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The present publication includes reports presented during the Conference devoted to the 85<sup>th</sup> Anniversary of the Faculty of Law of the Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the Faculty of Law of the Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others who are interested in different legal issues relating to the legal system of Armenia.

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**SOME ISSUES PERTAINING TO LEGISLATIVE  
DEFINITION OF  
“CRIMINAL OFFENSE”**

**Ara Gabuzyan<sup>1</sup>**

The criminal offence<sup>2</sup>, along with the punishment, is one of the key concepts of criminal law. The legislative definition of criminal offence is crucial for structuring the criminal legislation, precise wording of criminal-legal norms and provisions, for the purposes of differentiating the crime from other offences.

The criminal legislation defines the concept of “criminal offence” by enumerating the main features of it. The Criminal Code of the Republic of Armenia currently in force, defines “criminal offence” as a publicly dangerous culpable conduct prescribed by the Criminal Code (Criminal Code of RA, Article 18 (1)).

It is clear, that the Criminal Code, apart from the guilt and illegality, enumerates ‘publicly dangerous’ as a feature of criminal offence. There is no doubt that only publicly dangerous conduct can be considered as a crime. The issue here is whether being publicly dangerous is the very criterion to determine crime from other offences. In case if the answer is yes, then the legislative prescription of the criterion ‘publicly dangerous’ is justified.

There are different approaches in the academic literature with regard to the issue of differentiating crime from other types of offences. Some criminologists consider that public danger is only

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<sup>2</sup> The new Criminal Code uses the concept “offence” instead of concept “crime”. The thing is, that concept “crime” (in Armenian <<հանցագործություն>>) includes the process of commission of crime, while the legislation should define not the commission of the crime, but the notion of the criminal offence, as a separate type of offence. In other words, the law defines the conduct, the commission of which is considered as crime – commission of a criminal offence.

keen to crime. The minor violations, which are subject to administrative, civil, disciplinary regulation, do not breach the whole system of public relations, thus cannot be considered as publicly dangerous:<sup>1</sup> However, the vast majority of the criminologists is now of the view that the public danger is keen to any kind of offence <sup>2</sup>: First, the role and essence of the law, as a regulator of social relations, is the ability to be applicable to only socially notable events. Notwithstanding the minor importance of a separate conduct, the mere fact that the law prohibits that conducts means that it has a certain degree of danger for the public or the government. Apart from the mentioned, a conduct is considered as wrongdoing because of potential danger and they may cause damage to public relations. The need for defining punishment is based on the necessity of dispraise. It is not possible to prescribe responsibility for such conduct, which do not bear any social peril and are not subject of dispraise.<sup>3</sup>

For the purposes of differentiating criminal offence from other types of offences there are attempts in the academic literature to define to separate concepts: ‘social harmfulness’ and ‘social danger’. However, this approach has been criticized, on the basis that it is a mere equivoue. The notion of the conduct diminishing the interests of the society or the government will not change whether it is ‘harmful’ or ‘dangerous’<sup>4</sup>.

It is completely another point, that the criminal offence differs

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<sup>1</sup> See for example **Дурманов Н. Д.** Понятие преступления. М., 1948, р. 135; **Марцев А. И.** Диалектика и вопросы теории уголовного права. Красноярск, 1990, р. 30:

<sup>2</sup> See for example, **Ляпунов Ю. И.** Общественная опасность деяния как универсальная категория советского уголовного права. М., 1989 (Lyapunov Yu. I. The social danger of an act as a universal category of Soviet criminal law. M., 1989), **Ковалев М. И.** Понятие преступления в советском уголовном праве. Свердловск, 1987 (Kovalev M. I. The concept of crime in the Soviet criminal law. Sverdlovsk, 1987), Комментарий к уголовному кодексу РФ. Общая часть. М., 1996.

<sup>3</sup> See **Ковалев М. И.**, op. cit. p. 62:

<sup>4</sup> See **Ляпунов Ю. И.**, op. cit. p. 29:

from other types of offences by the degree of social danger. The Criminal Code should only enshrine those offences which have a high degree of social danger or peril. At the same time, it is important to note that the 'social danger' is a relative concept<sup>1</sup>: Often the legislator may consider as criminal such offences which do not have high degree of social danger. Moreover, foreseeing criminal liability for certain offences can cause undesirable consequences. A very good illustration is the example of the laws against alcohol in the United States at the beginning of the 20<sup>th</sup> century, which caused the increase of organized criminality.<sup>2</sup>

Additionally, very often the difference between criminal and other offences is so insignificant, making it impossible to talk about any essential difference between the degrees of social danger. Here we, in particular talk about those cases, when the difference between criminal and other offences is based on the subjective or mental element of the offense, and not the objective element. For example, abusing official powers, even if it causes essential harm, cannot be considered as criminal offence if committed without mercenary, other personal purposes or group interests. In many cases, even if the difference is based on the objective element, still the difference can be rather insignificant. For example, the difference between administrative and criminal theft is only one Armenian Drams. In some cases, other offences, particularly administrative offences and criminal offences can swop (for example, it has been the case with

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<sup>1</sup> Some Russian Criminalogists are of the same opinion (see for example - **Векленко С. В.**, Преступление как вид социального конфликта. / Научный вестник Омского юридического института МВД России, 1997, N 1 (Veklenko S.V., Crime as a kind of social conflict. / Scientific Bulletin of the Omsk Law Institute of the Ministry of Internal Affairs of Russia, 1997, N 1). **Васильев А. М., Мошкин С. В.** Теоретические проблемы современности к пониманию преступления. Теория и практика общественного развития, 2001, N 6 (Vasilyev A.M., Moshkin S.V. Theoretical problems of modernity to understanding crime. Theory and practice of social development, 2001, N 6)

<sup>2</sup> See **Jack S. Blocker** et al. eds. Alcohol and Temperance in Modren History: An International Encyclopedia. – ABC-CLIO, 2003, p. 23:

the ordinary type of hooliganism).

For these reasons, the social danger cannot be that criterion, which determines criminal offence from other types of offences. The only precise criterion for determining the criminal offence from other types of offences, is the enshrinement in the Criminal Code. In other words, being enshrined in the Criminal Code or criminal illegality is the objective element of a criminal offence because the legislator stipulates the conduct in the Criminal Code, considering the degree of social danger of a conduct based on subjective approaches. Being enshrined in the Criminal Code means that the legislator has already considered the public danger of a conduct, and made the decision to enumerate the conduct as a criminal wrongdoing<sup>1</sup>:

This in other words means that notwithstanding the fact that criminal offence is publicly dangerous, the latter cannot be considered as a separate element of a criminal offence and be stipulated in the definition of the criminal offence. Moreover, defining social danger as an element of a criminal offence creates a misperception that apart from being enshrined in the Criminal Code the conduct must have a certain degree of public danger. The mentioned creates a mess when delineating different kinds of offences. If the conduct is enshrined in the Criminal Code it means that it is a criminal offence, and if it is prescribed in the Administrative Offences Code – the conduct is an administrative offence.

Important to note that the new Criminal Code eliminated the provisions of the old code, according to which a conduct, which although has the elements of a conduct enshrined in the criminal code, should not be considered as a criminal offence, because of less importance, does not cause substantive harm to interests protected by

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<sup>1</sup> See Уголовный право России. / Под. ред. А. И. Игнатова, Ю. А. Красикова, т., 1, общая часть. М., 2005 (Criminal law of Russia. / A.I. Ignatov, Yu.A. Krasikova eds., vol. 1, General part. М., 2005), P. 79.

the law. Such an approach is also relative. Several questions emerge from the mentioned clause: what does ‘less importance’ mean, for whom the conduct is less important. The thing is that in one case the same conduct may not cause essential harm to the victim, and in another circumstances, may put the victim in a dire condition. Moreover, this would mean that an offence prescribed by the Criminal Code is not a criminal offence or crime. The said provision provides an opportunity to the implementing party to assume some of the legislative powers and consider a conduct enshrined in the Criminal Code as being not criminal, which is impermissible and incompatible with the state of law. It is a different issue when, the implementing agency can release the person from criminal liability in a certain case considering the essence of the conduct, non-significant harm, which is enshrined in the new Criminal Code.

Considering the above mentioned the draft of the new Criminal Code omits the “public danger” in the definition of the criminal offence. The determinative role of the ‘illegality of the conduct’ as a central feature of a criminal offence is a common practice among the majority of modern democracies and states of law. For example, the Article 1 of the German Criminal Code states: “An act may only be punished if criminal liability had been established by law before the act was committed”<sup>1</sup>: The Article 10 of the Criminal Code of Spain stipulates: “*Felonies or misdemeanors are intentional or negligent actions or omissions punishable by Law*”<sup>2</sup>:

Thus, criminal illegality of the conduct, i.e. being prescribed by the criminal law, is the very feature which differentiates felony from other types of offences. The next important element of the criminal offence is being ‘punishable by law’, which can be noted from the

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<sup>1</sup> See Уголовный кодекс ФРГ. М., 2000 (Criminal Code of Federal Republic of Germany, 2000).

<sup>2</sup> See Уголовный кодекс Испании. М., 1998 (Criminal Code of Spain, 1998). (the citation reflects the most recent amendment of the Spanish Criminal Code done in 2013).

above mentioned excerpts of the criminal laws of different countries.

The draft of the new criminal code states that the criminal offense is the prohibited conduct punishable by law. The mentioning of the element ‘punishable by law’ is not a coincidence. There are conducts prescribe by the criminal code, which are not only permitted but also encouraged conducts in the accordance with the law and mores. For example, self-defense, harming caused while catching the person who has committed publicly dangerous conduct, justified risk. There are circumstances which exclude the criminal liability of the person based on absence of guilt, absence of the criminal conduct per se, etc. For example, physical or mental coercion, implementing order or instruction, etc. Interesting that some of the mentioned conducts can even be qualified as illegal. For example, in the context of an execution of an order or instruction the person who obeys the order or the instruction is not subject to criminal liability because he/she does not comprehend the illegality of the conduct, in other words – there is no guilt. Although the mentioned conducts are prescribed in the criminal code, they are not illegal conducts punishable by law and the commission thereof is not a crime. Therefore, the criminal offence is only the illegal conduct punishable by law.

Apart from being punishable by the law, the new criminal code draft mentions also that the criminal offence is a conduct prescribed by the criminal code. Important to note that ‘prescribed by criminal code’ and ‘punishable by law’ are not similar. Punishable by law means that the conduct is illegal. While, ‘prescribe by criminal code’ means that the conduct corresponds to one of the crimes enshrined in the criminal code. Presence of the elements of the crime means that it is a conduct prescribe by the criminal code. All features of the conduct must fully correspond to the elements prescribed in the criminal code. Absence of any element or feature of the criminal offence in the conduct witnesses that that specific conduct is not a

criminal offence. As we know criminal code cannot be applied based on analogy. The Court of Cassation of the Republic of Armenia in its precedential decision in Y. Melqonyan stipulated: "... there is no crime, there is no punishment, if the conduct is not prescribed in the law in force, in line with the criteria of the legal certainty."

The notion of the criminal offence in the draft of the new criminal code also stresses the subject of the crime (the person who commits the offence). If the illegal conduct prescribed by the criminal code and punishable by law is committed by a person who cannot be a subject of crime (underaged person who is not liable criminally or irresponsible person), then there is no crime. In that case we will deal with a publicly dangerous but not criminal conduct.

Thus, the notion of "criminal offence" has been significantly modified in the draft of the new criminal code. The following features of criminal offence are prescribed: **a.** illegality, i.e. punishable by law; **b.** prescribed by the criminal code, i.e. the conduct should be compliant with the elements of a certain criminal offence enshrined in the criminal code; **c.** existence of the guilt; **d.** committed by a subject of crime. We are of the opinion that the definition of the criminal offence set by the new draft criminal code cures the past deficiencies, sets more precise criteria for differentiating the criminal offence from other types of offences. The mentioned can improve the practice of law enforcement.