Aleksei Rarog

Doctor of Legal Science, Professor of the Kutafin Moscow State Law University

Ildar Tarhanov

Doctor of Legal Science, Scientific Supervisor of the Faculty of Law, Professor of the Kazan (Volga region) Federal University

Ramil Gayfutdinov

Candidate of Legal Science, Associate Professor of the Kazan (Volga region) Federal University

THE MAIN CONCEPTS OF GUILT AND THE PARTICULARITIES OF THEIR REPRESENTATION IN RUSSIAN CRIMINAL LAW

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Abstract: Guilt is an obligatory feature of a crime under the Criminal Code of the Russian Federation (hereinafter referred to as the Code)[1]. However, there is no legal definition of guilt in the Code, as well as in most criminal laws of foreign countries. Understanding of guilt is sometimes contradictory in the doctrine so the authors consider the main concepts to present a holistic understanding of the formula of guilt in Russian Criminal Law: psychological concept, evaluative (normative) and dangerous state of mind.

Guilt is a criminal law concept and therefore has psychological, social and legal (criminal law) content. In Russian Criminal Law, it is usually considered within the framework of its social and psychological interpretation. At the same time, echoes of the other two concepts can be found, for example, in the interpretation of negligence as a form of guilt (Part 3, Article 26 of the Code) and criminal

[1] Criminal Code of the Russian Federation: Federal *Law No.* 63-FZ of 13.06.1996 (rev. from 19.06.2020) // Sobranie zakonodatelstva Rossiyskoy Federatsii = Russian Federation Code. 1996. No 25. Art. 2954.

responsibility for taking the highest position in the criminal hierarchy (Article 210[1] of the Code) due to the fact that certain elements of external assessment (normative concept) and subjective imputation (theory of a dangerous state of mind) can be seen in the construction of these rules by the legislator.

The paper strongly focuses on the analysis of the individual basic elements, attributes, components of the phenomenon in question and their relationship to each other: guilt and guiltiness, intellectual and volitional elements, knowledge, awareness, foreknowledge, understanding, desire, presumption, indifference and calculation.

Key words: guilt, concepts of guilt, subjective side of a crime, elements of crime, motive, purpose, intent, carelessness, direct intent, indirect intent, thoughtlessness, negligence, forms of guilt, knowledge, will, awareness, foreknowledge, understanding, intellectual moment, volitional moment.

1. Introduction

The doctrine of guilt is of great methodological importance for the cognition, development and application of categories and institutions of law in general. Guilt is an inter-branch category, so theoretical aspects of guilt have been studied by representatives of the general theory of law[1], and civil[2], and administrative[3], and other branches of domestic legal science. However, the most profound development of this problem was received in the criminal law science. And the issue of modern concepts of guilt in criminal law is one of the essential aspects of the mentioned problem.

Guilt is a mandatory feature of a crime under the Criminal Code of the Russian Federation (hereinafter referred to as the Code): a crime is a socially dangerous act committed culpably and prohibited by this Code under the threat of punishment (Article 14 of the Code). Article 5 of the Code enshrines the principle of guilt,

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[1] See: *Yurchak E. V.* [Vina kak obshchepravovoy institut] Guilt as a General Legal Institution. Thesis. Candidate of Juridical Sciences. M., 2016.

[2] See: *Matveev G. K.* [Vina v sovetskom grazhdanskom prave] Guilt in Soviet Civil Law. Kyiv, 1955; *Belyakova A. M.* [Grazhdansko-pravovaya otvetstvennost' za prichinenie vreda: Teoriya i praktika] Civil Liability for Damage: Theory and Practice. M. 1986; *Idrisov H. V.* [Vina kak uslovie otvetstvennosti v rossiyskom grazhdanskom prave] Guilt as a Condition of Responsibility in Russian Civil Law, 2010.

[3] See: *Yakuba O. M.* [O priznakakh administrativnogo pravonarusheniya] On the signs of an administrative offence // Pravovedenie. 1964, No. 3; *Kositsina L. A.* [Opredelenie viny yuridicheskogo litsa pri sovershenii im administrativnogo pravonarusheniya v oblasti tamozhennogo dela] Determination of guilt of a legal person in committing an administrative offense in the field of customs affairs // Aktual'nye voprosy publichnogo prava. 2012. No. 9; *Channov S. E.* [Vinovnost' kak priznak administrativnogo pravonarusheniya] Guiltiness as a sign of an administrative offence // Grazhdanin i pravo. 2017. No. 10.

according to which responsibility without guilt is not allowed. However, the Code does not contain a legal definition of guilt in either Chapter 1 or Chapter 5 (as do the vast majority of foreign criminal laws); limiting itself to an indication that guilt may be intentional or negligent.

Part 1 of Article 24 of the Code mentions two forms of guilt: intent and negligence, and Articles 25 and 26 of this law reveal the content of the said forms of guilt. The provisions of Article 28 of the Code on innocent infliction of harm are also of great importance in characterising guilt.

2. Research methodology

The above norms constitute the legislative basis for theoretical consideration of the problem of guilt in Russian criminal law. It is also important to understand the basic concepts of guilt in the science of criminal law and their implementation in the criminal law in order to define the concept of guilt.

There are three main concepts of guilt in Russian criminal law scholarship: psychological, evaluative (normative) and dangerous state of mind. The first two are considered the main ones. Their analysis suggests those modern theoretical concepts of guilt and its varieties in one way or another represent a reflection of a particular concept of guilt or a combination of their elements.

3. Main results

Psychological and evaluative concepts of guilt are similar in that each of them recognises the existence of an internal (psychological) side of the act, which expresses the attitude of the subject of the crime to the act. However, they substantially differ in the significance and role of this factor for the characterisation of guilt as a whole.

According to the psychological concept, the content of guilt is the mental attitude of the person himself towards his act and its consequences in the form of intent and negligence. Therefore, intent and negligence constitute the generic concept of guilt in the Russian criminal legal theory. Different combinations of its conscious and volitional elements form different combinations of guilt.

In the evaluative (normative) concept of guilt, the mental attitude of a person to the act is considered only as one of a number of factors determining the presence (or absence) of guilt, which is established at the discretion of the law enforcer. Law enforcer's conclusion on guilt is based on the consideration of other objective and subjective circumstances (sanctity, absence or presence of force majeure, etc.)[1].

[1] See: [Kurs sovetskogo ugolovnogo prava: Prestuplenie] Course of Soviet Criminal Law: Crime. In 6 volumes: General Part. V. 2 / A. A. Piontkovsky; Edited by: A. A. Piontkovsky, P. S. Romashkin, V. M. Chkhikvadze. M.: Nauka, 1970. P. 277.

Consequently, guilt is not a mental activity of a person, but an external evaluation of his behaviour, which has the nature of a blame to the offender. This assessment (statement of the blameful nature of the act) is considered as guilt, constitutes its main content. Therefore, this concept of guilt is called evaluative guilt in the Russian criminal law literature.

The evaluative concept of guilt is most commonly referred to in contemporary foreign literature as normative or ethical. Specialists note that the philosophical basis for its early interpretations was neo-Kantianism and then the ideas of phenomenology. It is believed that the implementation of these ideas in criminal law was primarily because it was difficult to justify the nature of liability in negligence[1] within the framework of the psychological concept. A number of other Russian sources most often referred to other circumstances that had mainly social and political roots, rather than just legal roots.

The concept of guilt under consideration is referred to in Russia as evaluative guilt, because guilt is determined within the framework of a negative evaluation of the behaviour of the offender by the court, and its essence is determined in the ethical blamefulness of the act violating the rule of law or blamefulness of willfulness[2]. This concept of guilt is later in time and borrows certain provisions of its psychological variety: it does not completely reject the element of the psychological (internal) attitude of a person to his criminal act, although it may give this factor a secondary importance.

One of the founders of the normative (evaluative) concept of guilt, Reinhard Frank, pointed out that blamefulness, as an evaluation of a person's behaviour and guilt, is determined by a combination of factors: the subject's sanity, the court's determination of the mental attitude of the person to the act that he commits and a number of factual circumstances by which the person commits the act. Representatives of the *subjective* branch of the normative theory adopted this approach. The notable German scientist and criminalist G. Welzel in two articles (1938 and 1948) formulated his variant of the evaluative concept of guilt, which was called the final theory of action. According to it, guilt means blame of a person for not showing the necessary will to change the course of events and thereby allowing harmful consequences to occur.

Criticising the main conclusions of the final theory, A. A. Piontkovsky emphasised that the substitution of the individual guilt of the offender (and it

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[1] See: *Pankov I. V.* [Umyshlennaya vina po rossiyskomu ugolovnomu pravu: teoreticheskiy i normativnyy analiz] Intentional guilt in Russian criminal law: theoretical and normative analysis: dissertation. Thesis. Candidate of Juridical Sciences: 12.00.08 / Ilya Vladimirovich Pankov. SPb., 2010. P. 20–21.

[2] See: *Lyass N. V.* [Normativnaya teoriya v sovremennom burzhuaznom ugolovnom prave] Normative Theory in Modern Bourgeois Criminal Law. L.: Leningrad University Press, 1963. P. 28, 43.

exists objectively *before* any judicial opinion on the case has been rendered) by the judge's negative judgement on the offender's socially dangerous behaviour is "deeply flawed"[1]. This view is also supported in contemporary Russian criminal law literature[2]. It criticises the excessive objectification of the concept of guilt, where the content of guilt is taken out of the awareness and understanding of the social danger of the act of conduct[3].

There have been attempts in German criminal law to find an acceptable compromise between the psychological and normative concepts of guilt, but only within the framework of the theory of blamefulness. In the early 70s of the last century, G. Jeschke, revealing the content of guilt, argued that the perpetrator is blamed by the act committed by him, and not the intention itself. Its realisation provides the basis for guilt and blamefulness and for criminal liability. This position became characteristic of the *objective* branch of normative theory. However, according to Russian scientists, supporters of the normative concept of guilt in any of its modifications do not depart from the evaluative concept of guilt[4].

It should be recognized that in the Soviet criminal law doctrine there was an attempt to introduce elements of the evaluative concept of guilt in the traditional for the Russian science social and psychological understanding of it. A monograph by B. S. Utevsky[5] was published in 1950, considering guilt in two qualities: as a subjective side of a crime and as a general basis for criminal responsibility. In the first sense, guilt was presented as intent or negligence, and in the second sense as a negative assessment by the court of the objective and subjective circumstances of the act, which "is much wider and richer than the concept of guilt as a subjective side of a crime". In his view, "the establishment of the defendant's mere intent or negligence does not always mean that the defendant is guilty as the basis of his criminal responsibility to the socialist state". However, B. S. Utevsky contrasted guilt as the general basis of criminal responsibility with guilt in bourgeois justice

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[1] [Kurs sovetskogo ugolovnogo prava] Course of Soviet Criminal Law: in 6 vols. V. 2. M., 1970. P. 283–284.

[2] See: [Ugolovnoe pravo. Obshchaya chast': uchebnik] Criminal Law. General part: textbook / Rev. by I. Y. Kozachenko. 4-th ed. updated and revised. M.: Norma, 2008. P. 273.

[3] *Kozlov A. P.* [Ponyatie prestupleniya] The concept of crime. Saint Petersburg: Yuridicheskiy Tsentr Press, 2004. P. 563.

[4] *Lyass N. V.* [Problemy viny i ugolovnoy otvetstvennosti v sovremennykh burzhuaznykh teoriyakh] Problems of guilt and criminal responsibility in modern bourgeois theories. L.: Leningrad University Press, 1977. P. 29–30, 49–50.

[5] *Utevsky B. S.* [Vina v sovetskom ugolovnom prave] Guilt in Soviet Criminal Law, Moscow, 1950. See also: *Sergeeva T. L.* [Voprosy vinovnosti i viny v praktike Verkhovnogo Suda SSSR po ugolovnym delam] Issues of Guilt and Guilt in the Practice of the Supreme Court of the USSR in Criminal Cases. M.-L., 1950.

because he was convinced that the assessment of the Soviet court had nothing in common with the social and political assessment, which was the basis of bourgeois neo-Kantian theories[1].

It should be noted that even in contemporary Russian literature there is sometimes an opinion that domestic science, legislation and practice have not actually abandoned the evaluative elements of guiltiness[2]. These conclusions are usually generated by identifying the concept of guilt and guiltiness, ignoring the existing differences in assessing the social content of guilt and the facts underlying the establishment of the mental attitude of a person to the act committed by him and its consequences. Thus, S. V. Sklyarov writes that the establishment of the subjective properties of the act depends on the totality of the available factual circumstances and on the professionalism of the law enforcement officer. On the same basis, he concludes that guilt is a concept *of evaluation*[3]. A number of other academics have a similar position[4].

Other researchers challenge the conclusion about the evaluative nature of guilt because guilt, like other features characterising a particular crime, is surely subject to legal assessment, but this does not "become an evaluative concept"[5]. It is true that the court evaluates the factual circumstances of the case when determining guilt. However, they are seen as a source of cognition: the presence (or absence) of the relevant (intellectual and volitional) components of guilt. There is no blamefulness of guilt of the act in such an assessment.

The **psychological** concept of guilt emerged as a negative reaction to the pre-existing notion of responsibility as an expression of revenge against any wrongdoer, regardless of guilt. The literature emphasizes the significant role of Roman law and the ideas of Christianity in the legal formulation of the psychological understanding of guilt[6]. It associates the problem of responsibility with the phenomena of con-knowledge and freedom to act at will of the actor. According to the famous Russian criminalist N. S. Tagantsev, the first rudiments of this kind of responsibi-

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[1] *Utevsky B. S.* Op. cit. P. 9–11.

[2] See: *Luneev V. V.* [Sub"ektivnoe vmenenie] Subjective imputation. M.: Spark, 2000. P. 12.

[3] See: *Sklyarov V. S.* [Vina i motivy prestupnogo povedeniya] Guilt and motives of criminal behaviour. SPb: Juridicheskiy Tsentr Press, 2004. P. 11.

[4] See: *Trukhin A. M.* [Vina kak sub"ektivnoe osnovanie ugolovnoy otvetstvennosti] Guilt as a subjective basis for criminal responsibility. Krasnoyarsk, 1992; *Veklenko S. V.* [Vinovnoe vmenenie v ugolovnom prave] Guilty imputation in criminal law. Thesis of the Doctor of Juridical Science. Omsk, 2003.

[5] [Ugolovnoe pravo Rossii. Obshchaya chast': Uchebnik] Criminal Law of Russia. General part: Textbook / Ed. by F. R. Sundurov, I. A. Tarkhanov. 2nd ed. updated and revised. M.: Statut, 2016. P. 318.

[6] See: *Fletcher J., Naumov A. V.* [Osnovnye kontseptsii sovremennogo ugolovnogo prava] Basic concepts of modern criminal law. M.: Yurist, 1998. P. 284.

lity in Russia can be found already in the Russkaya Pravda (Rus' Justice), where the punishable is not the fact of infliction of harm, but the attitude of the guilty person to it[1].

The psychological concept of guilt received its conceptualization in the XIX century in the works of foreign representatives of the classical school of criminal law (C. Binding, A. Feuerbach, etc.). In the domestic criminal law literature, it is considered that in Russia the psychological concept of guilt is mainly reflected in the works of N. S. Tagantsev, N. D. Sergeevsky, A. F. Kistyakovsky. However, a prominent researcher of Russian criminal law thought, G. S. Feldstein, underlined the contribution to Russian criminal law science underestimated by his contemporaries of Professor Gavriil Ilyich Solntsev of Kazan University[2]. He lectured there in Latin and Russian, knew European languages and scientific works, prepared manuscript editions of the first course of the Russian criminal law, wrote about the foundations of the general criminal law, and performed a number of other important works. After reading most of his manuscripts, G. S. Feldstein concluded: "only G. Solntsev should be seen as ... the first Russian criminalist who gave in his writings a model of scientific dogma of criminal law"[3].

Within the framework of the psychological concept of guilt, G. I. Solntsev characterises the subject of a crime as a person who has reason and free will, capable of "judging his actions and desires". This is admissible when the criminal act "was acted upon either by malice or negligence or failure to use due care". Thus, G. I. Solntsev not only takes the signs of the subject outside of the limits of guilt, but also forms an idea about its specific content and forms. The existence of a crime, from the point of view of the criminal law, requires an external action which has occurred under certain psychological conditions or depends, according to the scholar's words: on an "internal psychological basis", i.e. "on a different disposition of the will and attention of the perpetrator"[4].

The psychological concept of guilt, endorsed by many Russian scholars, was also reflected in Soviet criminal legislation. However, the latter was not always

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[1] See: [Russkoe ugolovnoe pravo] Russian Criminal Law. Lectures: General Part: In 2 vols. V. 2 / N. S. Tagantsev; Compiler and responsible editor: N. I. Zagorodnikov. M.: Nauka, 1994. P. 223.

[2] The works of A. Feuerbach did have a serious impact on the mindset of the most authoritative Russian criminalists of the time. G. I. Solntsev, who had independent opinions on many issues of criminal law science, also belonged to this pleiad. These extended to ideas about the elements of crime, sanctity, guilt, imputation, determining the nature of attempt, complicity, concurrence, etc.

[3] *Feldstein G. S.* [Glavnye techeniya v istorii nauki ugolovnogo prava v Rossii] Main trends in the history of the science of criminal law in Russia / edited and prefaced by V. A. Tomsinov. M.: Zertsalo-M, 2003. P. 298.

[4] *Feldstein G. S.* Op. cit. P. 315–316.

consistent in this direction and its development was not straightforward. To some extent, that was due to politics and the associated position in the Soviet criminal law doctrine at the time. Today, the social and psychological concept of guilt must be considered dominant, although there are scientific modifications that are reflected in theoretical studies of guilt and in the understanding of its structural components.

In Russian criminal law, guilt is usually considered within the framework of its *social and psychological* interpretation. Meanwhile, certain elements of external assessment can indeed be traced in the legislator's characterization of negligence as a type of guilt. The theory sets out a different understanding of them: the objective reality surrounding a person, requiring a mental attitude to it, is reflected in the form of appropriate images in the psyche of the subject. Their totality is usually referred to in philosophy as subjective reality[1]. A person's ability to adequately reflect objective realities (social facts) is a prerequisite for establishing a mental attitude to them. Famous criminalist L. D. Gaukhman writes: "The mind is the means, human awareness reflects objects and phenomena of the objective world, their essential features, interrelation between them"[2].

However, the processes that take place in the human psyche are indeed not directly perceptible. They are cognisable, but the law enforcer establishes them indirectly. Objective indicators are human actions (deeds) as social facts. Taken together, they constitute the subject of cognition of guilt and a means of establishing the actual mental attitude of a person towards his act and its consequences for the law enforcer. Thus, for the law enforcer guilt is a reality, i.e. an object of cognition external to him. This constitutes the methodological basis for establishing guilt as a mental attitude of a deceased person towards the deed.

There is a debate about the relationship between guilt and such concepts as "guiltiness", "imputation" and "find guilty" in the science of criminal law. They are not only used in theory, but are also applied in law. For example, there is a view in science that guilt and guiltiness should be regarded as identical concepts. Firstly, this statement cannot be considered correct, because in part 1 of article 14 of the Code the legislator does not use the term guiltiness, but refers to the crime as "guilty committed socially dangerous act, prohibited by this Code under the threat of punishment". However, the concept of guiltiness is often given a different meaning in Russian criminal procedure. It is therefore argued that

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[1] Consciousness in philosophy is defined as a subjective image of the objective world, a subjective reality. See: Encyclopaedic Dictionary of Philosophy. M.: Sovetskaya Encyclopaedia, 1983. P. 622. Сознание в философии определяется как субъективный образ объективного мира, субъективная реальность. См.: Философский энциклопедический словарь. М.: Советская энциклопедия, 1983. С. 622.

[2] *Gauchman L. D.* Op. cit. P. 143.

Russian criminal law "is dominated by a social and psychological understanding of guilt, in criminal proceedings guilt has broad sense, guilt considered as the commission of a crime"[1].

The criminal procedure law does distinguish between guiltiness and guilt. Thus, Article 73(1) (2) of the Russian Federation Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure) states that among the circumstances to be proved the law refers not only to the guiltiness of the person in committing the crime but also to the form of guilt and motives. The following questions are put to the jury (among others): whether *it is proved* that, the defendant committed the act and whether the defendant *is guilty* of committing the crime. The Code of Criminal Procedure allows, at the same time, for a jury questionnaire to include "one main question on the guiltiness of the defendant, which is a "combination of the questions specified in part one of this article" (Art. 339 of the Code of Criminal Procedure)[2].

The definition of guilt within the framework of its social and psychological concept cannot be constructed without taking into account the provisions of philosophy, psychology and other humanities concerning the processes occurring in the human psyche. The criminal law concept of guilt should be based on the data of these sciences. It is important to take into account that both philosophy and psychology have their own subject of research, somewhat different basic directions of research and corresponding methods. The common object in terms of legal cognition of relevant aspects of the psyche and mental activity is the problem of *knowledge*. In criminal law, it is considered as one of the components of the content of guilt, although its manifestations are not always precisely defined.

Philosophy explores knowledge in its epistemological, and social and logical aspects, mainly within the framework of solving the basic question of the relation of being and knowledge. Psychological science studies knowledge mainly at the individual level. Therefore, the theoretical literature notes that all these approaches are of particular methodological value when they are presented in a certain way within a general theory of knowledge, as D. A. Kerimov writes: "... the researcher will succeed based on a general theory of knowledge, which summarizes the achievements of all social and natural sciences in this area"[3].

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[1] *Kozlov A. P.* [Ponyatie prestupleniya] The concept of crime. Saint Petersburg: Yuridicheskiy Tsentr Press, 2004. P. 554, 561.

[2] Therefore, there were certain grounds for a scientific understanding of guilt as a set of objective and subjective circumstances justifying the imposition of a particular punishment on a person. See: *Sergeeva T. L.* Op. cit. P. 34.

[3] *Kerimov D. A.* [Metodologiya prava. Predmet, funktsii, problem filosofii prava] Methodology of law. Subject, Functions, Problems of Philosophy of Law. 2nd ed. M.: Avanta+, 2001. P. 387.

Russian jurisprudence usually takes as its basis the notion that knowledge is a psychological concept[1]. However, on another level, this does not exclude differences in the understanding of the elements of the content of guilt and their relationship to each other. At the same time, the concepts of knowledge and awareness are often equated; there is a debate about their substantive content, accompanied by reference to the data of psychological science.

When examining the content of guilt, one should refrain from excessive psychologicalisation of guilt and from the desire to infuse the terms by which the law defines intent and negligence with the meaning that is necessarily invested in them by psychology. However, this caveat is often criticised by some academics. For example, A. P. Kozlov, while agreeing that law uses psychological categories for its own purposes, draws the controversial conclusion that "guilt is primarily a social and everyday phenomenon". It should, in his view, "contain nothing but the categories of the psyche, psychology and psychiatry in their reproduction of society"[2]. This view appears to be highly controversial.

Guilt is a criminal law concept and therefore has not only psychological but social and legal (criminal law) content. In criminal law, a crime, which is understood as an act of will, includes such a basic objective attribute as an act (action or failure to act), which entails certain negative consequences. Guilt, as a psychological phenomenon, of course, must contain in its content the mental processes reflecting the *attitude of a person* to the act committed by him and its consequences. However, it should be defined within the framework of the construction of the relevant corpus delicti.

In psychological aspect, the term of an act is usually seen as a certain present and its consequences as some future. The idea of them, their subjective images, belong to *the realm* of knowledge. It is in this sense that it is seen in philosophy as "a preliminary mental construction of an image of reality itself and the result it produces"[3]. This knowledge "is expressed first and foremost in the understanding, in the comprehension of certain factors and provisions ..."[4]. On this basis, the criminal law constructs guilt as a specific legal phenomenon.

The content of guilt includes a set of elements such as *consciousness and will*. Sometimes it is considered that the elements of the content of guilt are thinking,

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[1] See e.g.: *Strogovich M. S.* [Izbrannye Trudy: Problemy obshchey teorii prava] Selected Works: Problems of the General Theory of Law. In 3 volumes. Vol.1 M.: Nauka, 1990. P. 53–54.

[2] *Kozlov A. P.* Op. cit. P. 568.

[3] [Kratkiy filosofskiy slovar'] Brief Dictionary of Philosophy / A. P. Alekseev, G. G. Vasiliev et al; Edited by A. P. Alekseev. M.: TK Velbi, Prospekt Publisher, 2004. P. 355.

[4] *Kerimov D. A.* Op. cit. P. 384.

will and emotions. Proponents of such an approach proceed from the fact that it is "through thinking that human knowledge reflects objects and phenomena of the objective world ..."[1].

In Russian doctrine, guilt is most often defined as a person's mental *attitude* towards the act he or she committed and its consequences. This fragment of the definition is traditional and practically not contested. Modern definitions of guilt contain, in addition, an indication of the forms of guilt: intent and negligence. Therefore, a representative of the criminal law school of Kazan University, Professor A. V. Naumov understands guilt as a mental attitude of a person to a socially dangerous act committed by him and its consequences in the form of intent or carelessness[2]. However, the definition of the concept of guilt is often supplemented with an indication of its social (axiological) component, which expresses, according to its supporters, the essence of guilt. "Guilt is a mental attitude of a person in the form of intent or negligence towards a socially dangerous act committed by him in which an antisocial, asocial or insufficiently expressed social attitude of this person towards the most important social values is manifested"[3].

Modern criminal law science also presents such definitions of guilt, which include its criminal law *meaning*. Thus, according to another representative of the Kazan school of criminal law professor V. A. Yakushin, guilt is a mental attitude of a person to a socially dangerous act committed by him, expressed in the forms determined by law, revealing the relationship of intellectual, volitional and sensual processes of the person's psyche with the act and being therefore the basis for subjective imputation, qualification of the act and determination of the limits of criminal responsibility[4]. With some refinements, this definition is reproduced by other academics[5]. While there are differences, each of them emphasises that guilt is a person's mental attitude to his or her act.

As the content of guilt is constituted by knowledge and will, the question arises to what extent *knowledge* expresses this attitude. Moreover, the legisla-

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[1] *Gauchman L. D.* [Kvalifikatsiya prestupleniya: zakon, teoriya, praktika] Qualification of a crime: law, theory, practice. M.: AO TsentrYurInfor, 2005. P. 143.

[2] See: *Naumov A. V.* [Rossiyskoe ugolovnoe pravo] Russian criminal law. General Part: A Course of Lectures. M., 2000. P. 223.

[3] *Rarog A. I.* [Nastol'naya kniga sud'I po kvalifikatsii prestupleniy] Handbook of the Judge on the Qualification of Crimes. M., 2009. P. 61.

[4] See: *Yakushin V. A.* [Sub"ektivnoe vmenenie i ego znachenie v ugolovnom prave] Subjective imputation and its significance in criminal law. Togliatti: TolPI, 1988. P. 122.

[5] See: *Bikeev I. I., Latypova E. Yu.* [Otvetstvennost' za prestupleniya, sovershennoe s dvumya formami viny] Liability for crimes committed with two forms of guilt. Kazan: Poznaniye, 2009. P. 22.

tor's description of negligence as a form of guilt does not actually present the sphere of knowledge.

In the psychological concept of guilt, a person's sanity is considered to be a prerequisite that embodies the reflective and cognitive with transformative and volitional aspects of guilt[1]. The sphere of knowledge is usually associated with a person's reflective and cognitive abilities, while the transformative and volitional aspect characterises the subject's state of will. Thus, according to the Code (Articles 25, 26), a person's mental attitude towards the *consequences* of his act may be expressed in their desire (direct intent), conscious assumption or indifferent attitude towards them (indirect intent) or in the expectation of their prevention (recklessness). According to a number of criminologists, the intentional element also occurs in crimes, which in theory are called formal crimes (i.e. which do not contain a legislative indication of the harmful consequences of the act). Therefore, the identification of the psychological element appears to be an urgent task not only in the will, but also in the very consciousness of the person.

Authoritative psychologists argue that knowledge is not the sum of its constituent elements, but a complex structural whole that reflects the *active* role of human knowledge. This manifests not only in the reflection of reality, but also in the attitude towards it: "The more aware a man's action is, the more pronounced" in this action is his attitude[2]. At the same time, in A. P. Kozlov's opinion, there are two blocks of such a person's mental attitude: the attitude towards the fact of behaviour and the attitude towards its social component (i.e., the asociality of the mental attitude)[3]. In other words, a person's knowledge encompasses not only the actual, but also the social side of the act. Therefore, an understanding of guilt defined in general as a person's mental attitude should be recognised as justified.

In the Code, the sphere of a person's knowledge is represented by its two main components: the person's awareness of the public danger of his actions (inaction) and his foreknowledge of the possibility or inevitability of socially dangerous consequences (Articles 25, 26, 27 of the Code). They are usually recognised as an *intellectual* element of guilt. However, in the theory of Russian criminal law there is no unity in understanding the content of each of them and their totality. This makes it difficult for law enforcers to establish this element in the process of qualifying a crime.

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[1] See: Russian Criminal Law: in 2 vols. Volume 1: General part: textbook / Edited by L.V. Inogamova-Khegay, V. S. Komissarov, A. I. Rarog. Moscow: Prospekt, 2006. P. 159.

[2] See: *Myasishchev V. N.* [Lichnost' i nevrozy] Personality and neuroses. L.: Leningrad University Press, 1960. P. 109, 114.

[3] See: *Kozlov A. P.* Op. cit. P. 564.

The psychological phenomenon of awareness is, in theory, identified with knowledge as a more general category. Previously, there were certain legislative grounds for this: in the Code of the Russian SFSR of 1960, the legislator to refer to the fact that a person understood the public danger of his or her deed used the term "knew". However, in the Code of 1996 the term "knew" was replaced by another term "was aware of". It, in our opinion, more corresponds to the meaning of the psychological concept considered here. In our opinion, the law now excludes the identification of the terms and concepts of knowledge and awareness and recognises them as equal in meaning and significance. The concept of awareness reflects such qualities (derivatives) of consciousness as knowledge and thinking. Awareness is the process *of functioning* of knowledge. It is addressed by the Russian legislator to the assessment of a person's actions (or failures to act).

A qualitatively different form of manifestation of the sphere of human knowledge is the *foreknowledge* by him of the possibility or inevitability of occurrence of consequences of his act. It is addressed to the future, and the Russian legislator addresses this psychological element to a sign of objective side of a crime, which is called consequence of act. In psychological terms, it is the mental perception by a person of the harm that will come (or may come) as a result of the act. In the Code, it is referred to as socially dangerous consequences (Articles 25, 26, 27, 28 of the Code).

Unlike awareness, foreknowledge is prognostic in nature, which also relies on knowing and is associated with thinking as an element of knowledge and its product. Consequently, foreknowledge and awareness share the same mental source, but differ significantly in the focus of cognition, its objects, methods and the totality (circle) of the factual circumstances to be proved.

Contrary to the current prescriptions of the Russian criminal law, in the domestic theory of law there is a real position of identification of the concepts of awareness and foreknowledge. For example, V. P. Malkov states that knowledge (in the sense of awareness) of the socially dangerous nature of a deed "is equivalent to foreknowledge of the consequences indicated in the law"[1]. A different approach is observed in other contemporary scientific sources. An opinion is expressed that "awareness as understanding ... is broader than foreknowledge as an assumption of the occurrence of something"[2]. Authors who believe that knowledge is derived from foreknowledge take the opposite scientific position[3].

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[1] *Malkov V. P.* [Sub"ektivnye osnovaniya ugolovnoy otvetstvennosti] Subjective Grounds of Criminal Liability // Gosudarstvo i pravo. 1995. No. 1. P. 93.

[2] *Bikeev I. I., Latypova E. Yu.* Op. cit. P. 42–43.

[3] See: *Nersesyan V. A.* [Ponyatie i formy viny v ugolovnom prave] The notion and forms of guilt in criminal law // Pravovedenie. 2002. No 2. P. 78.

The diversity of approaches in each case is ensured by reference to relevant psychological sources. This is also reflected in decisions on the problem of the correlation between awareness and anticipation in the temporal (temporal) aspect. For example, V. A. Yakushin states, "knowledge of public danger of committed actions is not unambiguous to the concept of foreknowledge of socially dangerous consequences". Such knowledge, according to the scholar, "precedes the foreknowledge of socially dangerous consequences, it is the basis of this foreknowledge, its base and starting point"[1]. However, there is an opposing view in the doctrine: awareness is derived from foreknowledge[2].

As already noted, the Code uses the terms "awareness" and "foreknowledge" to denote different forms of the functioning of knowledge. The legislator separates them. In our opinion, these concepts should not be considered as either mutually exclusive or equal in meaning. They are interrelated, but multidirectional, and therefore they are different in character. Constituting the intellectual element of guilt, each of them means perception and *evaluation* by a person of different in content objective signs of the objective side of the crime. In the legislative formula of guilt they may have a different designation than in reality. Therefore, awareness should not be endowed with the features of a generic concept in relation to foreknowledge or one should not be considered as a particular manifestation of the other.

A psychological phenomenon is the category of "understanding" seen as a property of knowledge. One of the factors causing a debate about the intellectual content of guilt is that only one of its components, i.e. awareness, is endowed with this property. I. I. Bikeev and E. Yu. Latypova write: "Awareness as understanding ... is broader than foreknowledge as an assumption of the onset of something"[3]. This assertion seems debatable.

Awareness and foreknowledge are seen as different forms of functioning of knowledge, and each of the named components constitutes *understanding* as a specific thought operation. In criminal law it is equally aimed at understanding what is happening and understanding what might happen. It is necessary for qualification in the presence of substantive offences. The exclusion of any of the intellectual components is inconsistent with the current Code. The formula of intent presupposes a person's understanding of each of the named features.

In modern criminal law doctrine there is a view that awareness, as a psychological phenomenon, should be extended not only to the act, but also to the

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[1] *Yakushin V. A.* [Oshibka i eyo ugolovno-pravovoe znachenie] Mistake and its criminal law significance. Kazan University Press, 1988. P. 22–23.

[2] See, e.g.: *Shchepelkov V. F.* [Kvalifikatsiya posyagatel'stv pri chastichnoy realizatsii umysla] Qualification of encroachments with partial realisation of intent // Zhurnal Rossiyskogo prava. 2002. No. 11. P. 205.

[3] *Bikeev I. I., Latypova E. Yu.* Op. cit. P. 42–43.

sphere of its consequences. According to some Russian scholars, the intellectual element of guilt is "the degree to which a subject is aware of the socially dangerous nature of his actions and their consequences"[1]. Sometimes it is considered that "awareness of the danger of actions (failures to act) ... at the same time means the awareness of the possibility of their consequences"[2].

Some scholars take the opposite position on this issue, believing that it is the element of foreknowledge that should be extended not only to consequences but also to the act *as a whole*. Awareness of the nature of the act is not considered to be mere awareness but foreknowledge of the "nature of one's behaviors". It is said to be "knowing of the nature of the act, which will take place in the near or distant future"[3]. Obviously, foreknowledge in this case is given an entirely different meaning, unrelated to the topic under discussion.

Many lawyers seek support for their conclusions from psychologists. For example, it is well known that they take the position that an act cannot be regarded as conscious "unless a significant consequence or result of that act has been aware of"[4]. It can be assumed that the authoritative Russian psychologists also cover the foreknowledge of the consequences of an act by the notion of awareness. It follows that foreknowledge is part of knowledge and therefore it should not be identified as a necessary element of intent together with knowledge[5].

The concept of guilt in Russian criminal law cannot be formulated without taking into account the achievements of psychological science. However, it is important to follow not only the terminology used by it. Often the same terms are used by psychologists in different semantic combinations. In the above statement about awareness as a special psychological phenomenon, S. L. Rubinstein, in our opinion, sought to emphasize that the completeness (or measure) of a person's awareness of his *action* is related to his understanding of the "substantiality" of its consequence (or result). This approach correlates with the prescription of the criminal law that a person is aware not only of the factual side, but also *of the public danger* of his actions (inaction).

The Russian legislator distinguishes between the concepts of awareness and foreknowledge, so the task of lawyers is to provide law enforcement with

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[1] *Luneyev V. V.* [Predposylki ob"ektivnogo vmeneniya i printsip vinovnoy otvetstvennosti] Prerequisites of objective imputation and the principle of culpability // Gosudarstvo i pravo, 1992. No. 9. P. 59.

[2] *Bikeev I. I., Latypova E. Yu.* Op. cit. P. 43.

[3] *Kozlov A. P.* Op. cit. P. 368–369.

[4] *Rubinstein S. L.* [Osnovy obshchey psikhologii] Fundamentals of General Psychology. SPb: Piter. 1999. P. 16.

[5] *Ivanov N. G.* [Umysel v ugolovnom prave Rossii] Intent in the Criminal Law of Russia // Rossiyskaya yustitsiya. 1995. No. 12. P. 17.

criteria for distinguishing these components of the intellectual element of guilt in relation to each form of guilt, to correctly reveal their criminal law meaning, taking into account the data of psychological science. Terminologically expressed judgments of psychologists cannot always be directly extrapolated to the criminal law matter.

Will as an independent component of the content of guilt is essentially different from its intellectual element, although it is related to it. In the Code it is considered as an independent sign of guilt, which expresses *the volitional attitude* of a person to the consequences of his act. This element of the psyche is regarded as a concept not reducible to knowledge[1]. The main characteristic of the human will is its self-determination, which is based on the philosophical understanding of the will as the mind's capacity for self-determination. Characteristically, in Russian criminal law, a person's ability to direct his or her own actions is distinguished as a special feature of mental capacity, distinct from awareness (Article 21 of the Code).

From the position of the Code, the state of will of a person may be expressed in the following types of his/her attitude to the consequences of his/her deed: the desire for socially dangerous consequences, the conscious assumption or indifferent attitude to their occurrence (Article 25) or in the expectation of their prevention (Part 2, Article 26).

The volitional side of the mental attitude of a person to a socially dangerous act committed by him forms the volitional element of guilt, the substantive content of which is determined by the construction of a crime. Each corpus delicti contains the main objective feature, which in a concentrated form embodies the social danger of an act, and the volitional attitude to it "serves as a determining criterion for establishing the form of guilt"[2]. This provision seems relevant in connection with the division in the theory of criminal law of corpus delicti into materially defined, formally defined and inchoate, according to the way the legislator describes the objective side of a certain type of crime.

Negligence is recognised in the Code as a form of negligence, but requires a particular psychological and legal characterisation. This is due to a number of circumstances. Firstly, it is sometimes argued in the literature that the concept of negligence does not fit within the social and psychological concept of guilt. Secondly, the Russian criminal law doctrine recognises as dubious or unpromising attempts to identify the grounds for criminal responsibility for negligence on the

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[1] On the psychological side, the will is characterised as a complex entity associated with a particular representation of purpose (choice, decision, etc.). Psychologists extend awareness to the will. There are degrees of will awareness: attraction, will, desire. See: *Varshava B. E., Vygotsky L. S.* [Psikhologicheskiy slovar'] Psychological dictionary. SPb.: Tropa Troyanova: Roshcha Akademii, 2008. P. 53.

[2] Encyclopaedia of Criminal Law. Vol. 2: Criminal Law. SPb., 2005. P. 707.

basis of its existing legislative formula. Thirdly, there is no unity of opinion on the intellectual and volitional elements of negligence. Fourth, in foreign sources negligence is often excluded from the concept of carelessness and is considered as a special (independent) form of guilt.

Under the Code an offence is deemed to have been committed through negligence if a person *did not foreknow* the possibility of socially dangerous consequences of his acts (or failure to act) although with due care and foresight he *must* and *could have* foreknew these consequences (article 26, part 3, of the Code).

The absence of such foreknowledge in a person allows some scholars to argue that the understanding of negligence does not correspond to the psychological concept of guilt and therefore requires a different legislative solution[1]. This conclusion is not unreasonable, because the psychological concept of guilt is based on the idea of the presence in its content of such elements as knowledge and will. Guilt in Russian law is traditionally viewed as a certain mental attitude of a person to the act committed by him or her.

According to some scholars, the legislative definition of negligence does not include knowledge and will in relation to socially dangerous consequences[2]. Considerations of social necessity and expediency are put forward as justification for the criminal punishability of this type of culpability: such acts cannot go unpunished[3]. With this approach, negligence is endowed with the features inherent in the evaluative (normative) concept of guilt. At the same time, the literature rejects the approach that justifies criminalising negligence by the need to encourage careful and prudent behaviour on the part of others, as this "leads to objective imputation"[4].

There is a tendency in the work of many Russian criminalists to view negligence within a social and psychological concept of guilt. However, there is a lack of unity in the arguments justifying such a commitment.

According to some scientists, with negligence the lack of a person's foreknowledge of the possibility of socially dangerous consequences does not mean that this person is not aware of the social meaning of the actions themselves: a person may be aware of the factual side of his behaviour, but not foreknow the onset of

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[1] See e.g.: *Luneev V. V.* [Sub"ektivnoe vmenenie] Subjective imputation. M.: Spark, 2000. P. 44–48.

[2] *Dagel P. S., Mikheev R. I.* [Teoreticheskie osnovy ustanovleniya viny] Theoretical Foundations of Establishing Guilt. Vladivostok: Far Eastern University Publisher, 1975. P. 67.

[3] See: *Veklenko S. V.* [Ponyatie, sushchnost', soderzhanie i formy viny v ugolovnom prave] Concept, essence, content and forms of guilt in criminal law. Omsk: Publishing house of Omsk Law Academy of the Ministry of Internal Affairs of Russia, 2002. P. 157.

[4] *Filimonov V. D.* [Problema osnovaniy ugolovnoy otvetstvennosti za prestupnuyu nebrezhnost'] Problem of grounds of criminal responsibility for criminal negligence. M.: Centre YurInfoR, 2008. P. 49.

socially dangerous consequences[1]. V. A. Yakushin calls as an intellectual element of negligence also "the personal meaning of the committed". In his opinion, it is not the awareness of impermissibility, blamefulness of committed actions, but the personal sense *dominates* in a crime committed on negligence[2].

Other scholars are moving in the same direction. They believe that a person's negligence has developed as a result of a long interaction with others and has developed a *program* of behaviour in the person's mind. Its peculiarity is own "insufficient attention to the interests of other people, society or the state". If these person's traits dominate, "circumstances that endanger the interests of other people, society or the state, although recognised by the person, are not properly assessed by the person"[3]. It follows that personal interests prevent a person from focusing adequate conation on behavior, consistent with other legally and morally protected interests.

There is also the view that negligence has its own intellectual content. It is characterised by two attributes: negative and positive. *The negative* attribute consists in person's failure to foreknow the possibility of socially dangerous consequences, which covers the lack of awareness of social danger of a committed act. *The positive* element of the content of negligence is seen in the fact that the guilty person should and could show the necessary attentiveness and foresight and to foreknow, thereby, the coming of actually caused harmful consequences. "It is this very attribute that turns negligence into a type of guilt in its criminal law meaning"[4]. It should be noted that the allocation of the mentioned signs in principle corresponds to the legislative formula of negligence in the Code.

Some Russian criminalists link the characterisation of negligence to modern psychological ideas about the nature of knowledge, its properties and functions as manifestations of the mentality *of* a *sane* person. Judging by the nature and content of the arguments put forward, even before the commission of the crime in the case of negligence, there is *information* reflected in the mind of a person *about the possibility* of the onset of harmful consequences. It is presented in the form of a potential, but not realised attitude. According to V. A. Nersesyan, such information "is contained at an unconscious level". Apparently, it is realised in the subsequent behaviour of the person under certain conditions which are external

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[1] See: [Kurs ugolovnogo prava. Obshchaya chast'. T. 1: Uchenie o prestuplenii] Criminal Law Course. General part. Vol. 1: The doctrine of crime. Textbook for Institutions of Higher Education / Under the editorship of N. F. Kuznetsova and I. M. Tyazhkova. M.: Zertsalo, 2002. P. 330.

[2] See: *Yakushin V. A.* [Kvalifikatsiya prestupleniy. Obshchie voprosy] Qualification of crimes. General issues. Togliatti: VUiT, 2016. P. 122.

[3] *Filimonov V. D.* Op. cit. P. 59–60.

[4] *Rarog A. I.* Op. cit. P. 94.

to the subject. V. E. Kvashis referred to these conditions as the environment that develops by the time and in the process of the subject violating the norm of precaution and determining the onset of the consequences of such a violation[1].

In addressing these questions, V. D. Filimonov relies on the doctrine of the *purpose reflex*. The author puts forward the thesis that there is a "peculiar moral program" formed in a human conscience. Its defects prevent a person from adjusting his behaviour in the process of interacting with external factors. The essence of negligence is, in the scientist's opinion, the manifestation of such inattention to legally protected interests. A person, being aware of the danger of his surroundings, is not aware of the danger of his actions (failures to act), which prove to be a direct cause of the occurrence of harmful consequences[2].

The *volitional* aspect (element) of guilt in the form of negligence is seen by Russian criminologists either in the special nature of the will of the person, which is manifested in their behavior[3], or in the desire to commit acts within the personal sense, in the lack of mobilization of their efforts to assess and analyze the possible onset of socially dangerous consequences[4], or in the volitional nature of the act committed by a person and the lack of volitional acts of behavior aimed at preventing socially dangerous consequences[5]. The combination of objective ("was meant to") and subjective ("could have foreknew them") legal criteria of negligence is considered as the basis of the criminal law assessment of negligence[6].

The proposed list of scientific judgments about the willful element of culpability in the form of negligence cannot be considered exhaustive, as it is most often linked to the authors' position regarding the intellectual content of negligence.

There is also a difference of opinion in foreign criminal law doctrine. For example, American specialists believe that when a person is negligent they are not aware that "as a result of their actions there is a significant risk of harm"[7]. In a number of

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[1] See: *Kvashis V. E.* [Prestupnaya neostorozhnost'. Sotsial'no-pravovye i kriminologicheskie problemy] Criminal Negligence. Social and legal and criminological problems. Vladivostok: Far Eastern University Publisher, 1986. P. 63.

[2] See: *Fillimonov V. D.* Op. cit. P. 54, 58–59.

[3] See: Course of Soviet Criminal Law. General Part. Vol. II. M.: Nauka, 1970. P. 317.

[4] See: *Yakushin V. A.* Op. cit. P. 123.

[5] See: [Kurs ugolovnogo prava] Criminal Law Course. General part. Volume 1: The doctrine of crime. Textbook for universities. Under the editorship of N. F. Kuznetsova and I. M. Tyazhkova / G. N. Borzenkov, V. S. Komissarov, N. E. Krylova et al. IKD: Zertsalo-M, Moscow, 2002. P. 331.

[6] *Naumov A. V.* [Rossiyskoe ugolovnoe pravo] Russian Criminal Law. Course of lectures: in two volumes. Vol. 1: General part. Moscow: Yuridicheskaya literatura, 2004. P. 241.

[7] *Burnham W.* The Legal System of the United States. 3rd ed. M.: Novaya Yustitsiya, 2006. P. 861.

European countries, the concept of negligence is developed within the framework of the evaluative (normative) concept of guilt. It occurs when a person omits to take the necessary precaution, which he was able and obliged to exercise in a given case by virtue of his personal capacity and knowledge[1]. It is easy to see that the formula of negligence in the Code in a number of elements to a certain extent corresponds to the evaluative rather than psychological concept of guilt.

4. Conclusions

Modern domestic criminal law doctrine relies on the psychological concept of guilt, although some scholars have attempted to give guilt an evaluative connotation. Even weaker is the voice of supporters of interpretation of guilt as a dangerous state of mind. For example, P. G. Ponomarev expressed the opinion that "subjective imputation is nothing else than the establishment of criminal liability in the absence of action or inaction by a person for the presence of a dangerous state of mind"[2]. However, this interpretation of guilt is not supported by Russian criminal law scholarship. For the matter of that, the legislator gave a reason to interpret guilt as a dangerous state of mind by supplementing the Law of 01.04.2019 No. 46-FZ of the Code[3] with article 210[1], which established liability for occupying the highest position in the criminal hierarchy regardless of the commission of specific criminal acts. However, this legislative solution was not supported by the academic community, which still firmly adheres to the psychological understanding of guilt in criminal law.

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[1] See: *Esakov G. A., Krylova N. E., Serebrennikova A. V.* [Ugolovnoe pravo zarubezhnykh stran: uchebnoe posobie] Criminal Law of Foreign Countries: Textbook. M.: Prospekt, 2013. P. 192.

[2] *Ponomarev P. G.* [O printsipe viny, zakreplennom v Ugolovnom kodekse Rossii] On the principle of guilt enshrined in the Russian Criminal Code // Ugolovnoe pravo: strategiya razvitiya v XXI veke. M., 2008. P. 37.

[3] On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation in terms of combating organised crime: Federal Law of April 1, 2019 No. 46-FZ // Sobranie zakonodatelstva Rossiyskoy Federatsii = Russian Federation Code. 2019. No. 14 (Part I). Art. 1459.

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Information about the authors

Aleksei Rarog (Moscow, Russia) Doctor of Legal Science, Professor of the Kutafin Moscow State Law University (MSAL) 9 Sadovaya-Kudrunskaya St., 125993, Moscow, Russia; e-mail: alek.rarog@yandex.ru)

Ildar Tarhanov (Kazan, Russia) Doctor of Legal Science, Scientific Supervisor Faculty of Law, Professor of the Kazan (Volga region) Federal University (18, Kremlyvskaya St., 420008, Kazan, Russia; e-mail: itarhanov@mail.ru)

Ramil Gayfutdinov (Kazan, Russia) Candidate of Legal Science, Associate Professor of the Kazan (Volga Region) Federal University (18, Kremlyvskaya St., 420008, Kazan, Russia; e-mail: rargajfutdinov@kpfu.ru)

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