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The following issue is dedicated to the bright memory of the prominent representative of Georgian legal science, Professor Emeritus Guram Nachkebia



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Guram Nachkebia*

The Objects and Subjects of Criminal Defense as the Categories of criminal Law Philosophy **

The article refers to the issues of criminal law philosophy and from this point of view the traditional dogmatic of criminal law which does not recognize the idea of legal relations due to reasonable action is criticized. From the same point of view the traditional conception of the Russian criminal dogmatic, according to which criminal law as though regulates the relation originated due to committing a crime, is criticized. The traditional concepts of “the object of a crime” and “the subject of a crime” are elaborated from this position as well. Really, in contrary, by committing a crime the person who commits a crime is fallen outside the framework of criminal law due to which “a crime” is not the subject of regulation of criminal law anymore. The article emphasizes that in the result of practical enactment of criminal law, legal relations are originated due to reasonable action. From this aspect, instead of the fake concept of “the subject of a crime”, the concept of “the subject of criminal law” is shaped as the last one, by its reasonable action, transfers the requirement of a norm of law to law and order. Consequently, the subject of law by its reasonable action, defends the object from criminal encroachment, which is defended from the criminal encroachment under the law of criminal law. Hence, “the object of a crime” does not exist, but “the object of criminal defense” which outmarchs committing a crime. “The objects of criminal defense (for example, life of a human, health, property, etc) and subjects (for example a citizen, worker, medical worker, etc) are on the one hand the elements of criminal relations due to reasonable action and on the other hand, create the system of the private part of criminal law.

Key words: *The subjects and objects of criminal law defense, System of the private part of criminal law*

1. Introduction

Subject of regulation of criminal law as a field of law remains to be an unsettled issue. Dominant theory in Soviet and post-soviet criminal law is focused on the idea of criminal law relationship triggered by the commission of the crime. According to this theory, a crime is a legal fact, which triggers a criminal legal relationship between the State and the offender. However, in some cases, the crime may be accompanied by a fact of justification. However, a question arises why can't a criminal law regulate the relationship directed towards the prevention of the crime. In other words, the relationship directed towards the lawful conduct, which translates the requirement of the norm into the state of the rule of law. **Doesn't that create a form of union as a category of ought (sollen) and the state of rule of law, as partially accomplished law as a category of being (sein). Isn't the content of this form, the positive responsibility of the subject before the State, the object of which is the lawful conduct?** Without the positive responsibility of the subject of the criminal law before the State, his negative responsibility wouldn't be possible. **All this appears to the subject of criminal legal philosophy, because researching the category of responsibility and its forms of manifestation in criminal law is not a task of criminal legal science and it belongs to the area of criminal legal philosophy.**

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** The present work is the last scientific work of Emeritus-Professor Guram Nachkebia.

Unfortunately, German criminal legal doctrine is not familiar with the concept of criminal legal relationship, neither triggered by the commission, nor directed towards the prevention of the crime. Hence, then dominating doctrine is the protection of the legal goods through the threat of punishment stipulated in the criminal law¹. Threat of future punishment may indeed influence the morally unstable elements of the society, **but this threat has no impact on the educated parts of the community, which abstains from the commission of the crime not because of the threat of punishment, but because of the personal dignity and high sense of responsibility before the community and the State. Consequently, we believe that it would be an insult to the dignity to this law abiding part of the community to say that they are acting under the threat of punishment.** Besides, it turns out that according to the German doctrine, only the State is fighting against the crime, while individuals do not take any part, because the German doctrine is not familiar with the concept of the subject of criminal law protecting legal goods from criminal harm through their lawful conduct. Unfortunately, neither the Russian criminal legal doctrine is familiar with the concept of the subject of the criminal law: Based on the doctrine of criminal legal relationship triggered by the commission of the crime, this doctrine is focused on the concept of object of the crime and subject of the crime. **Moreover, it looks as if the object of the crime and the subject of the crime are part of the legal definition of the crime.** It is true that in German doctrine, the concept of the crime and *corpus delicti* are clearly delineated from each other due to the fact that German legal doctrine is not familiar with the idea of criminal law relationship directed towards the prevention of the crime, the German scholars are compelled to describe the crime according to four elements: the object and the subject, the objective side and the subjective side, as it is also accepted in Russian criminal doctrine.

2. Falsity of the Concept of the Criminal Legal Relationship Triggered by the Commission of the Crime.

One of the textbooks of the criminal code of Russian federation is citing old Russian law, according to which the crime is a transgression of some rule („Пересугление сии правила,,)². Briefly stated, the commission of the crime means the stepping out of some rule or some law, which places the offender beyond the boundaries of the criminal law as the field of law. The history of Georgian criminal law also reveals the same concept. It appears that in old Georgian law, the crime implied a transgression of some rule, some law and therefore as a trespassing conduct. According to the opinion of academician Iv. Javakishvili “the goal of the legislator was to regulate the relationship between the individuals. Setting boundaries for the human conduct. Crossing these boundaries implied an assault upon the State, religion and rights and interests of others. The books of law mandated the implementation of the rule of law and therefore, correct behavior of humans was defined as “lawfulness”³. From here the author concluded that the conduct breaching the rules of faith of law and of procedures was called a trespass⁴.

Hence, in accordance with Georgian as well as with Russian law, a crime is the transgression of some rule, faith, religion or law (“Переступение”). If we consider the reality, according to which the criminal law, after its entry into force is directed towards all mentally capable individuals in order to induce the sense of responsibility towards lawful conduct, **here we have a relationship between the State and the subject of law directed towards the lawful conduct.** From here we can easily conclude that the commission of the crime takes the person away from criminal legal relationship with the State and therefore the crime does not trigger criminal legal relationship. **Therefore, the concept of criminal legal responsibility due to the commission of the crime is false, especially if we consider the crime as being legally committed when it is proven by the judgment of**

¹ Baumann O., Weber M., Mitsch W.J., Strafrecht, Allgemeiner Teil, Lehrbuch, 10 Auflage, 1996, 11.

² Уголовное право, Общая часть, Учебник для вузов, М., 2004, 78.

³ Javakishvili Iv., History of Georgian Nation, Vol., 12, T, 7, 188.

⁴ Ibid, 109.

conviction. Before that moment a crime is not legally committed and it cannot trigger any criminal legal relationship. Legal relationships based on the law of execution of punishment is a separate issue, which is not by itself a criminal legal relationship.

2.1. Anti Philosophical Consequences of the Confusion of Negative Responsibility with the Relationship Triggered by the Commission of the Crime.

The concept of criminal legal relationship arising out of the commission of the crime is significantly founded on the confusion between “**responsibility**” and “**relationship**”. Namely, the negative criminal responsibility triggered by the commission of the crime doesn’t raise any question, while criminal legal relationship due to the commission of the crime is impossible. The abovementioned textbook contains a logical contradiction: on the one hand it asserts, that according to old Russian law, the crime is the transgression of some rule or law (prestuplenie⁵), while the same **textbook asserts that “the criminal legal norms are directed towards a person who committed the crime”⁶. There is only one way of solving this contradiction: we should differentiate between criminal legal relationship and criminal responsibility. Unfortunately, due to the fact the philosophical nature of “responsibility” and “relationship” could not properly be analyzed in the past, an academic confusion of these two categories still creates a substantial misunderstanding.** The commission of the crime takes the offender outside the boundaries of the legal relationship with the State, due to which he is now negatively responsible for the State. However, the problem is that the criminal responsibility due to the commission of the crime is practically impossible without criminal procedural relationship. **According to art. 169 of criminal procedure code, the defendant in the stage of investigation is only a presumable perpetrator of the crime.** This is why a defendant in accordance with his procedural status is still considered to be non culpable until his guilt is established by legally valid court judgment of conviction.

Therefore, the responsibility due to the commission of the crime is the negative aspect of the responsibility. This is an aspect which is practically implemented through criminal procedural relationship. In this respect, the criminal legal responsibility is either not visible or assimilated to the punishment and in this case the philosophical category of “responsibility” is not manifested in the criminal law. This is impossible and runs against the category of “responsibility”.

3. The Idea of Positive Responsibility and Criminal Legal Relationship Directed Towards the Lawful Conduct.

Responsibility as a philosophical category has two aspects. The first aspect of the responsibility is positive, prospective aspect, which is called a responsibility for the future. According to this view, the subject responsibly deals with his obligation in present time and therefore his conduct is morally justified and legally lawful. The lawful conduct of the subject translates the requirements of the norm into the rule of law. The rule of law is a form of union between the norm of the law as a category of ought and the state of Rule of law as a partially implemented law. The content of this form is the positive responsibility of the subject of law due to the lawful conduct. In this framework, an individual is obliged to act lawfully and on the other hand a person is called upon to deal responsibly with his obligation towards lawful conduct. I.e. with internal readiness and full awareness of the personal dignity⁷. On the one hand, due to the false idea of criminal relationship triggered by the commission of the crime and on the other hand, due to the disregard of the concept of the criminal legal relationship for lawful

⁵ Ibid, 178.

⁶ Ibid, 61.

⁷ *Nachkebia G.*, Textbook of Criminal Law, General Part, Tbilisi, 2015, 46.

conduct, in criminal law there is no place left for positive responsibility and therefore the responsibility is only negative. A necessary outcome of this position is the assimilation of negative responsibility with punishment, which brings the criminal legal theory into the dead end. From this point of view, the criminal legal philosophy becomes impossible. The latter requires an independent research and cannot be founded in the framework of this article. However, it is still important to raise the issues of criminal legal philosophy in order to briefly clarify the concepts such as “the object of criminal legal protection” and the “subject of criminal law” as elements of criminal legal relationship directed towards the prevention of the crime. As we have already noted, based on the concept of criminal legal relationship due to the commission of the crime, **the Russian legal thinking has identified four elements into the *corpus delicti*: object of the crime, subject of the crime, objective side, subjective side.** The private part of the criminal law has also been structured based on these four elements.

4. Contradictions Related to the Traditional Concept of the Object of the Crime

Up to now, the Russian criminal legal doctrine is dominated by the concept of the object of the crime which is considered to be the first and the foremost elements of the legislative definition of the conduct. It appears that this is also manifested in the structure of the criminal code, in the private part of which we have for example “crime against the persons”, “crime against life”, “crime against property”, etc. From this viewpoint the notions of “object of the crime” and “subject of the crime” appear to be quite logical. But as soon as we examine the traditional definition of the object of the crime, we shall encounter a circle of the “logical contradiction”. Namely, “the object of the crime” cannot be defined without first referring to the **“object of the criminal legal protection”**. For example, P. Nikiforov was asserting that the “object of the crime and the object of criminal legal protection are the same. The object of the crime is the very same societal relationship, which is attacked by the crime and which is protected by the criminal law”⁸.

Thus, it appears that the object of the crime is the same social relationship protected by the criminal law. Thus, the object of the crime and the object of the criminal legal protection are the same. **“The definition of the object of the crime is logically preceded by the object of the criminal legal protection.** Before specific societal relationships are covered by criminal legal protection, an object of the crime cannot logically exist. Therefore we disagree with the assertion of professor Nikiforov, according to which the object of the crime and the object of the criminal legal protection are identical because we may not assimilate the criminal legal protection of specific social relationship and criminal infringement upon this relationship. For example, N. Kurjanski was defining the notion of object of the crime as “the societal relationship, which is protected by the criminal law from criminal assault”⁹.

Therefore, the traditional concept of the object of the crime is logically and factually preceded by the concept of the criminal law protection, **because the latter one is related to the legislative activity of the State criminalizing certain human conduct and thus creating the notion of object of criminal legal protection.** However, the case is not so simple. In the criminal legal literature of the Russian federation, the notion of the criminal legal protection as a product of legislative activity is not rejected. On the other hand, it is asserted that object of the crime, which is part of *corpus delicti*, is something completely different¹⁰.

It appears that the object of the crime has an independent meaning from the object of the criminal legal protection because the object of the crime is an element of *corpus delicti*. **However, an interesting question is, how can a societal relationship, which is damaged by the crime considered to be an element of *corpus delicti*. On the other hand, how can the subject of the crime be part of the *corpus delicti* committed by the**

⁸ *Никифоров Б.С.*, Объект преступления по советскому уголовному праву, М., 1960, 8-9.

⁹ *Коржанский Н.И.*, Объект и предмет уголовно-правовой охраны, М., 1980, 28.

¹⁰ *Гаухман Л.Д.*, Квалификация преступлений: закон, теория, практика, М., 2001, 64.

same subject. In order to avoid this type of absurd situation, we should say that there is only the “object of the criminal legal protection”, which is later harmed by the criminal conduct, which is composed by subjective side and objective side, while the object and the subject are outside the corpus delicti and they are elements of the societal relationship directed towards the prevention of the crime. The lawful conduct of the criminal law subject protects the object from criminal harm.

Thus, it is apparent that the concept of the “object of criminal legal protection” expresses the substance of the legislative activity. **By this, we want to say that the author of the criminalization is the legislator, while the investigative and judicial bodies classify the already committed conduct as a crime, in accordance with their procedural rules.**

So the object of the crime does not exist. What exists is the object of criminal legal protection – life, health, freedom, property, State power, etc. **Consequently, the crime is directed towards these objects, which are protected by the criminal law.** From the moment of entry of the criminal law in force, the criminal legal relationship is created which translates the lawful conduct of the subject into the rule of law and therefore it protects the object of the criminal legal protection from the crime.

5. Sociologism of the Traditional Concept of the Subject of the Crime

The crime is committed by a specific subject upon a specific object. Therefore, on the one hand the notions of the object and of the subject of the crime appear to be quite natural. However, in reality, they are the product of an erroneous thinking. It is enough to replace the traditional concept of the subject of the crime by the concept of the subject of criminal law. The subject of law is a physical or legal person, which is bound to act lawfully and thus create the rule of law. Here we already have defined legal relationship but not arising out of the commission of the crime, but on the contrary directed towards the lawful conduct and this is the case, when the subject of law translates the requirements of the norm of law into the rule of law by his lawful conduct.

Therefore, the concept of the “subject of law” is the product of the legal thinking **because the subject of law is obliged to act lawfully and called upon to deal with this obligation responsibly.** Traditional concept of the “subject of crime” cannot exist because the criminal legal relationship may not be created by the commission of the crime. Therefore, the traditional concepts of the object of crime and subject of crime are not a manifestation of legal thinking. However, they are sold as such, which is a rough sociologism in criminal law. **Based on this, the legislative definition of the crime is composed only of subjective and objective aspects. The “object of crime” and “subject of crime” do not exist. What exists, however, is the “object of criminal law protection” and “subject of criminal law protection”, which are indivisible elements of the special part of the criminal law.**

6. The Objects of Criminal Legal Protection in the System of Special Part of the Criminal Law

Criminal legislation is composed of general and special parts. While the most fundamental issues of the criminal law are covered in the general part (including the issue of criminal legal relationship), special part provides for the legislative definition of the criminal conduct. From this viewpoint, it is clear that the system of the special part of the criminal law is structured in accordance with the hierarchy of values expressed in the object of the criminal legal protection. From this viewpoint, in Georgia the primary object of the criminal legal protection is the human being, his life, health, freedom, while the remaining values are the community and the State (to a certain extent, the worldwide peace and security).

Thus, the system of the special part of the criminal law is based on the system of objects of the criminal legal protection. Now the question is whether the textbooks of the criminal law recognize the notion of the object

of criminal legal protection or still retain the notion of the object of the crime. Unfortunately, while the textbook of the criminal law of the Russian federation mentions the object of the criminal legal protection, it still refers to a concept of the “general object of the crime”¹¹. We have a similar situation in 2011 textbook of the special part of the Georgian criminal law, which on the one hand talks about the general object of the crime¹² and on the other hand it states that the legislator “is protecting the life of the person before his death”¹³.

While analyzing the crime against property, the given textbook formulates the traditional concept of the “object of the crime” and on the other hand, clarifies the concept of “object of criminal legal protection on the page 518”. The textbook issued in 2016 talks about two partite division of the object of the crime¹⁴. However, it talks more often about the object of criminal legal protection¹⁵, which is legally correct. However, we believe that **it would be more appropriate to clarify what are the advantages of the notion of object of criminal legal protection vis-à-vis to the traditional concept of the object of the crime.**

Thus it is apparent that the textbooks of the special part of the criminal law do not have a uniform approach towards this issue. Thus, once and for all, we should say good bye to the traditional concept of the object of the crime and replace it with the object of the criminal legal protection, which is the product of the legislative classification of the conduct as the crime when the legislator has classified the objects of criminal legal protection in special part of the criminal law in accordance with their value. **Criminal law protection objects may be classified into general, group or typical objects and while analyzing the corpus delicti of a crime, we may also have additional objects.**

7. Subjects of Criminal Legal Protection and the System of the Special Part of the Criminal Law.

The concept of subject of the criminal legal protection is even more ambiguous than the concept object of the criminal legal protection. Indeed, if the legislator has created the concept of object of criminal legal protection, as a product of legislative classification of the conduct of the crime, than **the subject of criminal legal protection is the legislator itself.** However, the point is that State is not the sole responsible entity for the fight against crime. **This fight requires the participation of every conscientious member of the community.** Therefore, we have a legal relationship directed towards the prevention of the crime or towards the lawful conduct as we have already underlined the lawful conduct translates the requirement of the norm of law into the norm of law. We have also mentioned that not every conscientious member of the community abstains from the commission of the crime for the fear of punishment. They are not committing crimes because of the high sense of the personal dignity and positive responsibility before the public. **These are exactly the persons, who are the subject of the criminal legal protection together with the State.** Besides, we should not forget so called encouraging norms, which call upon the citizens towards lawful conduct (such as the norm encouraging the abandonment of the crime). In addition, we also have grounds of justification, which require the active participation of the citizens (self-defense, arrest of the potential criminal, state of necessity, lawful risk);

Unfortunately, the system of the special part of the criminal law still retains the concept of the subject of the crime¹⁶. In this respect, we can frequently encounter the concept of the “subject of the crime” in the textbooks of the special part¹⁷, however, sometimes a more reasonable solution is found when they talk about the author

¹¹ Уголовное право, Особенная часть, Учебник М., 2011, 13.

¹² *Lekveishvili M.*, Private Part of the Criminal Law, Tbilisi, 2011, 24.

¹³ *Ibid*, 24.

¹⁴ Mamulashvili G. (ed.), Private Part of the Criminal Law, Part 1, Tbilisi, 2016, 20.

¹⁵ For example, 32.

¹⁶ For example, the above mentioned textbook of the criminal law of Russian Federation, 76.

¹⁷ For example the textbook of Georgian criminal law issued in 2016, Part 2, 159.

of the crime, including the special author (principle). As opposed to the view of the some of the criminal legal scholars, we believe that the crime is not committed generally, but through the execution of the legislated *corpus delicti*¹⁸, clearly, in absence of grounds of justification. Because the legislative formula of the *corpus delicti* is practically executed by the author (also the “co principle), the author of the crime is bound to deliberate before embarking upon the commission of the crime. Think whether it is better to act lawfully and therefore with the sense of responsibility before the State. Because he has a choice, naturally, he is the subject of positive responsibility and from this viewpoint, **he is the citizen, a non citizen with legal status, a public officer, a medical worker, a driver, a ship captain, etc. Clearly, the subjects enumerated here make up the special part of the criminal law in accordance with their status.**

We may definitely say that the subjects of criminal legal protection are the product of the same line of thinking as objects of the criminal law protection. Even in 1999 I wrote that here we have criminal legal relationship directed towards the prevention of the crime and one of the elements of this relationship is the object of criminal legal protection. Therefore, it is evident that we also need the concept of the subject of criminal legal protection because the lawful conduct of the subject, which is the object of the criminal legal relationship creates the object of the criminal legal protection. **Therefore, the subject of the criminal legal protection and the object of the criminal legal protection are the elements of the criminal legal relationship**¹⁹.

8. Conclusion

In the light of all that was mentioned above, there is nothing that can prevent us from asserting that special part of the criminal law is nothing more than **the unity of the objects and subjects of the criminal legal protection**. Therefore, we should start analyzing special part of the criminal law not by traditional concept of the object of the crime, but by the object of criminal legal protection. **The legislative classification of the conduct as a crime is expressed exactly in this viewpoint together with the fact that the legislator is protecting the societal goods by legislative definitions of the crime**. On the other hand, from the viewpoint of the criminal legal relationship directed towards the prevention of the crime, **It is clear who is obliged to act lawfully and thus protect the object of the criminal legal protection**. This is the mode of legal thinking which should be observed not only in the general part of the criminal law but also in the special part. **Therefore, the correct legal thinking requires even in special part of the criminal law to focus on the legal relationship directed towards the lawful conduct. The object and subject of the criminal legal protection are the categories of criminal legal philosophy and are indivisible from each other in the system of the special part of the criminal law.**

From this viewpoint, its even more logical to analyze the given problem **from the perspective of criminal legal philosophy**, because the legislative classification of the conduct as a crime requires the implementation of the principles of the criminal law and the identification of the objects of criminalization, in the course of which the legislator is not only **objectively justified** but also politically correct, especially taking into account the fact **that criminal law is the form of union between the criminal legal doctrine and criminal politics and as such category, its subject of philosophical research.**

¹⁸ See *Nachkebia G.*, Introduction to the general theory of the qualification of the conduct as a crime (from the aspect of the system of criminal science), Part 1, Tbilisi, 2000, 81.

¹⁹ See *Nachkebia G.*, Concept of the Object of Criminal Legal Protection “Samartali” 1999, № 6-7.

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