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RULES OF CRIMINAL AND LEGAL ESTIMATION OF COMMITTED ACT

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SUMMARY

The article is devoted to the rules of criminal and legal estimation (qualifications) of committed act by a person. Set types of such rules and their classification, found out sources of origin of rules, subjects of their regulation and application domain. The expounded suggestions in relation to expediency to foresee general (common) and special rules of criminal and legal estimation of committed an act in General part of penal law.

Key words: criminal and legal estimation of committed an act, qualification of crime, rule of criminal and legal estimation, penal law.

ПРАВИЛА УГОЛОВНО-ПРАВОВОЙ ОЦЕНКИ СОВЕРШЕННОГО ДЕЯНИЯ

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АННОТАЦИЯ

Статья посвящена правилам уголовно-правовой оценки (квалификации) совершенного лицом деяния. Установлены виды таких правил и их классификации, выявлены источники происхождения правил, субъекты их регламентации и сфера применения. Высказаны предложения о целесообразности предусмотреть общие (универсальные) и специальные правила уголовно-правовой оценки совершенного деяния в Общей части уголовного закона.

Ключевые слова: уголовно-правовая оценка совершенного деяния, квалификация преступления, правила уголовно-правовой оценки, уголовный закон.

Problem setting. A large value is given in the doctrine of criminal law and investigational-judicial practice to the question of criminal and legal estimation of committed act by a person, as correct legal opinion of behaviour of person is the necessary condition of achievement of legality at administering law in connection with realization of criminal realization (investigation).

The basic setting of criminal and legal estimation of committed act (it's aim) is establishment of that, or such act behaves to one of the crimes foreseen in the articles of Special part of the Criminal code (further is CC). The result of such estimation is qualification of crime, namely an exact and complete reflection of committed act is in the formula of qualification (reference is in a corresponding judicial document on digital denotation (number) of the article (parts of the article, point) of Special part of CC, and on occasion – and on the article (part of the article) of General part of CC that foresee the accomplished act). The use of pointing on a corresponding criminal and legal norm the internal,

rich in content aspect of criminal and legal estimation of committed act allows representing.

The **purpose of the article** is to study the rules of the criminal assessment of an act, ascertaining the content, classifications, and criminal effect.

Basic material. For the criminal and legal estimation of certain situation on the whole it is necessary on the basis of criminal and legal norms to estimate all complex of actual circumstances, in other words every structural element of legal fact. The ideal model of legal fact is given by a legal construction that finds the recreation in legislation. The legal construction of legal fact of criminal and legal estimation is a corpus delict, under that in science of criminal law and investigational-judicial practice understand totality of the legal signs (objective and subjective) that determine a committed act as crime set in a penal law. A corpus delict has such name, as it consists of component parts, that have the name of elements, which, in turn, are characterized corresponding signs. For this reason, be-

fore to give a legal estimation to the legal fact on the whole, it is necessary to set all it's separate structural elements. In other words the process of qualification consists in a successive exposure in committed by a person publicly dangerous act of all elements (their signs) of corpus delict.

A search of criminal and legal norm at the estimation of behaviour of person is a task of considerable complication. The object of such estimation actually and is a committed person act that is examined from the point of view of criminal illegality, in other words foreseen of it in a penal law as a crime. The types of illegal behaviour are described in corresponding criminal and legal norms that is contained in Special part of CC, and compositions of crimes have the name. A corpus delict is the normative, legislative founding (necessary component, pre-condition, condition) for the criminal and legal estimation of actually committed by a person act, actually, for qualification of crime. For this reason, at the criminal and legal estimation of value gets to all individual not circumstances (to the signs) that take place at the com-



mitted of particular act, but only those that have a legal value, in other words present a certain corpus delict. From all totality of signs that characterize a committed act, a subject that carries out such criminal and legal estimation elects those that is marked in the norm of penal law only, as signs of certain corpus delict.

In totality of elements of certain corpus delict a negative estimation consists by society, state and right for corresponding behaviour, in other words a corpus delict is an anti-norm of behaviour of member of society. A corpus delict represents the legal structure of any certain corpus and conformity to law of construction of both these corpus delicts and each of its elements and signs.

It should be noted that the object of criminal and legal estimation of committed act is not only criminal offence but also legitimate acts (acts and behaviour). In addition, the criminal and legal estimation of act comes true only in relation to facts that came already, unlike other types of legal opinion, that take place both in relation to facts (events) that came and in relation to facts present and future.

Remind, that qualification of crimes – it is the formalized process, that must be based on certain rules (requirements), that determine order of electing of criminal and legal norm at the criminal and legal estimation of committed by a person act, and also fixing of this estimation.

Rules of criminal and legal estimation of committed act are normative binding overs or universally recognized doctrine positions that provide the order of electing of norm of penal law for the estimation of behaviour of person. In other words these rules explain how to apply a penal law, and provide the correct criminal and legal estimation (qualification) of committed act the same. These rules must be based in turn on: a) wholly legal principles (principles of supremacy of right, legality, justice, equality before a law, realization of justice on the basis of competitive spirit of parties and freedom in a grant by them to the court of the proofs, humanism, presumption of nonguiltiness, impossibility twice to appeal to legal responsibility of one kind for the same offence, and others like that); b) principles of criminal law (principles of responsibility for a committed publicly of dangerous act that is confessed by a penal law as a crime, to responsibility

only at presence of guilt, personal (own) character of responsibility, individualization of criminal responsibility, and others like that) and c) the special principles of criminal and legal estimation (qualifications) of committed act (principles of officialness of qualification, exactness, stability, steadiness, unanimity, plenitude and individuality of qualification of act, and others like that). As right marks L. D. Gauchman, rules of qualification are a link that binds criminal and legal norms to the actual circumstances of committed act, and the same get a dynamics, bringing them over to the action, that answers an and letter, and spirit of law, specifying the static norms of CC and going into detail the idea of legislator [1, p. 275-276].

Rules of criminal and legal estimation of committed act are methods and facilities applications of penal law, that is foreseen in it, in resolutions (elucidations) of the Higher judicial instance of Ukraine – Supreme Court of Ukraine, and also worked out other judicial practice and doctrine of criminal law. These rules determine both general and special requirements that is produced to application of penal law, and own decision of question, about a presence or absence of grounds for bringing in of person to criminal responsibility. The feature of such rules consists in that they are not concentrated only in CC, but examined in relation to separate positions and institutes of criminal law [2, p. 34].

The rules of criminal and legal estimation of committed act must provide only approaches in investigational-judicial practice in relation to the criminal and legal estimation of behaviour of person, definiteness and authenticity of results of such estimation (qualifications of act), minimize the risks of wrong criminal and legal estimation (incorrect application of criminal and legal norms). Thus, the marked rules have a fundamental value for application of criminal and legal norms in case of estimation of behaviour of person. For this reason in scientific literature the expounded suggestion in relation to expediency of regulation of rules of criminal and legal estimation of committed act directly at normative level, in other words in a penal law. In this connection in the doctrine of criminal law it offers to foresee the independent division (chapter) «Rule of qualification of crimes» or «Rule of criminal and legal

estimation of committed act» in General part of CC, what to limit or even eliminate possibility of judicial interpretation of questions of criminal and legal estimation of behaviour of person.

It should be noted that the rules of criminal and legal estimation of committed act are various enough and numerous. They can touch both application of penal law in all without an exception cases and in separate individual situations. These rules can behave both to application of institutes of General part of CC (for example, institute of the stages of commission of crime) and complex institutes of criminal law (for example, institute of criminal participation), and also institutes of Special part of CC (dissociation and qualifications of the separate crimes foreseen by the articles of Special part of CC).

Taking into account the great number of the marked rules, they can be classified on different classification criteria.

1. On the quantitative and quality criterion of rule of criminal and legal estimation of act divided into: a) those, that distribute operating on the corresponding circle of acts that is subject to qualification, and used for law application; b) those that behave to the that or other division (to the institute) of criminal law and used in scientific researches and at the study of criminal law, as educational discipline.

2. Depending on the external form (sources) of expression (to the display) of rule of criminal and legal estimation of committed act it is possible to divide into: a) normative – those that is foreseen in normatively-legal acts, namely in a penal law; b) non-normative – those that did not get normative (formalized) expression in a penal law are however used for the criminal and legal estimation of act.

At the same time, as it is right marked in the doctrine of criminal law, such division of rules is sufficiently conditional, as a certain rule of criminal and legal estimation of committed act can consist of a few binding overs that is contained in different sources, one of that have normative, and other is non-normative character [3, p. 77]. For example, according to parts 1 and 2 Article 29 CC a performer is subject to criminal responsibility after the article of Special part of CC; an organizer, instigator and accomplice, is subject to criminal responsibility after corresponding part of Article 27 and by the that article



(by part of the article) of Special part of CC, that foresees a crime committed a performer. However, on occasion qualification of acts of accessories can come true and not after that the article, that foresees a crime committed a performer, as accessories, for example, can commit crime, following different reasons and pursuing different aims. For this reason the legislative rule of criminal and legal estimation of acts of accessories is specified by doctrine rules and corresponding interpretations (by elucidations) of Session of Supreme Court of Ukraine.

In addition, in investigational-judicial practice a question remains unsolved about the criminal and legal estimation of act of person that at the commission of general crime carried out a few roles. The session of Supreme Court of Ukraine gave its elucidation only in relation to separate crimes. Certainly, in accordance with sub. 20 of resolution «About practice of application of legislation courts about criminal responsibility for legalization (washing) of the incomes, got a criminal way» from April, 15, 2005 in № 5, actions of persons, that participated in legalization (washing) of the incomes got a criminal way, as organizers, instigators or accomplice, if they are not simultaneously accessories of this crime, it is required to characterize after corresponding parts of the Articles 27 and 209 CC. Alike approach is driven to p. 1 sub. 3 resolutions of Session of Supreme Court of Ukraine «About judicial practice in cases about crimes against life and health of person» from February, 7, 2003 in № 2 and p. 5 sub. 3 resolutions of Session of Supreme Court of Ukraine «About practice of consideration of criminal cases courts about crimes, committed proof criminal associations» from Decembers, 23, 2005 in № 13.

The unsolved at normative (legislative) level is remained by the rule of criminal and legal estimation of act of accessories, if a person at the commission of one crime was a performer (accessory), and at a committed other by an organizer, instigator or accomplice. Such the rules forced to set forth Session of Supreme Court of Ukraine. Certainly, according to p. 2 sub. 21 resolution «About judicial practice in cases about crimes against property» from November, 6, 2009 in № 10, if a guilty person at the committed of one crimes was a performer, and other –

by an organizer, instigator or accomplice, then such crimes it follows also to characterize separately with reference to corresponding part of the Article 27 CC. Alike approach is contained in paragraph 5 sub. 3 resolutions «About practice of consideration of criminal cases courts about crimes, committed proof criminal associations» from Decembers, 23, 2005 in № 13, where it is marked that if a person participated in the commission of one crime as an organizer, and other – as a performer, accomplice or instigator, its actions in every case must be characterized independently.

3. Depending on sources in that the rules of criminal are set forth and of legal estimation of committed act, they are divided into those that is contained in: a) norms of penal law; b) methodical researches of scientists, in relation to application of criminal and of legal norms at criminal and to the legal estimation of committed act; c) elucidations (resolutions) of Session of Supreme Court of Ukraine, devoted to both application of corresponding institutes of criminal law and interpretation of separate questions in relation to bringing in to criminal responsibility for a certainly committed crime; d) court decisions in relation to certain criminal cases (realizations).

It should be noted that only the separate rules of criminal and legal estimation of committed by a person act, that set forth in science of criminal law and worked out in investigational-judicial practice, called the recreation in a criminal legislation. Majority from such rules for today remain the article of research and suggestions of scientists. Situation in relation to that in CC foreseen only the separate (minimum) general rules of criminal and legal estimation of committed by a person act in science of criminal law got the name as regulative insufficiency of penal law [4, p. 68].

It is possible to assert with the certain chance of convention, that and separate positions of Constitution of Ukraine matter for the criminal and legal estimation of committed act. Certainly, in accordance with the Article 58 of Constitution of Ukraine, nobody can be responsible for acts that in a time of their committed did not confess a law as offence. According to Article 62 of Constitutions of Ukraine a person is considered nonguilty in the commission of crime and can not be

exposed to criminal punishment, while it's guilt will not be well-proven in the legal order and set by the accusatory sentence of court. A prosecution can not be base on the proofs got an illegal way, and also on suppositions. All doubts in relation to well-proven of guilt of person are interpreted on it's benefit. For the correct criminal and legal estimation of committed act such principle of subjective relation in guilt (responsibility is only at presence of guilt) has a fundamental value.

At the same time mostly absence of the legislative fixing of rules of criminal and legal estimation of committed act is compensated by elucidations (by interpretations) of Session of Supreme Court of Ukraine, that contained in corresponding resolutions. In such resolutions decide both general rules criminal and legal estimation act and special rules of qualification of separate crimes. In spite of the fact that elucidations of the Higher judicial instance of Ukraine carry recommendation (officially recommendation) character, they are based on an analysis and generalizations of judicial practice and, in majority, are scientifically reasonable. It is in addition, necessary to pay attention and on generalization of judicial practice that comes true by Supreme Court of Ukraine, that contain both general and special rules of criminal and legal estimation of committed act also.

It should be noted that row of rules of criminal and legal estimation for today exist in the type of doctrine suggestions (although the most universally recognized scientific positions found a reflection in CC, resolutions (elucidations) of the Higher judicial instance of Ukraine, legal positions of Supreme Court of Ukraine and county courts in relation to certain criminal realizations). Those doctrine positions, that is set forth in relation to the short stories of criminal legislation, in relation to that yet the absent withstands investigational-judicial practice, have most meaningfulness for law applicable activity, or that are the result of analysis and generalization of judicial practice in relation to the separate questions of criminal and legal estimation acts of person, that does not have an unanimous decision.

4. Depending on subjects that set forth the rules of criminal and legal estimation of committed act, they can be divided into: a) to the duty – those that is set forth by a legislator (Supreme Counsel



of Ukraine) and foreseen in a penal law; b) officially recommended – those that is driven to corresponding elucidations of Plenum of Supreme Court of Ukraine; c) officially orienting – those that is contained in the certain court decisions of courts of corresponding instances (legal precedents); d) unofficially recommended – those that is worked-out in the doctrine of criminal law, if they did not find a recreation in resolutions (elucidations) of the Higher judicial instance of Ukraine and corresponding legal precedents [1, p. 275-276].

5. Depending on an application of rules of criminal and legal estimation of committed act domain they can be divided into: a) general (universal), b) special, c) single (particular, separate) rules.

General rules of criminal and legal estimation of act – it those, that is used for qualification of any crime foreseen in a penal law. These rules have universal character. To them it follows to take such: a) act can be skilled as a crime, only if it is foreseen in CC; b) qualification by analogy is forbidden; c) qualification of crime comes true on a law that operated in a time of committed of corresponding act (sometimes the commission of crime admits time of committed the person of foreseen by the penal law of action or inactivity (P. 3 Article 4 CC); d) qualification comes true taking into account the rules (principles) of action of penal law in space; e) qualification comes true after the elements of corpus delict; f) result of qualification is subject to the judicial fixing in the order and form, statutory; g) founding and order of change of qualification must come true exceptionally in accordance with the requirements of legislation, and others like that.

Special rules of criminal and legal estimation of committed act – it those that is used in relation to the separate typical cases of committed of criminal offence (the crime). To them it follows to take: a) rule of qualification of crimes within the limits of one composition (rules are the qualifications, related to the features of certain corpus delict, features of its elements and their signs; rules of qualification of unfinished crime; rules of qualification of crime committed in participation, and others like that); b) rule of qualification of multiplicity of crimes (of rule of qualification of repeated, totality or relapse of crimes; rules of qual-

ification at the competition of criminal and legal norms (competition of general and special norms, competition of part and unit, and others like that).

The single (particular, separate) rules of criminal and legal estimation of committed by a person act are used for differentiation of certain crimes and expose the features of qualification exactly of separate crimes.

Undertaken study testifies to the variety of sources, that contain the rules of criminal and legal estimation of act by a person, subjects of their formulation, application of such rules domain, and others like that. It should be noted that such multiplicity of rules of criminal and legal estimation of act it is objective conditioned and appropriate. It is in addition, expedient to mark, that the obvious rules are not unchanging and depend on changes and additions of penal law.

In this connection in scientific literature two speak out opposite positions in relation to regulation of rules of criminal and legal estimation of committed act. Certainly, row of scientists, as marked already, suggest to foresee such rules (their separate kinds) in the norms of General part of penal law. Other researchers assert that in a penal law it is impossible to foresee all rules of criminal and legal estimation of committed act, as, firstly, a codified penal law must not contain the special (separate) rules of qualification of crimes that have limit area of application, because positions of CC are characterized the high degree of abstraction. Secondly, most rules of criminal and legal estimation of act have multilevel maintenance that shows up in different sources.

At the same time, as separate scientists, system of sources, that contain the rules of criminal and legal estimation of committed act that exists for today hardly is optimal, mark right, as maintenance of corresponding rules in many cases obviously does not answer external forms of their expression [5, p. 91].

It touches the rules of criminal and legal estimation of committed act first of all, that driven to elucidations (resolutions) of Session of Supreme Court of Ukraine. In a criminal and legal doctrine and investigation-judicial practice the most widespread position in relation to functions on

the value of elucidations (resolutions) of the Higher judicial instance and their place in the system of sources of criminal legislation consists in that they carry recommendation character, or provide a specification and interpretation of criminal law provisions. It is predefined by that the legislation of Ukraine does not contain binding overs, that would foresee obligation of application of elucidations that formulate the rules of criminal and legal estimation of act of person. Consider that elucidations (resolutions) of the Higher judicial instance of Ukraine can and must develop and specify the legislative rules of criminal and legal estimation of committed act, but not set the new own rules of such estimation.

However in the real actuality there are both general (universal) and special rules of criminal and legal estimation of committed act (for example, unfinished crime; crimes committed in participation; to multiplicity of crimes, and others like that) in resolutions of Session of Supreme Court of Ukraine. Maybe it is predefined by the necessity of removal, as be indicated before, regulative insufficiency of penal law.

Conclusions. On the basis of the study, it can be argued that general and special rules of criminal and legal estimation of committed act must find legislative regulation in separate or in the corresponding divisions of penal law. A foresight their correlation, system, will allow in CC of such rules to provide, to provide unity of law applicable activity and more rich in content definiteness of the criminal and legal adjusting. By the way, normative regulation of rules of criminal and legal estimation of committed act does not eliminate in future possibility of their specification in elucidations (resolutions) of the Higher judicial instance of Ukraine.

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