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Evaluation categories in the criminal law of the Republic of Kazakhstan

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Abstract

Present article analyses such legal phenomenon as evaluation categories, determines its importance in law in general and in criminal law in particular. The research was based on the general academic dialectical method of cognition, which involves the study of legal concepts in their development and interdependence. As a result, in assessing the categories of circumstances precluding the criminality of the act, the opinion of the subject of criminal law is also taken into account. In conclusion, the evaluation categories in criminal law are the norms of the concept (lexical units) used in drafting the norms.

Keywords: Criminal Law, Legislation, Evaluative Concepts.

Categorías de evaluación en el derecho penal de la República De Kazajstán

Resumen

El presente artículo analiza fenómenos legales como las categorías de evaluación, determina su importancia en el derecho en general y en el derecho penal en particular. La investigación se basó en el método dialéctico académico general de la cognición, que implica el estudio de conceptos legales en su desarrollo e interdependencia. Como resultado, al

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evaluar las categorías de circunstancias que excluyen la criminalidad del acto, la opinión del sujeto del derecho penal también se tiene en cuenta. En conclusión, las categorías de evaluación en el derecho penal son las normas del concepto (unidades léxicas) utilizadas en la redacción de las normas.

Palabras clave: Derecho Penal, Legislación, Conceptos Evaluativos.

1. INTRODUCTION

It is a common understanding that the law as a form of regulation consists in certain constructions referred to as legal norms. In turn, legal norms representing a particular law establish certain rules of conduct. The legal norm is the basic cell of law, it is the elementary legal system. Law cannot exist nor can it be explained outside its normative reality. Within the contents of any legal norm, a certain conscious representation of the legislature is stored regarding the possible conduct of the subjects participating in social relations. It is known, that legal norm has its own structure, which includes hypothesis, disposition and sanction. The hypothesis is part of the legal norm, which contains the condition of its implementation. Disposition of the norm in a generalized form describes (fixes) prohibited type of socially dangerous act, recognized as a crime, determined with varying degrees of accuracy and clarity of its main and essential objective-subjective features. Sanction is part of a legal norm, which indicates the legal consequences: negative or positive. In criminal and administrative law, negative sanctions are formulated as a type and measure of punishment. According to Semenescu and Frîntu (2016), the characteristic features of the legal norm are:

1. The legal norm is general and impersonal – legal norm prescribes conduct, a behavior standard, designed for a generic topic;

2. Legal norm has a typical character – this feature comes from the general character of the rule of law.

3. Legal norm involves an intersubjective relation.

4. Legal norm is compulsory – legal rule contains provisions which are not left to the free will of the subject;

The criminal legal norm, including the one with a blanket disposition, is the basis for the solution of many very important theoretical and practical problems of criminal law, in particular, the issues of its sources, the action of the criminal law in time and space, the subject and system of criminal law as a branch of law, the interpretation and application of the law on criminal liability, criminal unlawfulness as an important sign of a crime, etc. The criminal legal norm performs protective, regulatory and preventive functions. The very fact of the existence of criminal legal norm has a positive effect on the behavior of most people and determines their conscious choice of lawful (from the point of view of criminal law) forms and types of such behavior (actions). The main content of the post-Soviet development of Kazakhstan, in the context of political and legal state self-determination, was the evolution from the Republic of Soviets to the presidential Republic. The Institute of the President for the period of its short existence, in terms of historical

standards of development, has always been under the scrutiny of legal scholars, as one of the modern institutions of the modern time.

The legal policy serves as a mechanism for the development of a country, due to the need for interaction between the individual, state and society. The legal system appears as an independent and self-sufficient, preliminary and additional, highly significant and effective factor of social development along with and in interaction with other factors – spiritual, cultural, socio-economic, state and political (Ayupova, & Kusainov, 2013). Kazakhstan's legal policy is aimed at ensuring the supremacy of statute law and also pays special attention to the specification of norms. The law restricting constitutional rights and freedoms is to meet requirements of legal accuracy and predictability of consequences, i.e. its norms must be formulated with sufficient clarity and are based on clear criteria that allow plain distinguishing lawful behavior from unlawful one, excluding the possibility of arbitrary interpretation of the law provisions. Moreover, the main task of the State's legal policy is to ensure compliance of domestic criminal law and its application with international human rights standards and respect for safety. The achievement of this requirement depends on the content of the norms introduced in the sectoral legislation (Khanov et al., 2017). Therefore, it is important to have a common approach to the interpretation of the basic evaluative concepts used in the legislation.

In addition to absolutely certain requirements, the subjects of law-making activity place an evaluative element in the structure of the corresponding norm, the content of this element they leave open. Law-making body entrusts the law executor to determine the content of such

evaluative element. This results in the subjectivity in the content of the norm on the law executor part in the course of its implementation. At the same time, the more the legal norm includes evaluative formulations, the less determined the content of the norm in the text of the regulatory legal act. According to Beliayeva (2013), in view of evaluative concepts being vague in their logical nature, they allow covering a wide range of circumstances of reality, which the legislator, as a rule, is not able to accurately define in relation to all cases of action of the legal norm. Taking these circumstances into account in the framework of individual sub-normative regulation of social relations is often necessary for the successful implementation of the objectives of criminal law. However, the unjustified and excessive amount of evaluative concepts in normative acts complicates the interpretation and the process of law enforcement and thus poses a risk of subjectivity.

The more extensive the shadow area of the law, the more freely the subjects of legal relations can interpret it and the greater the possibility that they will not behave in accordance with the objectives of the law. Although the subject of legal construction can never achieve the ideal situation, when there is no disagreement about the meaning of a term, one needs to achieve much more concretization (Antonian, 2012). Evaluative concepts include the most general features of a certain concept which are intended by a legislator. The concretization of the evaluative indicator can be compared with the interpretation of the criminal law, that is, the explanation of its meaning in terms of the content of the evaluative indicator (Akhmedov, 2012). The core of the evaluation categories is that their meaning is defined within the specific actual situation in the case (crime). The content of the category, in contrast to the concept, lacks a

logical connection between the specific object (actual circumstances of the case) and the legal norm. In the evaluation category, the legislator only offers a possible framework for the discretion of the law executor.

As states Kanubrikov (2015), breach of the principles of the criminal law is not necessarily related to the incompetence of the practitioners. In some cases, the breaches stem from problems at the legislative level (when law includes evaluative indicators or categories). Domestic scientific literature describes a large number of types of evaluative indicators. Qualification of crimes is directly influenced by the actual (absolute) and relative (conditional) indicators. The first type cannot be formalized, described by reference to the extent of the damage, method, etc. For this type of evaluative concepts Kuznetsova (2007) offers rules of qualification of offences: 1) During their interpretation one should proceed from the fact that the character of public danger defines criminal law, calling the generic, specific and direct objects of the offense, characteristics of the victim, the contents of damage to objects and victims, intent, motive and purpose; 2) executor of law, specificities the generalized indicators according to the degree of danger of the elements of an offense depending on the situational circumstances of the case, measuring the extent of damage, time, place, crime situation; 3) when specifying the degree of public danger of the elements of offence with evaluative indicators it is essential not to go beyond the scope of the category of offence and character of crime danger, that is, beyond the object, subject, victim, damage content, intentional form of guilt, motives and goals of the offence; 4) the description of the content of the damage, as in all other crimes, is performed by legislator, so the moral damage is assessed by objective criteria, and not by subjective, emotional

representations of a victim; 5) in order to avoid qualification errors in the application of norms with evaluative indicators, the emphasis is on the legislative formulation of specific criminal elements; 6) if the criminal legal norm contains the word illegal, it means its blanket nature; 7) when disclosing evaluative indicators it is necessary to apply systematic interpretation, comparing such indicators with the same or close terms of Criminal Code, other sectors of the law, by-laws; 8) in case of conflict of norms of the Federal legislation in the process of qualification, the preference is given not to the criminal legal norms that follow from the principle of humanism and the criminal procedure law on interpretation of inherent contradictions in favor of the defendant.

The criminal law has two purposes – as a rule of conduct, it gives notice to the ordinary citizen to conform his conduct to the requirements of the law; thus, the principle of legality requires clarity in the statement of the law. The criminal law, as a rule of adjudication, on the other hand, is directed to the professionals; thus, for simplicity reason, it uses certain terms of art which have several preconceptions and intricacies. Certainly, the general part of the criminal law is drafted in a manner an ordinary person may not understand. However, the special part of the criminal law is clear more often than not. The Special Part of the Criminal Code focuses on the rules of conduct while the General Part deals with general rules applicable to all offences including rules of adjudication; but their areas of focus are not mutually exclusive (Assefa, 2018). Criminal law, the subject and method of criminal law has its own specifics that differ from other branches of law. Therefore, the definition of the concept and characteristics of evaluative indicators in the general theory of law, as well as in other sectoral legal sciences may not always be applicable in criminal

law. Consequently, criminal law, manifested in a particular evaluative indicator, is interpreted differently in each case (Akhmedov, 2012).

The individuals to whom the norms are addressed and whose behavior is to be modified may be termed agents and those who benefit from the modified behavior of the agents may be termed beneficiaries. Determination of who are agents and who beneficiaries should be made in light of the functions of the legal system. One of the law's primary functions is to induce agents to behave in a way which will bring about a socially desirable state of affairs. There are two strategies through which the policymaker can fulfill this function. One method is to change the preferences of individuals in ways that will bring about desirable behavior. The other strategy consists of changing the payoffs attached to behavior in a way that will lead the agent to behave in a socially desirable manner (Harel, 1994). In order for the law to be applied, it is necessary that the law should be interpreted. It is this conception of interpretation that had taken shape and meaning in the past three centuries. This is further assisted by a growing belief that because the courts also define the object of interpretation, they influence the content of the law through interpretation more than the lawmaker does. Consequently, because the interpretation process defines the outcome of the case, there are differing opinions on the purpose and method of interpretation. Interpretation of the criminal law is a dialogue between the judge and the text of the law; this dialogue between the judge and the text of the law is influenced by a host of factors beyond the mechanical methods of interpretation (Assefa, 2018).

As believes Weisberg (2003), various phenomena that can be called social norms surely influence crime and the criminal law, and criminal law

scholarship surely benefits from attending to these phenomena in their various concrete forms-indeed, that is what much of criminology is all about. The study of crime and criminal law offers a tempting entanglement of moral, psychological, and instrumental understandings of behavior and hence a tempting opportunity for interdisciplinary-sounding or dialectical-sounding insights. Criminal law scholars have theorized a range of principles with the purpose of directing the choice of criminalization. Among these are the principles that: criminal law should be used only to prevent harm to others; criminal law should target only conduct that is substantially wrongful; punishment should be proportionate to the seriousness of the wrongdoing, and that criminal law should be resorted to as an ultima ratio (Federico, 2014). The most noteworthy in this case is the criminal law, and the concept of the evaluation categories used in it is in the focus of the present study.

2. METHODOLOGY

The research was based on the general academic dialectical method of cognition, which involves the study of legal concepts in their development and interdependence. Dialectics includes the theory of the development of the material world and at the same time the theory and logic of knowledge. As part of the use of the dialectical method, the regularities of the development of scientific thought about the evaluation categories in criminal law were revealed. In the course of this study such research methods were also used: general logical (analysis and synthesis, induction and deduction, generalization, analogy, abstraction); methods of

theoretical research applied at the theoretical level of research (idealization, formalization, axiomatic method, hypothetical-deductive method, etc.); methods of systematization of scientific knowledge (typology, classification); methods of empirical research applied at the empirical level of research (observation, description, comparison, etc.). Besides, such methods as comparative-legal, system-structural, comparative, historical, formal-logical, statistical, and sociological and others were applied. The method of critical analysis took a special place in the study. As a result of the use of the above methods of scientific knowledge, the study of different views on the concept of evaluation categories was conducted, was identified the most common of their properties, an attempt to formulate the author's definition was made. The results of the research presented in this article can be used in the creation of regulatory acts and practice of the system of law enforcement and judicial bodies, as well as in the educational process of legal professions.

3. RESULTS AND DISCUSSION

Considering the role of evaluation categories in the legal norms, it should be noted that no matter how specific and concrete one may want to be when drafting the norms, evaluation categories cannot be avoided completely. This provision is dictated by the requirements, rules and methods that are complied with in the legislation and together constitute a legal technique. In addition, these conditions also form the requirements to the legal norm, which include:

- Obligatory nature;

- Permanent or temporary nature;

- Intended for multiple uses;

- The prevalence at the personal indefinite range of participants;

- Limited range of regulated social relations.

Meanwhile, some authors believe that the use of evaluative indicators is highly undesirable, since they blur the boundaries of the wrongful act, create amorphous boundaries and can cause mistakes in the assessment by the executor of law and can be used in questionable situations in favor of the release of a perpetrator from criminal liability (Akhmedov, 2012; Situmorang, 2019). In contrast to this opinion, Zhinkina (2014) believes that it is not always possible to explicitly specify the ev4aluative indicators in the law or subordinate act. The use of evaluative indicators in the law-making sphere contributes to the legislative economy. They contribute to the reduction of the textual volume of the regulatory legal act, and at the same time cover all the variety of relations regulated by law, allow executor of law to take into account the social situation, circumstances and features of each case.

In our opinion, without the use of evaluation categories, it is impossible to construct legal norms that would cover an indefinite range of participants or possible circumstances and consequences. For example, if the law specifies a pistol as a qualifying offense attribute, the gun used will not be covered by this norm. Conversely, the use of more general term

weapon in this example allows the norm to cover both the pistol and the gun. Another example can be given when the norm refers to the non-fulfillment of responsibilities by the parent, in which case the non-fulfillment of the assigned child-rearing responsibilities by the legal representative, guardians or tutor is excluded. The more specific relationships are in the legal norm, the smaller range of its impact and application. According to Petrakov (2009), it is impossible to foresee in advance all possible situations in legal practice - if to set out the norms of the law only in absolutely certain concepts, the law executer eventually will face situations not provided by the law. Over time, the number of such situations will increase. In this regard, the law executer will not be able to resolve such a situation unregulated by the legal norm.

It is quite difficult, and to some extent almost impossible, to formulate a single rule on the relationship in the text of the law of evaluation categories and absolutely certain requirements, since the relations in need of legal regulation are individual, which requires an individual approach to rule-setting. It is also worth mentioning that some criminal legal norms are of a blanket nature. Often, evaluation criteria are formulated in another regulatory act and executor of the law, taking into account the peculiarities of a particular event, must assess the actual situation and specify the presence of certain indicators. Especially clearly this is manifested with introduced new formulations of criminal offenses. A typical example is a criminal liability for illegal use of insider information since the main evaluative indicators were formulated not in the context of criminal, but other legislation. When drafting legal norms, it is necessary to exclude the possibility of free interpretation of evaluation categories, since such norms will not be applied uniformly. Interpretation

exacerbates the problem of compliance since one formulation of the rule is actually replaced by another (Bix, 2005). In the doctrine of legal realism, there was a specific statement that uncertainty of ordinary language follows uncertainty of legal norms. With such arguments, it is necessary to pay attention to the semantic meaning of linguistic units. The legislative norms should use such words and concepts that, together with others used in the construction of the legal norm, form a stable regulatory position.

In the history of criminal law, the subject of evaluative concepts in criminal law was approached as early as in the 1960s, but still remains of current interest. This is evidenced by a number of publications in recent years, including monographic works. However, there is still no consensus on what to call evaluative indicators, concepts or categories, despite the fact that the legal science has already considered the relationship of concepts related to the interpretation of evaluative provisions in the law. We believe that such language units should be called evaluative, because it is consistent with the provisions of other sectoral regulations and legal doctrine in general. In particular, the criminal procedure principle states that the judge, prosecutor, and investigator evaluate the evidence on internal conviction (article 25 of the code of criminal procedure). The term evaluative is already a characterizing property, so the term indicator applied to the above adjective may sound like a tautology. Since indicator refers to an attribute, a sign, a feature by which help in recognizing a thing, it can be interpreted as distinctive features.

The use of the term concept, which means the unity of essential properties, connections and relations of objects or phenomena reflected in thinking, seems to be the most appropriate, but in relation to the evaluative

and indefinite property, the term concept appears more static and concretized. However, we tend to use the term category, which is the most general or special a priori definition. This term is most consistent with the role of evaluation categories in criminal law, i.e. for application to an indefinite range of events that are subject to legal regulation. Since the aim of our study is to determine the evaluation categories used in criminal law, we should mention the opinions of various authors on this issue. One of the first definitions of the evaluative indicators was formulated by Vilnianskiy (1956), which he interpreted as the opportunity of free evaluation of facts, considering individual features. The presented definition is very broad and does not reflect the essence of the phenomenon being defined. In particular, the author mentions a free assessment of the facts. At the same time, one of the basic legal principles – the principle of legality – was not considered. In Kazakhstan, this principle has its origins in the Article 4 of the Constitution of the Republic of Kazakhstan, which stipulates that the current law in the Republic of Kazakhstan is the norms of the Constitution, relevant laws, other regulative legal acts, international treaty and other obligations of the Republic, as well as regulatory resolutions of the Constitutional Council and the Supreme Court of the Republic.

Thus, the principle of legality, in a broad sense, assumes that all law enforcement activities must comply with legal norms, including the fact that the use of evaluation categories must meet the requirements of legal norms. In this situation, in the presence of evaluative indicators and a certain variability, complete freedom of assessment of the facts is not excluded. As believes Kanubrikov (2015), the use of evaluative concepts is inevitable, but their large-scale consolidation in the norms of criminal

law results in a breach of the principles of criminal law due to excessive discretion of persons applying criminal law. To the earliest definition belongs the one of by Brainin: evaluative concepts are those not specified by a legislator and must be specified when applying the criminal law (Brainin, 1967). Based on the definition proposed above, it can be assumed that the evaluation category refers to a far broad range of concepts. So, for example, the deriving a benefit is determined in the application of the norm, that is, the qualification of the act. The benefit can be both materials, in the form of receiving financial resources or material values, and non-material, in the form of acquisition of the rights and advantages in own favor and even in favor of the third parties. It stems from the nature of criminal legal norm which structure differs in the high level of ambiguity. This method of presentation of a criminal legal norm, in contrast to the casuistic one, enable to embrace a wider range of possible relationships, allows it to be universal. In this regard, the characteristic of evaluation categories proposed does not reflect their exclusive properties, but rather refers to all criminal legal norms.

Kashanina (1974) proposed a general legal definition of evaluative concepts: this is an expressed in the legal norm provision, which sets the most common indicators, properties, qualities, connections and relations of various objects, phenomena, actions, processes, not explained in detail by a legislator so that it is concretized through evaluation in the process of application of law and allows to carry out within the limits of the community set in it an individual sub-normative regulation of social relations. The proposed definition focuses on the fact that the legislator, when using evaluation categories, aims to concretize the assessment in the direct definition. However, this opinion is contrary to the basics of legal

technique, according to which the main aim is accuracy and clarity of the content of legal norms. It seems that focus must be put on the impossibility of specification, rather than on the desire to concretize under certain conditions. Naumov (1973) interprets the term evaluative concepts in the criminal legal norms as the indicators of the offense, which are not defined by the law or other legal act, but by the legal awareness of the individual who applies the relevant legal norm, based on the specific circumstances of the case.

First, in this definition, the author assumes the use of evaluation categories only in the context of the offense, excluding the norms of the general part of the criminal law, which applies to its special part. Secondly, the presented definition excludes the subordination of evaluative concepts to the law or other normative act, which contradicts the principle of legality, which we previously discussed. On the other hand, if these concepts are contained in the legal norm, they are the law then, that is, its content. Therefore, it is not exactly accurate to declare the absence of dependence between evaluative concepts and the law, it does not contribute to a clear definition of the concepts, but, on the contrary, can be misleading. The content of evaluative concepts Kudriavtsev (2001) determines to a large extent by the legal awareness of a lawyer applying the criminal law, with due regard for the requirements of Criminal Code and circumstances of the case. At the same time, we believe that legal awareness of a lawyer should not play a key role in the application of evaluation categories. One of the objectives of the law-making is to ensure the uniform practice of its application and the level of legal awareness of executor of law should not affect the quality of the legislation.

Pitetskiy (1974) presents evaluative concepts as the concepts which are directly revealed only in the process of applying legal norms within the limits fixed by law the community, by assessing specific circumstances of each case, based on the legal awareness of a person applying the law. At first glance, the above definition contains all the characteristics inherent in the evaluative concepts and reveals their principles, but the author in the very basis emphasizes the legal awareness of the subject applying the law, which we have expressed our opinion about. A similar position on the key role of the law executor was chosen by Stepaniuk (2007), he believes that the evaluative concept of the criminal law is a concept contained in the criminal legal norm and concretized by law executor in the criminal law assessment of the facts determining the application of the criminal legal norm. Closer to the true understanding of this concept was Cherepanova (2009), which understands the evaluative concept as that encompassing both the relatively permanent and variable characteristics, where the content of the latter is not explicitly enshrined in law, and their understanding and concretization take place in the process of law enforcement activities.

In this case, the author has shifted away from the key role of law executor and his/her legal awareness, and focused on law enforcement, which is the most acceptable interpretation of this legal phenomenon. At the same time, stating the indicators, the author of the above definition distinguishes between relatively constant and variable ones, thereby complementing the uncertainty in particular on the question: how much should the indicator be relatively definite in order not to become a variable or to be constant? Such a definition, in our view, cannot be accepted as the basis for a uniform understanding of the evaluation categories in criminal

law. An attempt, taken by Akhmedov (2012), to summarize the many previously formed opinions, led to the following definition: evaluative indicators in criminal law are named, but undetectable by criminal law concepts used in the drafting of criminal legal norms, in the description of the indicators of the offences (affecting the qualification of a particular crime), understanding (interpretation, definition of boundaries) by the law executor, independently, in each case based on all the circumstances of the case. This definition also contains the elements that have been subjected to scientific criticism above, namely the role of executor of law, limitation by the elements of the offense, etc. The stated pluralism of opinions testifies to the inexhaustible interest in evaluative concepts in criminal law. With all the diversity of opinions, it is still possible to identify common elements inherent in many authors, which include:

- The presence of criminal law in the norm;

- Wide content of the term;

- The uncertainty of limits and boundaries;

- Lack of interpretation of the term in criminal law;

- Influence of external factors on the meaningful evaluation of the term;

- The key role of law executor;

- Their meaning for the qualification of the act.

Many of the identified common elements of the evaluation categories can be accepted, but some are questionable. Thus, the value of evaluation categories only for the qualification of a criminal act is too narrow for this substance. Evaluation categories are also used in the rules on the imposition of punishment: punishment must be imposed that is necessary and sufficient (Part 2 of Article 52 of the Criminal Code). In this regard, it should be noted that the evaluative concepts are used in the criminal law not only for the qualification of the act. Many authors tend to think about the key role of the law executor, to which referred even a court, prosecutor, investigator. However, in assessing the categories of circumstances precluding the criminality of the act, the opinion of the subject of criminal law is also taken into account. Thus, the exclusion of certain subjects of criminal law relations is not entirely justified.

4. CONCLUSION

In view of evaluative concepts being vague in their logical nature, they allow covering a wide range of circumstances of reality, which the legislator, as a rule, is not able to accurately define in relation to all cases of action of the legal norm. Without the use of evaluation categories, however, it is impossible to construct legal norms that would cover an indefinite range of participants or possible circumstances and consequences. In this work, we analyzed the term of evaluative categories and examined different approaches of this and related terms made by legal scholars. On the basis of the conducted research we came to the conclusion that the evaluation categories in criminal law are the norms of

the concept (lexical units) used in the drafting the norms, the legal meaning of which can be determined only in conjunction with the internal unity of disposition and external circumstances of the criminal law relations. Since it is nearly impossible to foresee all situations in the legal practice, the evaluative concepts in drafting legal norms play an important role, giving space for observing any type of offense.

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