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THE INSTITUTE OF OFFENCE IN REGULATION OF CHURCH RELATIONS: HISTORIOGRAPHY DIMENSION

The publication is devoted to analyze the content categories of «offence», «ecclesiastical offence», «ecclesiastical crime», «sin», reflected in prerevolutionary canonists literature and modern domestic and foreign inheritance of law historians. It is ascertained of little interest to understand the category of «ecclesiastical offense». Church legislator, confining the list of types of such offenses, failed to determine the content of the definition to now. However, it is possible, to find in some prerevolutionary canonists' work such attempts where scientists made synonymous categories «ecclesiastical offence» and «ecclesiastical crime» or even used only one the latter term. It is observed that today there is renewed interest to the problem, but modern canonists and law historians, focusing on types of religious offenses, are also in no hurry to determine the content of the category. A definition of «ecclesiastical offence» is offered to broad scientific audience as guilt against church rules, action or omission committed by a delictual person for which there comes responsibility as provided by canon law.

Key words: ecclesiastical offense, ecclesiastical crime, sin, canonist, researcher, canon law, church court.

Nowadays modern scientific literature deals a lot with the problem of understanding of such a category as «offence». There are plenty of monographs, articles and publications devoted to the legal historiography issue. The concept of «offence» is also updated in the textbooks on the general theory of state and law. In general, the author's conclusions and generalizations have a heteropolar character that demonstrates the diversity and topicality of the abovementioned issue.

To clarify the category of «offence» we address to the Ukrainian Law Encyclopedia where it is defined as a socially dangerous or harmful act (act or omission) that violates the law. It is also indicated that the characteristic feature of an offence is the wrongfulness of the act or omission of the subject of public relations. The authors of the encyclopedia consider the problem of an offence through the degree of social danger or harm quite logically. According to these parameters the scientists divide offences into crimes and disciplinary misconducts[1].

One of the best scholars of the national jurisprudence M. Tsvik also pays much attention to the analysis and clarification of the concept of offence and its derivative elements. In addition to the standard classification of offences, the identification of structural elements and their types, the author proves his own ideas on the typology of the offences according to certain criteria. Originality of M. Tsvik's approaches leads to a more detailed examination of the discussed issue. The author, in particular, offers to classify offences according to the following criteria: according to the degree of social harm offences fall into crimes (socially dangerous, criminally punished acts) and misconducts (acts that are offences under the other branches of law); according to the field of law, which includes the norms that are violated – into constitutional, administrative, disciplinary, land, environmental, civil etc.; according to the subject – into offences committed by an individual or by a legal entity; according to the subjectivity -into intentional and negligent acts; depending on the nature of violated norm – into substantive and procedural offences; according to the form of external expression – into unlawful actions and omissions; depending on the assessment of the damage caused (consequences) – into offences with the material component and the offences with the formal component; depending on the number of subjects who committed the offence – into sole and group (ie, committed in the complicity)[2] It should be emphasized that the researcher does not consider the following list exhaustive. He notes that the offences can be classified according to the spheres of public life. As an example, he mentions the offences in the field of economics, management, everyday

[1] Шемшученко, Ю.С. (2003). *Юридична енциклопедія.* Київ: Видавництво «Українська енциклопедія» ім. М. П. Бажана, 47-48

[2] Цвік, М.В. (2002). *Загальна теорія держави і права: підручник для студ. юрид. спец. вищ. навч. закладів освіти*. Харків: Право. <http://radnuk.info/pidrychnuku/teoriua-prava/38-tsvik/83-s-3-.html>

life and so on[1].

New methodological approaches to defining the category «offence» are demonstrated by a famous domestic practitioner and theorist of law M. Koziubra in his latest work «General Theory of Law». The scholar's concept is based on the gradation of the types of legal thinking. Within the positivist approach an offence is defined as «any act that violates the regulations set by the state in the relevant standards, regardless of their content evaluation»[2]. Clearly, in all other cases, the fact of the offence is missing. Another natural-law approach gives a wide significance to the category of «offence». The scientist believes, «If the norms are created by any other subjects but the state, which are contained in the statutes, religious texts, legal contracts, collective agreements, etc., then respectively the offences will be recognized as acts that are contrary to the requirements established by these norms»[3]. Specified conclusion is very important for our study because it indicates the presence of the institute of «offence» in the sphere of religious relations regulation. Moreover, M. Koziubra, relying on the historical experience of the struggle of humanity for justice and freedom, points to the deliberate violation of state legislative prescriptions that did not meet universal values or were contrary to natural rights. The scholar calls such actions «violation of state laws» but not «an offence» because they did not violate the principles of law, morals, and kindness[4]. We absolutely support and agree on this thesis. Natural and legal, human-centrist approach to understanding the law allows to differentiate the category of «offence» and «violation of law» in which the first category is synthesized in the light of justice, morality, human and social values.

The characteristic of the category «offence» is also considered by a modern law theorist V. Kotiuk. The scientist strongly advocates the position that «all offences are socially dangerous or harmful because they are directed against subjective rights and freedoms of an individual, a legal entity, a state or a society as a whole»[5] Violating natural or legal rights of any single person, the offender will certainly do harm to people, nature, the state or organizations. The scholar divides misconducts into administrative, constitutional, financial, civil, disciplinary, land, environmental, marriage and family. The author's conclusion on an unfinished list of offences is important for our work because «there may be other offences depending on the field of law»[6]. Thus, from the V. Katiuk's point of view, the field of law determines the type of offence. We fully and completely agree on this opinion, because the religious law has existed as a separate field of law for several centuries of Ukrainian national past. Thus, accordingly, there have been violations in the regulation of church relations, which were called either crimes against the faith and morals, or crimes against the church[7]. Therefore, we propose to analyze the concept of «a church offence».

At the present stage of development of church-state relations based on the principles of freedom of conscience and religion and separation of church from state, violation in this area has dual nature: criminal-law and church-legal. As for the first, it falls under the concept of «crime» and is regulated by norms of criminal law enshrined by the Criminal Code of Ukraine on April 5, 2001[8].

It is about crimes against freedom of conscience provided by Articles 178 – 181 of the Criminal Code. The legislator gave an exhaustive list of acts against religion and the church, these acts are recognized criminal and for them the criminal liability is foreseen. These include: damage to religious buildings, illegal retention, desecration or destruction of religious shrines, obstruction of religious ceremonies, attacks on human health under the guise of preaching religious beliefs or fulfillment of religious ceremonies[9].

Church and legal status of the offense is characterized by little study and uncertainty of its approaches to solving the problem, therefore, the purpose of the article is to analyze the category of «ecclesiastical offense» in legal scientific heritage.

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[1] Цвік, М.В. (2002). *Загальна теорія держави і права: підручник для студ. юрид. спец. вищ. навч. закладів освіти*. Харків: Право. <http://radnuk.info/pidrychnuku/teoriua-prava/38-tsvik/83-s-3-.html>

[2] Козюбра, М.І. (2015). *Загальна теорія права: підручник.* Київ: Ваіте, 287.

[3] Козюбра, М.І. (2015). *Загальна теорія права: підручник.* Київ: Ваіте, 287.

[4] Козюбра, М.І. (2015). *Загальна теорія права: підручник.* Київ: Ваіте, 288.

[5] Котюк, В.О. (2001). *Основи держави і права.* Київ: Атіка, 65.

[6] Котюк, В.О. (2001). *Основи держави і права.* Київ: Атіка, 66.

[7] Котюк, В.О. (2001). *Основи держави і права.* Київ: Атіка, 65.

[8] *Кримінальний кодекс України*, ст. 56 (2001) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon1.rada.gov.ua/laws/show/2341-14/print1214905443606898>

[9] *Кримінальний кодекс України*, ст. 56 (2001) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon1.rada.gov.ua/laws/show/2341-14/print1214905443606898>

Despite the fact that the category of «ecclesiastical offense» is mentioned in the main regulations of the Orthodox Church, but, unfortunately, church law does not give its definition. Instead, the Holy Synod of the Orthodox Church established a list of illegal acts in church relations which include religious offenses against the faith and the church, against Christian morality, against the rules of monastic life, against the Church and hierarchical order, failure or abuse by bishops and clergy of their duties, other ecclesiastical offenses[1].

The issue of semantic content of category «ecclesiastical offense» is found on the pages of some prerevolutionary canonists' and contemporary law historians, including M. Suvorov, A. Pavlov, N. Milash, M. Varyas, E. Belyakova, I. Prystinskyi, I. Oborotov. Analysis and theoretical understanding of canonical literature of the nineteenth century shows that researchers, focusing on coverage of types of Church crimes, mostly avoid the interpretation of the category. Only a few definitions occur in the work of a bygone era. Thus, the most famous pre-revolutionary canonist N. Suvorov was the first scientist who actualized the theoretical and legal status of ecclesiastical offenses and tried to define it in terms of contemporary ecclesiastical law. The monograph «About church punishment. Experience of research under canon law» which was published in 1876, the scientist described content of the category «ecclesiastical offense»[2]. It is defined as follows: «Ecclesiastical offense – is any criminal acts against the moral principles of church discipline violations, including violations of criminal law that are prohibited by the canons of the church and entail appropriate penalties»[3].

Another famous canonist of the nineteenth century - A. Pavlov also studied the matters of church law definitions. The researcher made synonymous the term «ecclesiastical offense» with the term «ecclesiastical crime» which, in his opinion, is much broader than the concept of «criminal offense». «Church considers any crime as a sin – the researcher writes – and confesses the sin of not only a violation of the commandments of God, but also a violation of any human law that governs the preservation of the natural moral principles». The researcher strengthened his position with the following thesis: «The current norms of canon law provide religious punishment for criminal offenses, including: adultery, murder, theft, robbery, etc., that fall under both secular and under ecclesiastical jurisdiction where every court shall decide in accordance with the norms of substantive law». Thus, the semantic content of the ecclesiastical crime covers also content of criminal offense.

Reflecting on the concepts of «sin» and «crime», the scientist concluded that the first category is much wider because «not every sin is a crime but only that for which some punishment is directly identified in church or state law that means such an act that violates the norms of certain law» [4]. Sin – is a violation of God's commandments and canons that may not apply to public order. Thus, sin and crime are correlated with each other as total and partial, as there are acts that may be sinful and cannot be a crime[5].

Based on this concept, the scientist argues that the scope of jurisdiction of the court of the church is much wider as opposed to a secular court. It is primarily characterized by a dual form: «in foro interno» (internal, secret form of court) and «in foro externo» (external, public form of court). The first form includes sins and/or crimes that violate church law and/or secular law where a guilty confesses and regrets an act (inaction) and is judged by a priest; the second one - religious crimes which violate the provisions of canon law only. In such cases the proceedings are carried out openly, publicly, according to the norms of Church law by relevant procedural authority of the ecclesiastical court. A separate group of offenses is the one that violates both church and secular law. It falls under the jurisdiction of both public and secular courts. Given this stratification to jurisdiction the scientist allocates religious crimes, crimes and mixed crimes. They are collectively covered by a broader category whose name is «sin» [6].

A somewhat different approach to the definition of the category «ecclesiastical crime» suggested another pre-revolution researcher N. Milash. It features an original interpretation of the wording of the definition. Thus, under the ecclesiastical crime the scientist understands «violation by any external actions

[1] Перелік церковних правопорушень, що підлягають розгляду церковними судами, затверджений Священним Синодом Руської Православної Церкви *(2011) (Журнал Священного синоду). Офіційний сайт Священним Синодом Руської Православної Церкви <http://patriarh.org.ua/uk/zhurnali-svyashchennogo-sinodu/2011-r/item/6348-perelik-tserkovnih-pravoporushen-scho-pidlyagayut-rozglyadu-tserkovnimi-sudami.html>*

[2] Суворов, Н. (1876*). О церковных наказаниях. Опыт исследования по церковному праву.* Москва: б.в., 4.

[3] Суворов, Н. (1876*). О церковных наказаниях. Опыт исследования по церковному праву.* Москва: б.в., 4.

[4] Павлов, А.С. (1899). *Сокращенный курс лекций церковного права*. Москва: б. в., 341-342.

[5] Павлов, А.С. (1899). *Сокращенный курс лекций церковного права*. Москва: б. в., 341-342.

[6] Павлов, А.С. (1899). *Сокращенный курс лекций церковного права*. Москва: б. в., 342.

of the current church law, if someone makes something that should not do or do not fulfill the thing that one had no right to ignore, according to their responsibilities»[1]. As we see, the author's definition is far from legal terminology but is worth being noted as the scientist is one of the few researchers of the bygone era who managed even in this perspective to talk about this issue. In addition, N. Milash proposed to classify ecclesiastical crimes by the criterion of responsibilities of the subjects of the church into two groups. He attributes to the first the crimes of clerics concerning the breach of their duties or general norms of canon law; the second - lay crimes. This second type offense the scientist calls «sin.» In addition, the theologian objected to Pavlov A. the content of the category of «crime» and «sin», where the latter is narrower which in our view is contrary to general principles of canon law, and therefore - is quite controversial.

Sharing the opinion of A. Pavlov about distinction of church jurisdiction, N. Milash believes that «sins in case of confession, repentance toward God, reformation before the church fall into the internal court of the church, and in the case of public exposure - in external court verdict which has legal consequences; if sin coincides with a crime that violates the secular law, it is accordingly subject to the secular and ecclesiastical court at the same time»[2]. However, the scientist, unfortunately, did not say anything about the venue of the first type of church crimes committed by clergymen. Summing up made authors considerations, we'll note that although the work of N. Milash is far from deep and convincing evidence, but we have to admit its existence and terms.

Finally, another pre-revolution researcher, whose work attempts to define the term of «ecclesiastical offence» is M. Gorchakov. In the early twentieth century the scientist along with other canonists was involved in development of the concept of reorganization of the Church in general hierarchical structure and reform of principles of the ecclesiastical court in particular. Working on the project «Charter of organization of the church court» which after the Bolshevik coup in October 1917 was not approved, the scientist introduced to the text of the document the term «ecclesiastical crime» as follows: «The ecclesiastical crime – is the act aimed at the violation of church rules, orthodox doctrine, moral law and order, which, being discovered and proved in court, shall be determined by the legislature Local church punishment»[3]. The entire working group of canonists agreed with this interpretation who worked on the preparation of the reform, as no objections received from them[4].

From that time until now the problem came to a total oblivion, and only recently some historians of canon law came back to its revival. Thus, the Russian scientist M. Varyas drew attention to the difficulty of formulating definition of «ecclesiastical offense» but tried to define it as «expressed in any objective form guilty (deliberate or careless) act or omission of the subject of ecclesiastical law which violates canon law (including state laws recognized by church) and infringes on set by God or a government order that emerged in the life of church, control, or basis of faith and morals» [5].

In turn, the current Ukrainian researcher I. Prystinskyi, recognizing the definition of M. Varyas as the most successful, yet pointed to its shortcomings, among which he called: the lack of criminality as a sign of the ecclesiastical crime and inexpedient use of the phrase «subject of the canon law.» I. Prystinskyi argues that not all subjects of canon law can be subjects of ecclesiastical crimes, because the concept of «an ecclesiastical law» is much broader than the concept of «a subject of ecclesiastical offense».[6] However, the scientist suggested his own understanding of punishable canonical action (or inaction) committed by the subject of ecclesiastical offense[7]. To the main achievements of I. Prystinskyi we should enroll his intention to find out the essential features of the ecclesiastical offense, including: a form of a crime (active – act or passive – inaction); a danger for both society, church, and for the offender, which thus has a spiritual damage; guilt which can be characterized by intent or negligence; wrongfulness which is in violation of church law and state-government regulations, recognized by ecclesiastical authority; punishment whose

[1] Никодим, М. (1897). *Православное церковное право.* СПб.: Типография В. В. Комарова, 508-509.
[2] Никодим, М. (1897). *Православное церковное право.* СПб.: Типография В. В. Комарова, 508-509.
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[6] Пристінський, І. (2012). Поняття та ознаки церковного правопорушення (злочину) в канонічному праві православної церкви. *Кримінальне право і кримінологія*, 136-140.
[7] Пристінський, І. (2012). Поняття та ознаки церковного правопорушення (злочину) в канонічному праві православної церкви. *Кримінальне право і кримінологія*, 136-140.

primary aim is remorse and correction of the offender and then imposing of appropriate sanction; commitment by the subjects such as church clergy and laity, ecclesiastical offense[1]. It should be noted that according to the norms of canon law, the minimum age when the responsibility for ecclesiastical offense comes is seven years old for lay. Church delictual dispositive capacity for clergy is due to appropriate age from which a person can belong to holy orders or to hold a church office[2].

Thus, the study and research of relevant sources of canon law, church law and modern literature of past centuries testifies little interest in understanding the category of «ecclesiastical offense.» Yes, ecclesiastical legislator, confining by the list of types of offenses to now failed to determine the content of the definition. Instead in some works of pre-revolutionary canonists we can find such attempts, however, in our opinion, they were not entirely successful. The main flaw is that scientists made synonymous categories «ecclesiastical offense» and «ecclesiastical crime» or even used only one.

Now we observe the slight recovery of interest in this issue. Modern historians and law canonists focusing their attention on the types of religious offenses are also in no hurry to determine the content of the category itself. We find isolated attempts to break the established stereotypes in works of M. Varyas and I. Prystinskyi. However, their definitions are not exemplary and do not resolve the problem.

So, little development of analyzed category encourages us also to contribute to understanding of its content. Taking into account the works of predecessors such as canonists and historians of canon law, considering the secular and ecclesiastical legal tradition of legal consciousness, we offer to a broad scientific audience our own definition of «ecclesiastical offense». In our opinion, it is a guilty, against church rules act or omission committed by delictual entity for which there comes responsibility as provided by canon law. In addition, we consider it appropriate to single out the following features of the ecclesiastical offense: a form of commission (active or passive), strong-willed character (intent or negligence), illegality, guilt, punishment and an act or omission committed by the subject of ecclesiastical offense.

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