

CATEGORY OF GUILT IN CRIMINAL LAW: ECONOMIC APPROACH

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The subject of the paper is guilt as criminal legal category.

The main aim of the paper is to confirm or disprove the hypothesis that there is a need for risk management in order to prevent crime.

The description of methodology. The author uses economic approach and the theory of rational choice as well as the dialectic and formal-legal methodology.

The main results and scope of their application. The greater the probability of socially dangerous consequences of actions, the greater the risk, the greater the degree of guilt of the subject and the degree of danger of the crime. In criminalization the risks should be optimally distributed between the state (installs criminal prohibitions) and the citizens (complying with those prohibitions), as well as between the potential offender and the victim. It is necessary to quantify the risk of socially dangerous consequences (for example, as a percentage) for each form of guilt. This will make it possible to streamline and develop forms of guilt, to correlate specific types of guilt with specific crimes in terms of the risks that the crime carries. New forms of guilt, in particular criminal ignorance, need to be introduced. Unlike negligence, which is difficult to control, ignorance, as well as competence, can be fully controlled. It is necessary to take into account the guilt of the victim, who by his behavior contributed to the crime. If the victim has not taken all precautions (the more provoked the offender) – he must share the overall result, bear the risk of socially dangerous consequences. If there is a violation of the rules of conduct by the offender and the victim, the court should have the right to substantially mitigate the punishment or to refuse to apply it at all, taking into account the nature and extent of the violations committed by each

party. For example, with regard to crimes of minor gravity when the victim provoking a crime, failure to take precautions should provide for mandatory exemption from criminal liability with compensation for harm in civil law. Premeditated intent seriously complicates the disclosure of crimes. This intent should be seen as a basis for more severe sanctions. The results of research may be used as the basis of correction of the criminal legislation.

It is concluded that any form of guilt in any legal system is based on an assessment of the risks of negative consequences.

1. Introduction

It is proposed in the scientific literature to take into account the economic approach when considering the Institute of guilt [1, p. 199-210]. According to R. Posner, the concept of intent used to determine one of the forms of guilt in the Anglo-American criminal law performs three economic functions: identification of net forced transfers, assessment of the probability of detention and conviction, determination of the effectiveness (economic feasibility) of criminal punishment as a means of controlling undesirable behavior [2, p. 1221].

Within the framework of the above functions, almost all forms of guilt are realized in both Anglo-American and Romano-German law, which makes an economic approach to their study very productive. Guilt is an inherent feature of the crime, and specific forms of guilt are used to distinguish between criminal and non-criminal acts. And in this regard, guilt really helps to identify net forced transfers, which include crimes.

The doctrine of guilt is also linked with the effectiveness of crime prevention and the severity of criminal punishment. So, the difference in social risk between intentional and reckless acts due to different probability of causing harmful effects [3, p. 22]. The more a person acts thoughtfully, the more likely to achieve a criminal result and the more difficult it is for law enforcement agencies to detect the committed act. Therefore, in order to deter such criminals, they should be punished more strictly for intentional infliction, as well as for infliction with a high degree of recklessness, while unintentional infliction, committing an act in a state of passion may be punished relatively less severely [2, p. 1222]. Furthermore, the elasticity of the suggestion of intentional and negligent acts varies greatly depending on the severity of

the punishment. Thus, it is true that the degree of criminality of the situation in careless crimes is much higher than in intentional crimes. In careless, often situational acts, the consequences do not in all cases depend on the will and "quality" of the subject's behavior. In intentional crimes, the threat of punishment is a more serious contraction [4, p. 18-19, 24, 31]. Hence, the threat of punishment is less effective against reckless acts, less reduces their supply.

Ignoring the institution of guilt significantly reduces the effectiveness of criminal repression. For example, if a person makes a mistake when trying to commit an act prohibited by criminal law (in particular, murder with the help of a voodoo doll) and his punishment does not prevent any crime in reality, the use of criminal repression will not be socially useful [2, p. 1218]. It does not require special evidence and the thesis that the use of criminal punishment without taking into account the form of guilt will also significantly reduce the effectiveness of social exchange of relevant anti-blogs. Since criminal penalties are differentiated, a differentiated assessment of the crimes committed is required, and the institution of guilt plays an important role in this case.

The normative and doctrinal understanding of guilt is, for the most part, quite optimal. At the same time, there are many promising areas for improving this institution, increasing its efficiency, including taking into account the theory of rational choice and economic approach.

2. Risk management for crime prevention.

In fact, any form of guilt in any legal system is based on an assessment of the risks of negative consequences. For example, in the Russian criminal law, the presence of direct intent suggests that a person foresees the possibility or inevitability of the onset of socially dangerous consequences [5-6], whereas with indirect intent the offender foresees only the possibility of their occurrence [7-8], with frivolity a person relies on certain circumstances (albeit presumptuous), which will allow to avoid the onset of consequences [9-10]. In case of negligence, the subject does not know at all that there is a risk of these consequences [11-12]. As the researchers note, the person exhibiting negligence, imposes excessive risk on the other [1, p. 456]. That is, the greater the probability of socially dangerous consequences due to the Commission of the act, the greater the risk, the greater the degree of guilt of the subject (respectively, and the degree of danger of the crime).

In economic theory, there is a whole area devoted to risk management. The knowledge accumulated in it may well be used in determining the characteristics of specific forms of guilt. The task is not to eliminate risks at all, but to achieve an effective level of compliance with precautions, an effective level of risk [13, p. 197]. The legislator and law enforcement officer are able to take into account these circumstances in the development of forms of guilt, their features and the implementation of the relevant norms of criminal law.

In the process of criminalization, the risks should be optimally distributed between: 1) the subject establishing the criminal law prohibition, carrying out the application of criminal repression (the state), and the subject, which will comply with this prohibition (the citizen); 2) between the potential offender and the victim.

In particular, when establishing signs of forms of guilt, the individual may be exposed to risks associated with the need to comply with additional precautionary measures in order to avoid violation of the criminal prohibition. Thus, if the criminal law requires awareness of the age of the victim, the potential offender will not have incentives to find out the necessary information, thereby avoiding the Commission of such acts [14, p. 11. 27; 2, p. 4. 1222]. If the law in establishing a criminal ban will be based on the need to observe additional precautions in behavior, which involves finding out the age of the victim, such a rule will encourage a potential offender to comply with the established rules of conduct, to be reinsured when making a decision.

The approach proposed above may be applied, inter alia, in imposing a criminal prohibition on sexual intercourse with a person who has not reached the minimum age established by law. In this case, criminal repression can be applied regardless of the age of the victim, which will help to prevent the Commission of such acts at a low cost of preventive measures on the part of a respectable citizen, who is quite capable of more carefully choosing a sexual partner. The same is true of the prohibition of the sale of alcohol to adolescents.

By creating such criminal prohibitions, we, on the one hand, require a person to be more careful in behavior, reducing the standards of proof of the presence of the crime (in the above example, without

requiring awareness of the age of the victim), on the other hand, increase the degree of protection of society, more effectively preventing the Commission of crimes.

Of considerable interest to criminal law is the quantitative calculation of the degree of risk of socially dangerous consequences (for example, in percentage terms) in relation to each form of guilt, its variety, which will: 1) streamline the differentiation of forms of guilt, to develop it in the future, not limited to today's two main forms (intent and negligence); 2) with proper scientific justification "bind" a particular species of guilt to the specific offenses from the point of view of the risks incurred by the Commission of a given act, which will allow more effectively to prevent it. For example, in relation to direct intent, the risk of consequences may be 95-100%, in relation to indirect intent-50-95%, in relation to frivolity-1-49% (with frivolity, although a person anticipates the possibility of events, but presumptuously expects that they will not occur; therefore, it evaluates the probability less than 50: 50), in respect of negligence – 0,1-1%. If the risk of an event is less than 0.1% or the average value reflecting its random nature, it can be concluded that there is an incident. Of course, the proposed risk scale requires additional arguments, including the use of probability theory.

In the process of criminalization, we determine the form of guilt, assessing adequately the degree of risk, taking into account the value of the object, the specifics of the objective side and the subject of the crime. So, if we are talking about human life, it is quite adequate to ban the infliction of death not only intentionally, but also by negligence (including the presence of both frivolity and negligence). Even the most minimal risk in case of threat to human life (more than 0.1 %) should be excluded. If it is a question of causing property damage, in this case it is possible to allow a greater risk of consequences (more than 49%), criminalizing acts committed intentionally.

3. The introduction of new forms of guilt.

The urgent task is to update the doctrine of wine, taking into account the growing complexity of social relations, scientific and technological progress. Risk management assumes that the guilt model should be adequate to the relationships to which it is applied. Otherwise, the effectiveness of this institution will naturally decrease. In this regard, proposals for the use of new forms of guilt in criminal law may be considered.

3.1. Criminal ignorance.

One promising idea is the use of the form of guilt in the form of criminal ignorance. This ignorance presupposes that the person has not acquired the knowledge that he should have and had the opportunity to acquire, and as a result has committed a crime.

Unlike negligence, which is quite difficult to control, ignorance, as well as competence, are subject to full control! Criminal ignorance is reasonably characterized as having an extreme social danger, taking into account the increased risk of consequences. M. S. Greenberg, comparing ignorance and negligence, wrote: "if negligence is a situational phenomenon, to a certain extent accidental (in the same situation of confusion, loss of vigilance could not be), then ignorance leads to miscalculation with inevitability-sooner or later the events in question should have occurred" [15, p. 77]. In the consideration of this question should consider not only the ignorance of the causer, but the guilt of other persons for the acquisition of social engineering and other systems such unsuitable personnel [15, p. 77, 79].

How effectively does the state counteract the Commission of crimes if it does not take into account the above arguments? We illustrate the question with a hypothetical example. The violations in the work of socio-technical systems due to the irregularity of its operation, with the result that people died. The rules were violated because of the incompetence of staff who did not have the knowledge necessary to make a decision. There is no reason to impute negligence on the part of the staff, given at least the fact that they were objectively unable to foresee the consequences. At the same time, persons who admitted incompetent specialists to the management of the system will also not be criminally liable - their actions, taking into account the modern understanding of guilt and the absence of the category of careless co-infliction in the criminal law, will not be recognized as criminal. Thus, it was refused to initiate criminal proceedings against the person responsible for the organization of flights, based on the materials of checking the report of the crime, the signs of which are provided for in article 351 of the criminal code, in connection with the accident of the aircraft. The causes of the accident were, among other things, the failure to prevent violations in the acquisition of the crew of an air weather scout; the lack of integrity and

personal indiscipline, expressed in the transfer of control of the aircraft to a person who does not have access to flights on this type of aircraft; the performance of aerobatics by a crew that does not have the necessary theoretical knowledge and practical skills. Another example is the post of acting commander of the motorized rifle platoon was appointed Lieutenant of the medical service, who did not have sufficient knowledge and was incompetent to perform the duties of the commander of the motorized rifle platoon, including during combat firing and company tactical exercises. In this case, the Lieutenant was admitted to the company's tactical exercises without conducting control exercises and classes of the unit. In the course of combat firing after receiving the command to check the weapon for discharge from the personnel due to its incompetence and lack of necessary knowledge in the device of weapons and the procedure for arming and discharging weapons is not convinced of the discharge of the machine gun on the BTR-e 80. Private J., being the gunner of the armored personnel carrier 80, after ceasefire the weapon didn't discharge, wasn't convinced of a discharge of the weapon and didn't report to the commander of office about a discharge of the weapon, i.e. broke rules of the weapon handling. As a result of the dismantling of the gun to the victim due to the accidental discharge was caused serious bodily harm. Criminal case was brought only against the gunner of the armored personnel carrier Zh. The risks associated with omissions in the regulation of the process of management of the social engineering system, in this case, are assigned exclusively to the company.

Even in view of the fact that criminal repression is not a panacea and a means to solve the problem, the position of the legislator regarding the criminalization of ignorance seems to be ineffective. There is virtually no negative incentive for the relevant actors to avoid causing socially dangerous consequences. However, the criminal law should encourage cooperative behaviour by all participants in public relations to prevent such acts.

In this regard, it is necessary to provide not only a differentiated application of criminal repression, taking into account the signs of ignorance, including assessing the probability of the risk of consequences (apparently, it is close to the probability of consequences with indirect intent), but also the possibility of using criminal repression against entities that allowed incompetent people to the relevant activities.

Similar rules should be applied both to the persons involved in the operation of social engineering systems and to the subjects making management decisions in the authorities of all levels, organizations controlled by the state, local self-government (first of all, senior officials, top managers).

3.2. It is necessary to take into account the guilt of the victim, who by his behavior contributed to the Commission of the crime. As a result of the application of the economic approach in tort law, it was proved that the strategy of mutual precaution (Bilateral Precaution) is more productive, because it forces both the perpetrator and the victim to take all necessary measures to avoid causing harm [1, p. 204-205, 212]. It is ineffective to impose liability only on the guilty person if the victim has not taken the necessary precautions [13, p. 11]. 293-294].

In domestic science, a proposal has already been made to take into account the guilt of the victim, his victim behavior within the concept of mutual guilt in the mutual infliction of harm or damage [3, p.4]. In addition, the sentencing and provocation of the victim should be taken into account. This measure will encourage the potential victim not to commit provocative actions, as it will take into account the greater likelihood of becoming a victim in view of mitigating the criminal punishment threatening the potential offender [14, p. 11]. 31-32]. Similarly, the issue should be resolved in the case where the victim committed violations of the established rules, which led to the Commission of a negligent act and causing him the same harm or damage (for example, both the victim and the driver of the car violated the traffic rules, which resulted in the negligent infliction of serious harm to the health of the victim).

If the victim has not taken all precautions, the more provoked the offender-he must share the overall result, bear the risk of socially dangerous consequences. If there is a violation of the established rules of conduct on both sides, the court should have the right to significantly reduce the amount of criminal repression used or to refuse to use it at all, taking into account the nature and extent of the violations committed by each party. For example, with regard to crimes of minor gravity in the provocation of a crime, failure to take precautions for victims may provide for mandatory exemption from criminal liability with compensation for harm in civil law. With regard to other categories of crimes, at the discretion of the court in such a situation, a significant reduction of criminal punishment is possible.

3.3. Premeditated intent.

In the criminal law of Russia, in contrast to a number of foreign countries, it does not matter when there was intent to commit a crime – directly in front of him or long before the event. That is actually equated in terms of possible punishment of the person who committed the crime spontaneously, and criminals who have long prepared the act, pondering the possible consequences, ways to avoid criminal liability.

In foreign law there are other approaches to solving the problem. For example, in France, premeditated murder (art .221-3 of the criminal code of France) is punishable by life imprisonment, while simple murder without premeditated intent (221-1) entails the application of a criminal sentence of 30 years. It seems that foreign criminal law, in which premeditated intent increases criminal liability, is more effective.

It is obvious that the chances of solving a crime differ significantly not in favor of acts committed with premeditated intent. According To the definition of R. Posner, criminal intent is the intention to obtain a prohibited object by investing resources in achieving this goal [2, p. 1221]. It is obvious that these "investments" (in the form of time spent on preparation for a crime, money, other material resources, etc.) in the model proposed above are not taken into account by the Russian legislator at all, which makes the exchange of punishment for such a crime unequal.

It seems appropriate to differentiate criminal law prohibitions in respect of the most common and most dangerous crimes, taking into account the moment of intent (for example, in respect of murder, serious bodily harm, theft, robbery, robbery), and if there was a premeditated intent - to apply more severe sanctions.

4. Conclusions.

Thus, any form of guilt in any legal system is based on an assessment of the risks of negative consequences. But the directions of improving the doctrine of wine with the help of rational choice theory are not limited to the above problems. The task of the science of criminal law is to change, through an economic approach, the stereotypical perception of guilt as a set of features provided for in the law. The institution of guilt should be used not so much for practical purposes of qualification of crimes, but to improve the efficiency of criminal law regulation through the establishment of optimal criminal law prohibitions.

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