

Comparative Legal Analysis of Sources of Criminal Law in Asian-Pacific Countries

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Abstract: This article observes the situation with criminal law in several countries of Asian-Pacific region. The author is talking primarily about the sources of the criminal law. He is comparing where the norms of criminal law are established in Japan, Republic of Korea and some other countries nowadays.

Key words: Source of law • Legal system • Criminal code • Criminal law • Asian-Pacific

INTRODUCTION

Sources of law are competent elements of the legal system. They act as a unitary hierarchic functional system that ensures formation of law and formal legal certainty and separately - each source being an independent element of the legal system.

The contemporary general theory of law offers an ambiguous interpretation of “source of law” as a notion. For example, N.Ya. Razumovich classifies sources of law into material, ideal and legal [1]. This way, material sources of law are primarily rooted in the system of intrinsic needs of social development, uniqueness of the given manufacturing method and in basis relations.

G.I. Muromtsev avers that “material” understanding is possible basing on etymology of the Russian word source (literally: where you take from). Currently there is a tacit “gentlemen agreement” (expression of Muromtsev) in force between the lawyers according to which the term “source of law” is construed primarily from the legal perspective which makes it essentially a synonym for the notion “form of law” [2]. According to M.N. Marchenko “form of law can be defined as a method (pattern, means) for internal organization and manifestation of the law, more specifically - manifestation of rules of conduct comprised in the standards of law” [3].

Muromtsev’s observation is confirmed by most of educational materials. In fact usually authors of textbooks simply reduce a source of law to its form, for example: “Sources of law are official documents in force in a given

state that set or sanction standards of law and forms of manifestation of a state’s legislative activities by means of which will of a legislator becomes binding” [4].

In our opinion the above example shows nothing more than understanding phenomenon “source of law” in material sense as a “basis to lay down rules of conduct fixed in the standards of law, its outset”.

A statutory instrument is an official document issued by a competent public authority endorsed in a prescribed procedure that fixes (sets forth) standards of law in its structural elements (chapters, etc.). A statutory instrument is the primary source of law in the countries of Roman and Germanic legal family. It has a number of advantages compare to other sources of law: in particular, it is the generic nature of the regulations that they contain aimed for repeated application, opportunity to cover broad areas of social life, relatively quick procedure of application, amendment or abolishment, high degree of systematization and codification. Statutory instruments are issued by state authorities and in some cases by other entities (citizens in course of referendum, local authorities within the framework of delegated law-making) in a prescribed form within the scope of competency of the law-making authority.

In the countries of Roman and Germanic legal family the main source of law is usually viewed solely as a codified statute that defines delinquency and penalty of actions. However in most countries form of criminal law is not restricted only to criminal code: some articles of other statutory instruments might have criminal content and thus viewed as a source [5].

RESULTS AND DISCUSSION

Since almost all countries legally formalize its commitment to democracy (Japan, Republic of Korea) or to socialism (DPRK), the entering wedge of criminal law is a statutory instrument of the paramount legal effect in a given country - Constitution. [6] We could expect that the only statutory instrument regulating legal relations in criminal cases after constitution is the criminal code of a certain country. However it is hard to maintain such an ideal approach in real life. That's why various special statutes and executive orders are added to sources of law. It is particularly true for countries where criminal codes were enacted long ago, for example, Japan, Federal Republic of Germany and Holland. As it is known there are about 30 special statutes currently in force in Japan besides the criminal code; these statutes regulate various areas of legal relations that are not covered by the criminal code [7].

Of all the recognized types of criminal law sources in Japan only statutes are functioning (including constitution and criminal code). This way Japanese constitution contains important starting point principle of criminal law. The principle of legality, which stipulates that delinquency of an action as well as its penalty and other consequences under criminal law should be determined by law, is formulated in three articles of Japanese constitution. Article 31 states "No one can be put to death or under restraint or incur any other criminal punishment otherwise than in accordance with the procedure stipulated by law". In accordance with art. 39 "no one can be indicted for an action that was legal at the moment it was committed or for an action in respect of which the person has already been acquitted". Finally, art. 36 stipulates "tortures instituted by public authorities and cruel criminal punishments are prohibited". As we can see these chapters involved certain aspects related to criminal procedural law [8]. Art. 12 of the Japanese constitution says that "freedoms and rights guaranteed by the constitution to the people must be supported with continuous efforts of the people". "People must abstain from any kind of abusive practices" with these freedoms and rights and are responsible for using them for public welfare" [9] Art. 18 of Japanese constitution says: no one can be held slave in any form. Compulsory labor is prohibited otherwise than as punishment for a crime. [10] Art. 79 of North Korean constitution formalizes basic guarantees of inviolability of a person: "citizens are

guaranteed inviolability of a person and housing and privacy of correspondence. Citizens cannot be detained, arrested, their housing cannot searched otherwise than on legal grounds". Stipulations important for criminal law are contained only in chapters and sections of constitutions related to political and economic system and activities of law enforcement agencies [11].

Constitution of the Republic of Korea guarantees to its citizens equality before the law regardless of their sex, religion or special status; it guarantees their inviolability and protection in case of ungrounded arrest as well as freedom to choose place of residence.

This way almost all Asian-Pacific countries formalize main standards of criminal law and principles of criminal policy in constitutional instruments. However, just as it is in Russia, these provisions are given in greater detail in criminal codes of the respective countries. Structure of the criminal codes mostly does not differ from traditional examples of continental law-making system and consists of general and special part. However criminal code of the DPRK does not distinguish these parts structurally despite the known adoption of soviet experience. While in fact two beginning sections of the criminal code contain the standards that are usually included into the general part, since the first section deals with principles of criminal law of DPRK and the second part deals with general provisions on a crime and a punishment [12].

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