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Definition of the Criminal Legislation and its Correlation with Criminal Law

Based on sound evaluation of scientific points of view in criminal law doctrine the definition of criminal law, criminal legislation and law of crime has been given. Most prominent features to identify correlation of criminal law as field of law and criminal legislation have been pointed out. It was determined that criminal law should be envisaged as system of general effect, formally determined (statutory) rules of behavior which are ensured, guaranteed and protected by state, dealt with providing of public relations protection from criminal offences as well as with regulation of public relations arise with regard to crime committing. Criminal law is defined as law of crime form of existence expressed in regulatory acts of higher juridical force adopted by highest legislative body of power according to relevant procedure and dealt with public relations protection from criminal offences as well as with regulation of public relations arise with regard to crime committing. Criminal legislation consists of Constitution of Ukraine, Criminal code of Ukraine and other legal acts with general effect by parliament consent which dealt with public relations protection from criminal offences as well as with regulation of public relations arise with regard to crime committing. Criminal law and criminal legislation are in correlation as relevant rule of behavior with relevant form of such rule expression (existence). It is possible to imagine a correlation of criminal law and criminal legislation as an interrelationship between a system of forms of criminal law existence expressed in regulatory acts of higher juridical force and a separate form of law of crime existence expressed in regulatory act of higher juridical force adopted by highest legislative body of power according to relevant procedure. Correlation of criminal law and criminal legislation is a correlation of formally (statutory) rules of behavior adopted by state with general effect and could be guaranteed by state power with system of forms of law resulting in existence of regulatory acts of higher juridical force.

Keywords: law; legislation; criminal law; criminal legislation; correlation; form of existence; system of forms.

Problem statement. Despite of multi-faceted fundamental premises un criminal law doctrine researchers are still going back to its study and discussion. For example, a comparison of criminal law and criminal legislative definitions has been analyzed time and again. However to get a clear picture of criminal legislation creation and realization mechanism it is necessary to explore thoroughly a definition of criminal legislation as well as its comparison with criminal law and other criminal legal categories.

Analysis of recent research and publications. On this occasion let it be mentioned that problems of right, law, legislation were studied numerously each of theory of state and law doctrine and of branch legal doctrines. S. Alekseev, Yu. Baulin, I. Kazmin, A. Kolodii, V. Kopeichikov, V. Navrotskyi, V. Nersesyants, V. Opryshko, P. Rabinovich, I. Samoshchenko, O. Skakun, Yu. Tykhomyrov, G. Finnis and others have dedicated their studies to researching of these problems. Nonetheless the question of criminal legislation definition and its comparison with criminal law still has not been examined soundly.

That's why the research of criminal legislation definition and its comparison with criminal law **is the topic of this article.**

Presenting main material. First attempts to understand the law, its variations from laws and certain conclusions on correlation of law with society, individual and state can be found in ancient philosophers' opinions according to which law precedes the positive legislation, is established naturally, and therefore is an objective phenomenon [1, p. 11]. Based on study of nature and content of law, Cicero formulated an important principle of branch law as «pacta sunt servanda» (agreements must be fulfilled) [2, p. 190].

Regarding the current interpretation of «law» definition, it is characterized with various approaches, theories and concepts. Despite the existence of numerous opinions concerning the interpretation of law, often the following approaches are outlined: historical, normativistic, sociological, natural-legal, philosophical, social-cultural, legalistic, integrative etc.

According to opinion of P. Rabinovych, which we consider to be correct, for every case when the definition of «law» is used it is necessary to clarify the context and specific meaning chosen [3, p. 34]. That is why the specificity of criminal legislation and existence of principle of legislative identification of crime, its punishability and other penal consequences (p. 3 of Article 3 of the Criminal Code of Ukraine) determine the necessity to interpret law from the standpoint of normativism concept (theory). Thus special meaning is given to statements of G. Kelzen that law is valuable because it is a rule [4, p. 56]. Still we refrain from denying the importance and correctness of all other approaches (concepts, theories) of legal interpretation and fully agree with the necessity to maintain existence of various concepts and scientific schools.

According to individual interpretation by G. Kelzen law is just a concept created by humanity, fixed/expressed in certain rules (regulations). Having analyzed the jurisprudence theory he proves that it describes legal regulations formed by the acts of human

behavior and applied due to these regulations since the law demands, allows, authorizes but doesn't «teach» [5, p. 29]. Therefore, law must be free from any moral judgments regarding justice and other indistinctive features (features non-relevant to law as the fixed rule of behavior). It results in formulation of «pure theory of law», to be precise – jurisprudence where law is usually taken separately from other juxtaposed social phenomena which, despite affecting its formation (creation) or implementation, still don't reflect the rules of behavior and are not subject to fixation. Taking the abovementioned into account, jurisprudence must be free from psychology, economics, sociology and other sciences. This shapes complex understanding of G. Kelzen's normativism theory of law interpretation according to which law is first and foremost a set of fixed (manifested in form of regulations) behavior rules and without this manifestation these rules may not be recognized as laws.

It allows us also to formulate the definition of «criminal law» which, according to the abovementioned statements, can be described as a system of mandatory, formally established rules that are ensured, guaranteed and protected by the state, ensuring criminal-legal protection of social relations and regulation of relations arising in connection with the crime commission.

In this regard of the utmost importance is not only the subject of criminal law and its tasks but the understanding of criminal law as certain structured complex (system) of interconnected norms with certain external manifestation (fixation). The scope of these rules covers, firstly, protection of social relations from the criminal offences (encroachments) and secondly, regulation of social relations, arising in connection with the crime commission. This regulation may include in particular: establishment of type and scope of punishment, grounds for exemption from criminal liability, grounds for relief from punishment, peculiarities of punishment imposition and essence of legal restrictions imposed on certain individual, opportunity to take other corrective actions etc. it is obvious that range of social relations regulated by the criminal law – just like the range of social relations protected by it – is pretty broad but in general the subject of criminal law and its key tasks are outlined in relevant definitions.

But mentioned subject and tasks separate the criminal law from other branches and general definition of «law».

It means that criminal law must be defined as the set of rules and provisions which are externally manifested and legally fixed, related to protection of social relations from criminal encroachments and regulation of social relations arising in connection with the crime commission.

Differences between law and legislation, even in the context of normativism concept of law interpretation, are obvious. Typical features of any law are: standardized normative consolidation, supreme legal force, peculiarities of legislative procedure, direct or indirect (by higher representative bodies of state power) adoption. Thus, despite the law has certain formal manifestation, it is not always characterized with the supreme legal force, not always generated (adopted) by people or representative body and not always characterized by the specificity of legislative procedure. Undoubtedly we can outline even more distinctions, especially if interpreting law as the higher social phenomenon and highest measure of justice. But we only try to point at the divergent features of law and legislation instead of opposing them and defining their primacy or superiority.

Thus, criminal law is a relevant rule of behavior and criminal legislation – only one of external manifestations of criminal law. Correlation of criminal law and criminal legislation may be presented as correlation of content and form its expression (existence). Legislation is the form (not the only one) of law manifestation. It is obvious that except of legislation there are other statutory orders which may present as manifestation of law. The latter include first and foremost the by-laws and norms of international law which establish certain rules of behavior but are different from laws due to adoption procedure and legal force.

In this respect the definition of criminal legislation (laws on criminal liability) may also be specified by the features of scope of legal regulation of the laws – indicating that criminal legislation (laws on criminal liability) refers to ensuring of legal protection of social relations from criminal encroachments and regulation of social relations arising in connection with the crime commission.

While carrying on the research of issue of correlation between criminal law and criminal legislation, it is necessary to perform the prior identification of the content and features of the «law» definition from the standpoint of state and law. Thus, definition of «legislation» is presented in numerous variations in legal science. In particular, legal encyclopedia presents the interpretation of legislation in different terms:

1. System of Ukrainian laws presented by Verkhovna Rada of Ukraine, comprising the Constitution of Ukraine (1996), constitutional and applicable legislation, international agreements recognized as binding by the parliament.

2. In a broad sense – as a system of laws, other regulatory acts, adopted by Verkhovna Rada of Ukraine and higher bodies of

executive power (decrees of Verkhovna Rada of Ukraine, decrees of the President of Ukraine, decrees and rulings of the Cabinet of Ministers of Ukraine which specify relevant laws and do not contain any contradictions are adopted on the basis of Constitution, ratified international agreements). This is the interpretation of the term «legislation» mentioned in part 3 of Article 21 of the Code of Laws on Labor (ruling of the Constitutional Court of Ukraine dd. July 9, 1998).

3. In the broadest sense legislation is a system of laws and decrees of Verkhovna Rada of Ukraine, decrees of the President of Ukraine, decrees, orders and rulings of the Cabinet of Ministers of Ukraine regulatory acts of ministries and agencies, local councils and local administrations (Constitution of Autonomous Republic of Crimea, laws of Verkhovna Rada of Ukraine and rulings of Council of Ministers of Autonomous Republic of Crimea), international agreements.

4. Sometimes legislation is understood as one of the key methods of state law-making function performance stipulating the activity of relevant state bodies including drafting, consideration, adoption and publication of laws and other regulatory acts, its amendment and cancellation [6, p. 499].

Relevant positions (approaches to interpretation of term «legislation») are reflected in specialized research and educational sources. D. Lylak notes that Ukrainian legislation must be based only on regulatory acts intended for multiple application, defined as universal regarding its effect in time and space and from the range of individuals, and adopted within the scope of its responsibility by Verkhovna Rada of Ukraine and all-Ukrainian referendum, the President of Ukraine, the Cabinet of Ministers of Ukraine, the National Bank of Ukraine, central and local state executive power bodies, local authorities, applicable international agreements [7, p. 6]. A. Hratsianov and O. Maistrenko interpret legislation as a set of all regulatory acts issued by the state [8, p. 7; 9, p. 12].

As opposed to that, N. Proniuk stands for the specified definition of «legislation», presenting it as a set (system) including the Constitution of Ukraine, all laws and international agreements recognized as binding by Verkhovna Rada of Ukraine [10, p. 9]. Similar definition is provided by Y. Yevhrafova, justifying the understanding of legislative scope only as a set of laws and legal acts (which constitutional features shape its legal force – rulings and judgments of the Constitutional Court of Ukraine, applicable decrees of the government) adopted according to the Constitution of Ukraine. At the same time peculiar classification of regulations included in legislation takes place: traditional (adopted according to legislative procedure) and non-traditional – with legal force similar to that of

laws but with different adoption procedure (rulings and specific judgments of the Constitutional Court of Ukraine, applicable decrees of the government) [11, p. 7–8]. This position, in our opinion, is considered to be more correct and coherent as, on the one hand, a specified understanding of the term «legislation» is provided, on the other hand – it includes those regulatory acts which, despite not being identified as laws and are adopted (having been adopted) according to different procedure and by other subjects, are very close to laws concerning its force.

Still we must pay attention to the fact that the term of «legislation» is not defined legally, and its content in different regulations is presented through the set of indirect features. For example, according to statements by A. Zayets, O. Petryshyn, D. Lukianov, analysis of the Constitution of Ukraine allows to conclude that the term «legislation» is used in both – specific (Articles 9, 19, 92, par. 12 of Transitional provisions) and broad meaning (par. 8 of Article 118) [12, p. 14; 13]. Still some researchers (Y. Yevhrafova, D. Lylak) stress on necessity to have the definition of «legislation» legally fixed – in their opinion it promote the unification of the term application in all regulations, ensure use of one single harmonized definition and ensure the compliance with unified requirements [7, p. 6; 11, p. 7].

Basically, it proves the existence of different approaches regarding the interpretation of the term «legislation». Thus, complex research of such approaches requires deeper analysis of feasibility and justifiability of this term interpretation in its broad sense – as a set of regulations en masse including both laws and by laws.

Taking the abovementioned into account, we justify the statement on certain imperfection and contradictory nature of interpretation of legislation as the whole set of regulations explained by the legal force of the laws and other regulations. It is obvious that simultaneous incorporation of all these categories to legislation will result in certain equalization of legal force of different acts – certainly, it may not be considered justified. In other words, covering the by-laws with the term «legislation» may result in leveling of the legal force of certain acts and, respectively, to simplified equalization of by-laws and laws.

At the same time broad sense of the term «legislation» is comfortable for the executive power bodies. In particular, Y. Boiko and O. Yushchuk think that this approach may result in potential replacement of laws by different by-laws, therefore it will lead to certain ambiguity in the course of legal regulation of certain situations. This tendency is considered by them as pretty popular – it may be found

even in acts with official interpretation of the law (clarifications provided by the Presidium of the Supreme Economic Court of Ukraine «On certain issues related to practice of dispute settlement in case of agreement invalidation», 1999) [14, p. 12; 15, p. 161]. This is absolutely intolerable and even dangerous as the meaning of law as act of supreme legal power is diminished, its specificity is dissolved in other regulations resulting in extension of discretionary powers of law enforcement agencies and disparity in law enforcement practices.

Taking this into account it would be considered feasible to narrow the definition of «legislation» and consider it only as a system of interrelated laws and likened regulations. In this aspect we must also draw our attention to the fact that mentioned scientific opinion is not a new one in legal circles and has already been presented in papers of S. Alekseev, A. Zayets, P. Yevhrafov, V. Medvedchuk, A. Piholkin, Yu. Tykhomyrov, S. Pohrebniak etc. [16, p. 13; 17, p. 69; 18, p. 10].

But it is obvious that no possibility is there to instantly change the approach to understanding of the term «legislation» and change the indirect features which define its content in regulations. Especially if we take into account that change of such approach will require presentation of certain amendments to the Constitution of Ukraine and other regulations. But O. Lysenkov states that refusal from the broad meaning of the term «legislation» and transition to its narrower sense during the short period of time is not possible [19, p. 93].

At the same time legal science justifies another opinion about the interpretation of the term «legislation» defined as a set of regulatory acts issued by the higher bodies of state power and administration which excludes departmental regulations and local agencies' acts from the legislation [20, p. 313]. Therefore, on the one hand, it seems like the «extended» character of term «legislation» is maintained, but on the other hand – certain stability of regulations' hierarchy is ensured.

I. Seniakin and S. Polenin support the «narrow» meaning of legislation, defining it exclusively as the set of laws. They conclude that in order to ensure the adaptation of the principle of rule of law in society in future it is more practical to keep to this unified understanding of the term «legislation»; it means that this definition must be legally fixed [21, p. 10–11; 22, p. 97].

It is important to draw attention to the aspect that legislation may cover only applicable regulations. The abovementioned relates to all approaches applied to define the term «legislation». Regardless of whether legislation covers only laws or also the by-laws, all these may be considered as legislation only upon condition of its effectiveness (from the moment of coming into effect and till the

moment of its annulment or cancellation. In other words regulations which still haven't come into effect and those which are subject to annulment or cancellation may not be considered as part of legislation as rules of behavior contained in it are illegitimate and can influence neither protection of social relations, nor its regulation.

Taking the abovementioned into consideration we may conclude that «legislation» should be understood as part of the whole set of regulations – system which includes the applicable Constitution of Ukraine, Laws of Ukraine, international agreements, recognized as binding by Verkhovna Rada of Ukraine. This definition of the term «legislation» will be used by us in the course of criminal legislation study.

Accordingly, criminal legislation (legislation on criminal liability) should have been understood as the system of interrelated laws and likened regulations related to protection of social relations from criminal encroachments or regulation of social relations arising in case of crime commission, adopted and ratified by Verkhovna Rada of Ukraine (the Constitution of Ukraine, Criminal Code of Ukraine, laws, international agreements recognized as binding by Verkhovna Rada of Ukraine).

Still, this definition does not coincide with provision of par. 1 of Article 3 of the Criminal Code of Ukraine which literally presents Criminal Code of Ukraine as criminal legislation (legislation on criminal liability), based on the Constitution of Ukraine and universal principles and norms of international law. It means that criminal legislation includes only Criminal Code of Ukraine but the Constitution of Ukraine and international agreements are only the foundation and certain prerequisites for Criminal Code of Ukraine and formally (according to direct interpretation of par. 1 of Article 3 of the Criminal Code of Ukraine) are not covered by the criminal legislation. But we would like to stress that this literal interpretation may not be taken as correct.

Respectively, in specific studies the idea of inclusion of the Constitution of Ukraine and international agreements recognized as binding by Verkhovna Rada of Ukraine is taken positively with certain logical arguments provided in its favor.

Constitutional norms provide certain arguments in support of presented definition of criminal legislation (Articles 8, 9). First of all we would like to mention that according to Article 8 of the Constitution of Ukraine its norms are directly applicable, therefore ensure legal protection or regulation of social relations regardless of presence or absence of separate law providing detailed interpretation of constitutional provisions. Moreover, has the

supreme legal force and laws together with other regulations are adopted on its basis and must comply with its provisions. So, it is logical that the Constitution of Ukraine must be covered by the legislation on criminal liability and its provisions truly ensure legal protection of social relations from criminal encroachments. For example, Article 27 of the Constitution of Ukraine claims that no person shall be deprived of life capriciously and establishes the responsibility of the state for protection of human life. Therefore this constitutional norm ensures direct protection of human life from criminal encroachment.

Regarding the applicable international agreements recognized as binding by Verkhovna Rada of Ukraine, these agreements (according to Article 9 of the Constitution of Ukraine) are recognized as part of national legislation and criminal legislation is a similar case. If the Constitution of Ukraine defines international agreements recognized as binding by Verkhovna Rada of Ukraine as part of national legislation, any agreements related to provision of legal protection of social relations from criminal encroachments and regulation of social relations arising in the course of crime commission must be covered by Ukrainian criminal legislation.

We must mention that similar understanding of criminal legislation is justified in papers published by A. Savchenko and M. Khavroniuk who include not only criminal laws but constitutional norms and acts of international law to criminal legislation (both Ukrainian and foreign). According to A. Savchenko, concept of constitution presenting fundamental source for criminal legislation is common for criminal legislation of Ukraine and federal criminal legislation of the USA [23, p. 13]. At the same time M. Khavroniuk underlines the role of constitution and international agreements along with unified EU criminal legislation in the abovementioned processes which is very important in the context of current global integration trend [24, p. 12].

Also we should mention the potential opportunity of incorporation of other laws into the criminal legislation apart from the Criminal Code – it relates to the cases of duplication in criminal legislation when criminal law (rules of behavior) is presented not only in Criminal Code but also in other laws. Of course this tendency is not common for Ukrainian criminal legislation comparing to continental Europe (Austria, Andorra, Belgium, Holland, Denmark, Italy, Finland, France, Cyprus, Germany, Switzerland, Sweden etc [24, p. 12].

Thus we consider inclusion of the Constitution of Ukraine, Criminal Code of Ukraine, criminal laws, international agreements

recognized as binding by Verkhovna Rada of Ukraine and related to provision of legal protection of social relations from criminal encroachments and regulation of social relations arising in the course of crime commission into criminal legislation as fully justified.

The following **conclusions** may be formulated on the basis of the abovementioned.

1. Criminal law is a system of mandatory and formally manifested (legally fixed) rules of behavior ensured, guaranteed and protected by the state and related to protection of social relations from criminal encroachments and regulation of social relations arising in the course of crime commission.

2. Criminal laws are defined as the form of criminal law existence manifested in regulation with supreme legal force, adopted by the higher state power body according to special procedure and related to protection of social relations from criminal encroachments and regulation of social relations arising in the course of crime commission.

3. Criminal legislation – system of interconnected laws and likened by-laws related to protection of social relations from criminal encroachments and regulation of social relations arising in the course of crime commission, adopted and ratified by Verkhovna Rada of Ukraine (the Constitution of Ukraine, Criminal Code of Ukraine, laws, international agreements recognized as binding by Verkhovna Rada of Ukraine).

4. Criminal law and legislation are correlated as relevant rule of behavior and one of the forms of rule's manifestation.

At the same time, correlation of criminal law and criminal legislation may be presented as correlation of *system of forms* of criminal law existence manifested in regulations of supreme legal power and *separate form* of criminal law existence manifested in regulation issues by the higher legislative body according to special procedure with supreme legal force.

Correlation of criminal law and criminal legislation is a correlation of formally manifested *rules of behavior* which are mandatory, issued by the state and may be subject to coercion and *system of forms* of law manifested in regulations of supreme legal power. Therefore, criminal law and criminal legislation are correlated as certain rules of behavior and system of forms of manifestation of these rules.

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Поняття кримінального законодавства та його співвідношення з кримінальним правом

На підставі ґрунтовного аналізу наукових позицій у доктрині кримінального права сформульовано дефініції кримінального закону, кримінального законодавства та кримінального права. Окреслено найважливіші риси, що визначають співвідношення кримінального права як галузі права та кримінального законодавства. З'ясовано, що кримінальне право необхідно розглядати як систему загальнообов'язкових, формально виражених (нормативно закріплених) правил поведінки, які забезпечуються, гарантуються й охороняються державою і стосуються здійснення охорони суспільних відносин від злочинних посягань та регулювання суспільних відносин, які виникають у зв'язку з учиненням злочину. Кримінальний закон визначено як форму існування кримінального права, що втілюється в

нормативно-правовому акті вищої юридичної сили, який приймає вищий законодавчий орган державної влади за відповідною процедурою і стосується забезпечення охорони суспільних відносин від злочинних посягань та регулювання суспільних відносин, що виникають у зв'язку з учиненням злочину. Кримінальне законодавство формують Конституція України, Кримінальний кодекс України, закони, міжнародні договори, згода на обов'язковість яких надана парламентом і які стосуються забезпечення охорони суспільних відносин від злочинних посягань або регулювання суспільних відносин, що виникають у зв'язку з учиненням злочину. Кримінальне право та кримінальний закон співвідносяться як відповідне правило поведінки та одна із форм вираження (існування) такого правила поведінки. Співвідношення кримінального закону та кримінального законодавства може бути представлене як співвідношення системи форм існування кримінального права, виражених у нормативно-правових актах вищої юридичної сили, та окремої форми існування кримінального права, що виражена в нормативно-правовому акті, який видає вищий законодавчий орган за відповідною процедурою і має вищу юридичну силу. Співвідношення кримінального права та кримінального законодавства – це співвідношення формально (нормативно) виражених правил поведінки, які є загальнообов'язковими, видаються державою та можуть забезпечуватися її примусом, і системи форм існування права, які втілюються у вигляді нормативно-правових актів вищої юридичної сили. Кримінальне право та кримінальне законодавство співвідносяться як відповідні правила поведінки і система форм вираження цих правил поведінки.

Ключові слова: закон; законодавство; кримінальне право; кримінальне законодавство; співвідношення; форма існування; система форм.