

CRIMINAL AND CRIMINOLOGICAL ASPECTS OF COMBATING OFFENSES IN THE FIELD OF ENTREPRENEURIAL ACTIVITY

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ABSTRACT

The relevance of the research topic is predetermined by the ongoing scientific and practical disputes in modern states about the quality of the legal regulation of social relations that develop in connection with the implementation of entrepreneurial activity. The range of such regulation is extensive and most often it concerns the problems of positive legislation (in particular, civil, sectoral commercial), which are promptly eliminated under the influence of development needs and lobbying opportunities of business, especially state and large business.

The provisions contained in the article develop and deepen theoretical views and outlining practical implications on the nature of illegal acts, the subject of which is an entrepreneur, as well as on other aspects of the responsibility of this category of persons. The materials of the article supplement the sections of criminology that cover such issues as the personality of the criminal, economic crime in general, and such a direction as privileged (respectable) crime in particular. Comprehension and analysis of these provisions allows developing the theoretical foundations of the institution responsibility of entrepreneurs, as well as counteraction to their criminal behavior.

Keywords: Criminal Aspects, Criminological Aspects, Entrepreneurial Activity, Legal Responsibility, Criminal Law Regulation.

INTRODUCTION

The status of an entrepreneur is a complex cross-sectoral institution, which is formed by the norms of constitutional, civil, administrative, and criminal and tax legislation, reflecting in the relevant sectoral provisions certain aspects of the social role of a given person, giving him specific rights and obligations. Distinctive features of the status of an entrepreneur are the presence in its structure of private-legal and public-law components, as well as prohibition norms addressed to the entrepreneur, the violation of which introduces the mechanism for recognizing him as a subject of administrative, criminal, and tax liability.

The complex nature of the legal status of an entrepreneur, in turn, predetermined the complex type of responsibility of the named category of persons, covering a group of legal relations regulated by the norms of the branch of law that establishes specific grounds for the emergence of certain legal relations. A generic theoretical category that denotes the grounds for the emergence of entrepreneurs' liability is entrepreneurial misconduct (Gottschalk, 2013). The practice of counteracting the criminal behavior of entrepreneurs differentiates this generic category into administrative, tax and criminal offenses, and crimes based on the illegality of the deed.

The institution of entrepreneurs' responsibility is modeled on the basis of such a legislative technique as mixed wrongfulness, which requires a thorough analysis of all the circumstances of the unlawful act when qualifying the offense, since establishing only the status of its subject does not mean that the entrepreneur is guilty of committing a crime.

The medium and small (especially individual) business sector is exposed not only to unfavorable economic factors, but also to the problems of excessive criminal law impact, which, being laid down in the legislation, is acutely manifested in the course of its application. At the same time, redundancy is reflected in different content. At the level of the Criminal Code, its obvious signs are the following: the criminalization of the acts of entrepreneurs that do not pose a public danger; in the establishment of overstated criminal-legal sanctions that are not adequate to the degree of public danger of the deed; in the criminalization of acts not prohibited by other laws (DiMarino & Roberson, 2019). In practice, the oversufficiency of the application of the Criminal Code is reflected in the following: in a large number of persons prosecuted for acts committed in connection with the implementation of entrepreneurial activities, the guilt of which subsequently, in the course of the investigation of criminal cases, is not proven; in the unjustified law enforcement officer's use of the qualifying signs of the deed (imputation of causing damage in conditions of ordinary economic risk; recognition as legitimization profits obtained in violation of the conditions for carrying out entrepreneurial activity; committing a crime in a group of persons with the collective nature of the violation of the criminal law by a business organization) (Benson, 2009).

The widespread implementation of criminal legislation will be absolutely intolerable for business entities, simply blocking all the most significant economic and social processes (Ardelyan, 2019). Probably, we should agree with the opinion that a competent reduction in the volume of criminal violence can, to a certain extent, ensure the interests of entrepreneurs (Payne, 2011). Other researchers, noting the existing problems in this area, which are closely related to the unjustified criminalization of a number of acts, expressed this position more clearly: certain criminally punishable acts should be recognized not as crimes, but only as administrative offenses, and in some cases as civil tort (Gottschalk & Smith, 2011). In this case, we should talk about such crimes that are rarely used by the investigating authorities or their application in practice is difficult (Zaffaroni & Oliveira, 2013). It should be recognized that the effective impact of the branches of private and public law on the sphere of entrepreneurial activity and economic relations in general will be possible only when the legislator and law enforcement officers ensure their coordination with each other and will encourage entrepreneurial initiative and the growth of personal and social capital.

Criminological research of the problems of criminal policy in the field of entrepreneurship is urgent for a number of reasons. First, its results allow for the reflection of the adverse

consequences expressed in terms of social and economic losses (Leap, 2007). Secondly, the further implementation of the outlined optimization to reduce the criminal law impact on the business sector (the institution of the business ombudsman, partial liberalization of the criminal law) remains questionable, which appears as a temporary concession to the existing monopoly of criminal law methods of economic management. Such optimization outside of development is not viable. This dictates the need for a criminological study of modern criminal policy in the field of entrepreneurship, with the identification of patterns in the state of the corresponding crime, its susceptibility to measures taken and the development of recommendations to ensure the adequacy of criminal legislation and its application in the area under consideration.

LITERATURE REVIEW

An entrepreneur, based on specific violations, norms and rules provided for by the legislation on entrepreneurial activity may be subjected to measures of state coercion provided for by the norms of administrative, tax, and criminal law and entailing corresponding negative consequences for the offender entrepreneur (Gilbert & Russel, 2002). By this, the limits of entrepreneurial activity are limited in order to protect specific law-protected objects, when the positive regulations, provided for by civil law, are strengthened by criminal and administrative-legal prohibitions and act as an incentive for law-abiding behavior of entrepreneurs and, in general, ensuring law and order in their economic activities.

Representatives of different branches of law and spheres of activity come to different, but important conclusions. Their theoretical and practical significance is expressed in the provisions explaining the problems, which are often far from applied purpose. These provisions, being in a scattered form and outside the complex criminological analysis of the patterns of crime in the field of entrepreneurship, assessing the susceptibility of its manifestations to the measures taken, as well as recommendations for combating, act as only an “*alarming button*” signaling qualitatively negative processes and problems that need to be addressed and solved.

It seems expedient, firstly, to single out entrepreneurs who are subject to criminal liability for their failure to fulfill their obligations stipulated by civil legislation and legislation on entrepreneurial activity. The named compositions are modeled on the basis of combining the principle of civil liability for failure to fulfill obligations, for causing the corresponding harm and involving its compensation with a criminal-legal approach, the purpose of which is to punish the tortfeasor. It should be noted that these corpus delicti are criticized by experts (Rorie, 2019; Simpson, 2021).

Secondly, many authors consider it possible to single out entrepreneurs who commit crimes using various kinds of techniques that together form such a category as deception (Reurink, 2016; Simpson, 2011). A characteristic feature of deception in the commission of crimes by entrepreneurs is that they, using various kinds of delusions, misconceptions, benefit from causing harm (damage) to another person through deception. In legal language, this means that a civil contract is a cover for a crime or a means of committing it. In this case, there are grounds for the intervention of criminal justice.

Third, the analysis of crimes committed by entrepreneurs or with their participation makes it possible to single out persons who have been granted certain powers by the civil legislation, as well as by the legislation on entrepreneurial activity (Reurink, 2016). The use of these

opportunities by these persons for illegal purposes necessitates criminal prosecution of the perpetrators.

Fourth, a separate group is made up of entrepreneurs whose illegal behavior is associated with the violation of special rules (Leclerc & Wortley, 2013). Their observance is a prerequisite for safety in the performance of various types of work, and also guarantees the prevention of dangerous consequences in the form of destruction of property, death of people, and harm to their health.

According to another classification, there are two categories of criminal entrepreneurs. The first group consists of persons who proactively choose or allow criminal forms and methods of doing business, knowingly going to violate criminal law prohibitions. The second group includes persons whose criminal actions arise indirectly from entrepreneurial activity. In the mechanism of their criminal behavior, the stages of motivation and decision-making may include acts that are not considered by the criminal law as preparation for committing a crime. These subjects, being representatives of legal entrepreneurship, adapt to the aggressive conditions of doing business through deviant behavior, which most often does not seem to be such in their minds. Such subjects are victimized, and their businesses have the properties of a crime target (Needleman, 1979; Sjorgen & Skogh, 2004).

The purpose of the study, therefore, is to develop a set of theoretical proposals and applied recommendations aimed at improving criminal legislation and the practice of its application in connection with the criminological assessment of criminal policy in the field of entrepreneurial activity (Simpson & Weisburd, 2009).

METHODS

The principled approach to the research was determined by the use of general and partial methods of scientific knowledge. The author relied on the possibilities of a systematic approach, as well as analysis and synthesis, induction and deduction, statistical and comparative legal methods. To study the materials that formed the empirical basis of the research, the author used specific sociological methods in the form of content analysis.

The author proceeded from the fundamental provisions of the theory of state and law, criminal, civil, entrepreneurial, administrative, financial, tax law, operational-search activities, as well as criminology, sociology, management theory, which are important for studying the criminal behavior of entrepreneurs and developing measures to counter it.

RESULTS AND DISCUSSION

Based on the theoretical provisions of criminal law, an entrepreneur is a special subject, since in order to bring him to criminal liability, not only general, but also constructive signs must be established, which is due to the norms of administrative legislation regulating licensing and the procedure for determining types of entrepreneurial activity, as well as important for entrepreneurship by the norms of civil legislation.

The subjects of criminal liability for certain crimes in the field of economic activity, as well as for a number of other crimes can be both entrepreneurs - individuals and legal entities - since in law a person is not only an individual, but also an organization whose rights and obligations are derived from the rights and obligations of individuals forming a legal entity. The

authors base this provision on a realistic theory that recognizes a legal entity as a really existing special subject of law, without being in this regard a supporter of the theory of fictions, which, according to a number of lawyers, exclude the criminal liability of legal entities in criminal law (Gilbert & Russel, 2002).

The typology of entrepreneurs as persons committing crimes can be carried out proceeding, first, from the recognition of them as a special subject of crimes that differ in specific constructive features; secondly, taking into account the specific and immediate objects of those crimes, which are encroached upon by this category of persons; thirdly, taking into account the peculiarities of the objective side of the illegal acts committed by them.

A characteristic feature of persons prosecuted in connection with illegal actions in the framework of entrepreneurial activity is that they are dominated by men of older age groups, mostly married, some of whom have minor children (Winter, 2019). They are distinguished by a rather high educational level, and this indicator correlates with the data indicating the age of the perpetrators, since at the corresponding stage of their life they had both life experience and educational level. As for the sphere of economic activity, the bulk of the perpetrators did not engage in production activities, but preferred trade operations; from the point of view of their physical condition, they were mainly able-bodied, healthy and sane persons. A feature of their characteristics is the fact that they are mostly natives of cities (Winter, 2019). At the same time, the entrepreneurs brought to criminal responsibility usually were not convicted earlier. Realizing the criminal line of economic activity, that is, illegal entrepreneurship was accompanied by tax evasion, etc.

Comparison of data that characterize persons prosecuted for illegal entrepreneurship, tax evasion with data that distinguish thieves, fraudsters, show that it is really possible to talk about the existence of the phenomenon of privileged (respectable) crime in society, when, first of all, a crime in the sphere economic activities are carried out by persons who have advantages over other citizens due to their prestigious work, education, corresponding position in the professional and service hierarchy with incomes that allow them to live comfortably. Certainly, there are some peculiarities for certain indicators, for example, among the fraudsters; there are professional criminals who do not have a permanent job. Among them, the level of those with previous convictions, as well as persons without secondary specialized and higher education is higher. However, a common feature is the intellectual level of privileged (respectable) criminals, which allows them to act with the help of cunning, deception, inventing and implementing criminal schemes that guarantee receiving illegal profits.

In the context of the crises of recent years, including the current COVID-19 pandemic and its socio-economic consequences, contradictions and conflicts in society associated with the redistribution of property and property stratification of society have significantly aggravated; there has been an increase in illegal violations of economic interests, often crossing the line of criminal law. This is most acutely manifested in the sphere of entrepreneurial legal relations, which are defined, as it is known, in the categories of economic interest.

At its core, economic interest is the driving motive of any economic activity, and, accordingly, ensuring the possibility of its implementation largely determines the success of the economic development of the state, otherwise it leads to the emergence of economic problems and negative trends both at the production stage and at stages of exchange and consumption of goods, works and services. Realization of economic interest is a form of embodiment of an

economic initiative into a real economy. Therefore, the task of both the legislator and the law enforcement officers is to stimulate and in every possible way support a justified legitimate economic interest, not to restrain the manifestation of economic initiative, which, of course, will contribute to the strengthening of the national economy and the development of economic relations in general (Picard, 2008; Michel, 2008). The possibility of realizing an economic interest and its protection is provided by a number of branches of law, including the norms of criminal law.

The peculiarity of criminal law norms is that they have a fairly high degree of effectiveness of impact on persons infringing on economic interests. Other norms of law achieve, first of all, the goal of ensuring property liability, i.e., civil, administrative, and financial liability (Reurink, 2016; Winter, 2019). These circumstances predetermined the concept of this study. It is based on a critical analysis of a set of very different information that is criminological significant. This set was made up of socio-economic information that made it possible to present the content of the processes of determination and causality of crime in the field of entrepreneurial activity.

One of the main directions of the criminal policy of the Republic of Kazakhstan is to ensure the legal security of entrepreneurial activity, including through the revision of the scope and procedure for applying criminal liability measures to entrepreneurs. There have been many changes in this area. Offenses that were criminal offenses and were contained in the Criminal Code of the Republic of Kazakhstan have now passed into the category of administrative offenses. This is due to the fact that modern criminal policy is aimed primarily at not applying repressive measures associated with deprivation of liberty to persons who have committed economic offenses. This category of offenders, as a rule, does not commit “*common crimes*”, and their correction will be more expedient with serving a sentence that is not related to isolation from society (Tinistanova, 2015).

Humanization of legislation began to be carried out in the following aspect: decriminalization of certain types of offenses by classifying them as criminal offenses or administrative offenses. However, this trend today has created even more difficulties in the qualification of offenses, including in the field of entrepreneurial activity. The issues of correct qualification have always been relevant, since each specific composition of the offense is accompanied by adjacent compositions, respectively, any specific composition has its own microsystem, and its identification is a very laborious activity. Even the study of all the factual circumstances and elements of the microsystem does not guarantee the correct qualification, since when comparing them it becomes clear that the actions committed by the offender are not always accurately described in the law. The above trend has complicated this process, due to the fact that an additional number of factors have appeared that must be taken into account: the differentiation of administrative, criminal offenses and criminal infractions (misdemeanor).

Speaking about the norms of the Criminal Code of the Republic of Kazakhstan, it should be noted that it does not contain a separate chapter that directly regulates entrepreneurial activity. However, Chapter 8 contains criminal offenses in the field of economic activity. In the scientific literature, there are various classifications of offenses committed in the field of economic activity, which are based on different criteria. For example, the most complete and reflective of the realities of the post-Soviet space is the classification of the Russian legal scholar B.V. Volzhenkin. He highlights the offenses of officials against guarantees of business activities; offenses against the general principles of the established procedure for carrying out

entrepreneurial activity; offenses against the interests of creditors; offenses related to the manifestation of monopoly and unfair competition; offenses against the established procedure for the circulation of money and securities; against the order of foreign economic activity; against the order of circulation of currency values; against the payment of taxes and other mandatory payments, as well as against the rights and interests of consumers (Victoria, 2019).

In a theoretical approach to determining the nature of an entrepreneur who commits a crime in the field of economic activity, it is necessary to take into account the entrepreneurial factor itself. This means that the principle “*risk – income*”, which is reflected in daily life on analytical activity, can also cover such an object as a crime with the subsequent alternative: to make a non-standard decision and get income by criminal means, i.e., choose an adventurous path or follow a line of law-abiding behavior. However, studies show that entrepreneurs are also characterized by a criminal version of resolving their problems, which has given rise to a whole galaxy of dealers, denoted in criminology by the phrases “*businessman-delinquent*”, “*gambler*”, etc. (Freeman, 2010; Gottschalk, 2013). This predetermines the need to ensure proper special control over entrepreneurs, which does not exclude the implementation of other measures in the interests.

Countering the criminal behavior of entrepreneurs requires the implementation of a system of legal measures, which can be divided into general legal and special ones. General legal measures create rules for entering entrepreneurial activity, monitoring its implementation, and also form effective conditions for its implementation. In the current circumstances, in particular, in Kazakhstan, the legislation regulating entrepreneurial activity is subject to concretization and systematization, as the author believes, in the form of the integrative Commercial Code, which would lay the foundations for the public-legal status of entrepreneurs, creating the preconditions for the exercise of their public rights and obligations.

CONCLUSION

Criminological balance of criminal legislation in the field of entrepreneurial activity cannot be achieved without ensuring its consistency. The quality of consistency and systematicity is manifested here in two ways: external (in relation to other branches of law) and intra-branch. It has been established that external inconsistency is capable of turning the non-criminal into criminal, and internal inconsistency leads to excessive criminalization of the acts provided for by the Criminal Code.

In connection with the above, it should be noted that the sphere of entrepreneurial activity is in dire need of consolidating comprehensive protection measures through the establishment of not only administrative and civil legal measures, but also criminal mechanisms. At the same time, in order to achieve the goals and objectives of protecting entrepreneurial activity with the help of criminal legislation, the criminal law prohibitions provided by the legislator should be purposefully applied in a system with administrative and civil legal impact, since only such an approach will ensure the minimization of possible negative consequences from the application of criminal law, will help significantly improve the overall efficiency of legislative regulation of business relations and guarantee their effective protection.

In addition, clarification of the issue of the normative legal status of an entrepreneur is important in semantic terms for analyzing the problem of a special subject of a crime. This is due

to the fact that an entrepreneur in the understanding of this figure as an individual entrepreneur or as the head of the body of a legal entity can be the subject of a number of crimes. In addition, certain acts provided for by the Criminal Code may be committed with his participation. In this regard, the results of the study of the normative legal status of an entrepreneur may be of interest for the correct classification of crimes.

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