary equivalent of the property lost by the victim or a similar thing, restoration by the forces of the guilty person independently, or with the involvement of specialists of the property damaged by him.

Making amends in any other way involves compensation for moral, physical or other non-material consequences caused by monetary payments or in another way. The latter should be understood as an apology to the victim, a public refutation of slanderous fabrications, payment for treatment, participation of the perpetrator in caring for the victim during the illness caused by the crime committed, and other similar actions.

It should be borne in mind that the prerequisite for the application of the considered type of exemption from criminal liability is precisely the commission by the guilty of actions aimed at restoring the violated good. In this regard, N. Erokhina and A. Chuvilev point out that it is hardly right to agree with the termination of a criminal case when the perpetrator only promised to compensate for the damage caused [5; 22]. Based on the grounds of release in connection with active repentance, this approach is beyond doubt. However, it does not take into account situations when it is impossible to provide compensation for material damage at once, in a short period of time, since the criminal has no property, he is unemployed, or belongs to pensioners, low-paid categories of workers, etc. As a rule, the authorized bodies in these cases are satisfied with the statement by the victim of the fact of the absence of claims against the culprit. Since the perpetrator often undertakes to repay the damage caused in installments, the risk of non-fulfillment of this obligation passes to the victim. Abuse of the victim's credulity and the unwillingness of a person released from criminal liability to compensate for damage are not grounds for revoking the decision to terminate the criminal case. In this regard, the provisions of Article 65 of the Criminal Code of the Republic of Kazakhstan on compensation for harm require more detailed regulation.

The considered subjective circumstances of exemption from criminal liability in connection with active repentance actualized the discussion about whether it is necessary for exemption from criminal liability under Article 65 of the Criminal Code of the Republic of Kazakhstan to commit all socially useful actions spec-

ified in it, or it is enough to establish some of them. There are several positions in the literature on this issue. “Within the meaning of the current legislation, the establishment of any of the possible acts indicating repentance may entail the release of a person from criminal liability”, said V.G. Shalamov, V.A. Kushnarev, A.Y. Magomedov, who analyzed the law enforcement practice of terminating criminal cases in connection with active repentance [6; 16]. A similar opinion is expressed by V. Kolomeets, L.V. Golovko.

V.V. Sverchkov, A.V. Savkin, A. Chuvilev hold a different point of view. They believe that only the sum of all the listed conditions forms the necessary prerequisite for exemption from criminal liability. The absence of at least one of these conditions, if it is necessary for a specific legal fact, should indicate that there are no grounds for exemption from criminal liability as such, but there are certain circumstances mitigating criminal liability [7; 53].

V.S. Egorov in his monograph “Exemption from criminal liability” defined his position in the dispute as follows. The analysis of the norm “allows us to conclude that all these conditions are listed in the law without alternative. It explicitly refers to the possibility of exemption from criminal liability only if there is a full set of these circumstances”. At the same time, he acknowledges that in some cases the circumstances of the case are such that the commission of the specified in Article 75 of the Criminal Code of the Russian Federation (Article 65 of the Criminal Code of the Republic of Kazakhstan) actions “cannot be carried out by a guilty person due to objective circumstances beyond his control” [2]. For example, in the absence of a confession, when committing crimes in which the guilty person immediately becomes known to law enforcement agencies. When the possibility of turning himself in is excluded for reasons beyond the control of the culprit, and all other circumstances provided for by law are present, he can still be released from criminal liability in connection with active repentance, V.S. Egorov believes.

Of interest is the position of Yu.V. Gracheva, who points out that the law “provides only an approximate list of forms of active repentance and it is given only to help the law enforcement officer establish that a person has ceased to be socially dangerous as a result of active repentance” [8; 322].

It seems that the commission of certain socially useful actions as a condition for exemption from criminal liability in connection with active repentance depends on the nature of the public danger and the specifics of the composition of the criminal offense. In our opinion, Article 65 of the Criminal Code of the Republic of Kazakhstan does not contain a strict dependence of exemption from criminal liability with the uncontested commission by the guilty person of all the actions listed in it. This is indicated, firstly, by the fact that active repentance is not determined only by a confession, which is a special procedural action of the guilty person. Secondly, all the actions listed in Article 65 of the Criminal Code of the Republic of Kazakhstan are criteria that are not established, but are taken into account when deciding whether active repentance takes place or not? Thirdly, it should be remembered that Article 65 of the Criminal Code of the Republic of Kazakhstan provides for a general type of exemption from criminal liability in connection with active repentance, which is specified in special cases of exemption provided for by the relevant articles of the Special Part of the Criminal Code.

The meaningful differentiation of general and special types of exemption from criminal liability in connection with active repentance depends on the public danger of the crime and the object of criminal encroachment. The existence of special grounds for exemption from criminal liability in connection with active repentance encourages the perpetrators to self-incrimination, assistance in the disclosure and investigation of crimes.

However, it should be borne in mind that criminal acts belonging to the category under consideration represent an increased degree of public danger. Because of this, exemption from criminal liability for their commission is a forced measure taken by the state in order to protect protected public relations from greater harm. I. Petrukhin, in this regard, notes that special types of exemption from criminal liability are “not acts of humanism, but methods of prevention, suppression and disclosure of serious crimes, not necessarily connected with active repentance”. The legislator departs from the principles of the inevitability of responsibility for the commission of a crime and the equality of all before the law in the name of saving people, property, protecting the highest state interests and uncovering serious crimes [9; 25].

The legislative formulation of the signs of exemption from criminal liability in special cases of active repentance is based on the following formula: the necessary actions on the part of the guilty person, forming the content of active repentance, are indicated, then the legal consequences of their commission are exemption from criminal liability. These norms are completed by another necessary condition — an indication of the absence of other elements of the crime in the actions of the perpetrator. However, in the note to Article 296 of the Criminal Code of the Republic of Kazakhstan, the legislator used a different construction of

the disposition, indicating that the perpetrator is exempt from liability under this article, i.e. for illegal trafficking of narcotic drugs or psychotropic substances, their analogues, precursors without a marketing purpose. It turns out that various phrases are used in the formulations of active repentance: “he is released from criminal responsibility for this act (under this article)” and “he is released from criminal responsibility if his actions do not contain the composition of another crime”.

Analyzing the above-mentioned problem, it would be necessary to agree with V.S. Egorov, who believes that it would be more expedient to construct all the norms of the Special Part of the Criminal Code by indicating exemption from criminal liability for this particular crime without reference to the absence of any other corpus delicti in the actions of the perpetrator. “Such a change in the dispositions of the norms governing special cases of active repentance would eliminate their ambiguity, which takes place today, by clearly defining for which particular act a person is exempt from criminal liability” [2].

It should be borne in mind that in the case of the perpetrator committing several criminal acts, in respect of one of which active repentance is carried out, provided for in the article of the Special Part of the Criminal Code, the person is released from responsibility only for his commission, while for all the others he is liable on general grounds.

In the criminal law literature, the question of the ratio of general and special norms providing for the possibility of exemption from criminal liability in connection with active repentance is raised. However, there is no consensus on the resolution of these inconsistencies.

Most of the authors (Alikperov H.D., Chuvilev A.A., Petrukhin I., Sverchkov V.V.) note that since the notes to the articles of the Special Part of the Criminal Code of the Russian Federation do not contain references to the need to comply with the conditions specified in Article 75 of the Criminal Code of the Russian Federation (Article 65 of the Criminal Code of the RK), they are special, independent norms that allow the release of persons from criminal liability without fail only if the conditions mentioned in the relevant notes are met.

There is another — the opposite point of view, supporters of which (Yani P., Pastukhov I., Kolomeets V.) believe that the notes to the articles of the Special Part of the Criminal Code of the Russian Federation do not contradict the requirements of Article 75 of the General Part of the Criminal Code of the Russian Federation (Article 65 of the Criminal Code of the RK), but only supplement it; not being independent norms of law, they are only part of the norm on the active repentance of a person as a basis for his release from criminal liability. According to scientists, exemption from criminal liability in connection with active repentance in accordance with the notes to the articles of the Special Part of the Criminal Code is possible only on the basis and subject to the fulfillment of the requirements for voluntary surrender, contributing to the disclosure of the crime, compensation for damage or other compensation for the harm caused by the crime.

But there is also a third point of view on the problem of the ratio of general and special cases of exemption from criminal liability mentioned in the notes to the articles of the Special Part of the Criminal Code of the Republic of Kazakhstan. Its supporters (Savkin A.V.) consider these norms not independently or in contradiction, but in unity, believing that they stimulate the post-criminal positive behavior of the subject.

Scientists who have studied the practice of applying general and special norms on active repentance in order to improve them suggest either gradually replacing the provisions of the General Part of the Criminal Code of the Republic of Kazakhstan on exemption from criminal liability in connection with active repentance with specific instructions in the notes of the Special Part of the Criminal Code of the Republic of Kazakhstan, or vice versa — generalize the special grounds in the General Part of the Criminal Code of the Republic of Kazakhstan.

In our opinion, such a proposal is more than rational, the grounds and conditions for exemption from criminal liability in connection with active repentance should certainly be reflected in the General Part of the Criminal Code with a list of notes to the articles of the Special Part of the Criminal Code, which provide for special conditions for exemption from criminal liability. It is important that the law clearly states under what conditions and for what specific criminal acts persons who have shown active repentance can be released from criminal liability.

Special types of exemption from criminal liability are provided in the notes to the articles of almost all chapters of the Special Part of the Criminal Code of the Republic of Kazakhstan, with the exception of criminal offenses against the family and minors; against constitutional and other human and civil rights and freedoms; against property; in the field of informatization and communications; against the interests of service in

commercial and other organizations; crimes against peace and the safety of humanity. At the same time, the number of special grounds for exemption from criminal liability tends to increase.

Active repentance is a discretionary type of exemption from criminal liability, i.e. it is applied at the discretion of the prosecutor, the preliminary investigation body, the court. The court, in accordance with Part 1 of Article 36 of the Criminal Procedure Code of the Republic of Kazakhstan, in cases provided for by Part 1 of Article 65 of the Criminal Code, has the right to issue a guilty verdict with exemption from criminal liability.

Most special types of exemption from criminal liability are imperative, but there are also those for which exemption from criminal liability depends on the discretion of the court (for example, for military criminal offenses).

According to Part 2 of Article 65 of the Criminal Code of the Republic of Kazakhstan, taking into account the amendments made by the Laws of the Republic of Kazakhstan dated April 9, 2016 and July 12, 2018, the conditions of exemption from criminal liability in connection with active repentance do not apply to persons who have committed a terrorist crime, an extremist crime, a crime committed as part of a criminal group, a crime against sexual integrity minors, torture, a grave or especially grave crime against the person, except in cases specifically provided for by the relevant articles of the Special Part of this Code. This restriction does not apply to minors who have committed a crime against the sexual integrity of a minor between the ages of fourteen and eighteen.

Let us consider the ratio of institutions of voluntary refusal and active repentance.

Voluntary renunciation of a criminal offense according to the law is the termination by a person of preparatory actions or the termination of an action (inaction) directly aimed at committing this act, if the person was aware of the possibility of bringing the criminal offense to an end (Article 26 of the Criminal Code of the Republic of Kazakhstan).

Voluntary refusal, which is possible at the stages of preparation or attempt, is sometimes called the “golden bridge” built by the legislator for those who started a crime (criminal offense). This figurative expression is quite acceptable, since a person who voluntarily refused to bring the initiated criminal offense to an end is not subject to criminal liability.

Between active repentance, as the basis for exemption from criminal liability, and voluntary refusal, a distinction can be made on the following grounds:

1) at the moment when they are possible — voluntary refusal is possible before the onset of socially dangerous consequences of the act, and repentance is carried out after their occurrence;

2) according to legal consequences — voluntary refusal gives grounds for not bringing a person to criminal responsibility, since there is no criminal offense in his actions, with active repentance, the composition of the criminal offense is obvious, therefore active repentance acts as a basis for exemption from criminal liability;

3) by goals — the institute of voluntary refusal pursues the goal of stimulating positive post-criminal behavior of a person who has committed a criminal offense, and the goals of the institute of active repentance are to facilitate the disclosure of committed criminal offenses and to ensure the maximum possible compensation or mitigation of the consequences of a criminal offense.

Active repentance under the current criminal legislation of the Republic of Kazakhstan entails various legal consequences: in some cases it is the basis for exemption from criminal liability (Article 65 of the Criminal Code of the Republic of Kazakhstan), and in others it is only a circumstance mitigating punishment (Paragraphs 5, 11, Part 1 of Article 53 of the Criminal Code of the Republic of Kazakhstan).

### *Conclusion*

In modern civilized countries, the value of the institution of exemption from criminal liability is seen in the need to protect citizens from unjustified criminal legal influence. In this context, it can be confidently stated that the norms on exemption from criminal liability contribute to the full-scale implementation of the principle of saving criminal repression.

European criminologists who have studied the impact of psychosocial intervention in the criminal justice system on the crime rate have come to an unequivocal conclusion in favor of non-punitive criminal law measures replacing traditional criminal law measures [10; 2].

We also associate the value of the norms on exemption from criminal liability with their incentive-stimulating potential, affecting the consciousness, will and psychology of people. The basis for encouraging exemption from criminal liability is the post-criminal behavior of a person who has committed a criminal

offense, “voluntarily aimed at preventing, neutralizing or reducing criminal harm, facilitating the disclosure of a crime, and otherwise testifying to the person's remorse for what he committed” [11; 95]. The incentive that encourages a person to positive post-criminal behavior, in this case, is the favorable prospect of the complete elimination of the criminal consequences of the criminal offense committed.

The institution of exemption from criminal liability serves to increase the effectiveness of the means of criminal law protection of public relations: the victim receives the fastest possible compensation for the harm caused to him; the person who committed the act avoids criminal liability; the state saves time, money, personnel related to the investigation, trial, execution of the sentence, etc. Active repentance as a type of release from criminal liability, contributes to the prevention of serious consequences and compensation for the damage caused.

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А.А. Биебаева, А.М. Калгужинова

### Шынайы өкінуіне байланысты қылмыстық жауаптылықтан босату

Қазақстан Республикасының қылмыстық заңнамасын жетілдірудің басым бағыты «қылмыстық-құқықтық реттеудің жазалау, қалпына келтіру және алдын алу құралдарының» теңгерімін қамтамасыз ету. Авторлар қалпына келтіретін сот төрелігінің отандық тұжырымдамасында өзекті орын алатын шынайы өкінуге байланысты қылмыстық жауапкершіліктен босату туралы норманың мазмұнын жан-жақты зерттеген. Зерттеу формальды-құқықтық, тарихи-құқықтық, салыстырмалы-құқықтық әдістерді, құрылымдық-жүйелік талдау әдісін қолдана отырып, әлеуметтік процестерді танудың диалектикалық әдісі негізінде жүргізілді. Зерттеу барысында қазақстандық және ресейлік ғалымдардың ғылыми еңбектері, қолданыстағы қылмыстық заңнама қарастырылды. Мақаланың негізгі бөлімінде 1959 ж. ҚазКСР ҚК, 1997 ж. және 2014 ж. ҚР ҚК шынайы өкінудің құқықтық реттеу тарихы баяндалған. Шынайы өкінудің мәні анықталды, құқықтық табиғаты ашылды, заңда бекітілген объективті және субъективті негіздер мен шарттар, шынайы өкінуге байланысты қылмыстық жауапкершіліктен босатуды қолдану тәртібі талданды, қылмыстық жауапкершіліктен босатудың осы түрінің құқықтық және әлеуметтік мәні көрсетілді. Шынайы өкінуге байланысты қылмыстық жауаптылықтан босату мүмкіндігін көздейтін жалпы және арнайы нормалардың арақатынасы сипатталған. Қылмыстық құқық бұзушылықтан ерікті түрде бас тарту және шынайы өкіну институттары ажыратылған. Теориялық зерттеулердің нәтижелерін және қолданыстағы заңнаманы бағалау негізінде шынайы өкінуге байланысты қылмыстық жауапкершіліктен босату туралы ереженің көтермелеу-ынталандырушы әлеуетіне қатысты тұжырымдар жасалды.

*Кілт сөздер:* қылмыстық жауапкершілік, босату, шынайы өкіну, босатудың негізі мен шарттары, босатудың арнайы түрлері.

**Освобождение от уголовной ответственности в связи с деятельным раскаянием**

Приоритетным направлением совершенствования уголовного законодательства Республики Казахстан является обеспечение баланса «карательных, восстановительных и превентивных средств уголовно-правового регулирования». Авторы всесторонне исследовали содержание нормы об освобождении от уголовной ответственности в связи с деятельным раскаянием, занимающей центральное место в отечественной концепции восстановительного правосудия. Исследование проведено на основе диалектического метода познания социальных процессов, с применением формально-юридического, историко-правового, сравнительно-правового методов и метода структурно-системного анализа. В ходе исследования были изучены научные труды казахстанских и российских ученых, действующее уголовное законодательство. В основной части статьи прослежена история правового регулирования деятельного раскаяния по УК КазССР 1959 г., УК РК 1997 г. и 2014 г. Определена сущность деятельного раскаяния, раскрыта правовая природа, проанализированы закрепленные в законе объективные и субъективные основания и условия, порядок применения освобождения от уголовной ответственности в связи с деятельным раскаянием, показано правовое и социальное значение данного вида освобождения от уголовной ответственности. Проведено соотношение общей и специальной норм, предусматривающих возможность освобождения от уголовной ответственности в связи с деятельным раскаянием. Разграничены институты добровольного отказа от уголовного правонарушения и деятельного раскаяния. На основе оценки результатов теоретических исследований и действующего законодательства сформулированы выводы относительно поощрительно-стимулирующего потенциала нормы об освобождении от уголовной ответственности в связи с деятельным раскаянием.

*Ключевые слова:* уголовная ответственность, освобождение, деятельное раскаяние, основание и условия освобождения, специальные виды освобождения.

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А.Д. Рахметулин\*

Верховный Суд Республики Казахстан, Астана, Казахстан  
(E-mail: a.rakhmetulin@gmail.com)  
ORCID ID 0009-0002-2696-3190

## Конституционализация уголовного судопроизводства: понятие и содержание

Теоретическая и практическая значимость темы конституционализации уголовного судопроизводства предопределяется все возрастающим влиянием и действием конституционных идей, принципов и ценностей в правовом регулировании общественных отношений, касающихся законодательства, а также досудебной и судебной стадий уголовного процесса. В первую очередь, конституционные ценности должны обеспечиваться в сфере законотворческой деятельности, чтобы исключались и, в крайнем случае, сокращались случаи, когда нормы и положения уголовно-процессуального законодательства признаются не соответствующими Конституции Республики Казахстан. Кроме того, необходимы действенные меры по восприятию всеми субъектами применения норм уголовно-процессуального законодательства провозглашенных Конституцией РК ценностей и приоритетов, что приводит к адекватной оценке того факта, что высшими ценностями Республики Казахстан являются человек, его жизнь, права и свободы. В этом аспекте важным направлением в изучении феномена конституционализации является научное осмысление вопроса о том, что представляет собой конституционализация уголовного судопроизводства, каково ее соотношение с конституционализацией всей правовой системы, как эти вопросы рассматриваются научным сообществом, какие меры принимаются различными субъектами по обеспечению конституционализации уголовно-процессуального законодательства. Автором проанализированы данные вопросы с учетом того, что научных разработок в Казахстане по указанной проблематике очень мало, а понятие конституционализации исследуется в рамках определения других терминов и категорий: конституционализма, конституционного правопорядка и верховенства права. Кроме того, он рассмотрел понятие конституционализации уголовного судопроизводства через содержание деятельности различных субъектов конституционализации.

*Ключевые слова:* Конституция, конституционализация уголовного судопроизводства, уголовный процесс, субъекты конституционализации, уголовно-процессуальное законодательство.

### Введение

Реализация Конституции Республики Казахстан представляет собой многогранный и многофункциональный процесс претворения ее норм, принципов и ценностей в правомерное поведение участников правоотношений, который обеспечивает действие конституционных норм. В свою очередь, о действии Конституции можно говорить тогда, когда осуществляется полное воздействие конституционных норм на общественные отношения в различном его аспекте, включая информационное, ценностно-мотивационное и регламентирующее воздействие Конституции на государственную и общественную жизнь [1; 59].

Какое значение имеет в этом процессе реализации и действия Конституции понятие конституционализации, которое начало употребляться в юридической науке постсоветского пространства относительно недавно?

Некоторые авторы считают явление, фиксирующее воплощение опыта реализации Конституции в юридическую практику, конституционализацией [2; 106].

Представители научного сообщества дальнего зарубежья рассматривают конституционализацию права и, в частности, уголовно-правового и уголовно-процессуального регулирования как усиление контроля Конституции над уголовными делами в результате обогащения конституционных принципов и диверсификации проверок конституционности. Все органы, контролирующие, разрабатывающие и применяющие нормы уголовного права и процесса, посредством обмена своими компетенциями и обмена своими доктринами, вносят свой вклад в развитие уголовно-процессуального законодательства, соответствующего Конституции. Кроме того, хотя конституционализация является частью продвижения Конституции, она, прежде всего, служит «узакониванию» самих уголовных дел [3].

\* Автор-корреспондент. E-mail: a.rakhmetulin@gmail.com