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CRIMINAL AND LEGAL ESTIMATION OF UNFINISHED CRIME

A crime displays an act (action or inactivity), that in a that or other measure continues in time. At the committing of such act possible passing of row of implementation of criminal intent of person phases (stages), that carries out him, what can be and unrealized to the end. In last case the question is about an unfinished crime the certain specific, conditioned by that compositions of complete crimes are foreseen in the Articles (parts of the articles) of Special part of the Criminal code of Ukraine (farther is CC), takes place at the criminal and legal estimation (qualifications) of that.

In what basic specific of unfinished crime that force to examine its qualification relatively independently? In our view, it is predefined by that the objective side of such acts is described in the norms of both General and Special parts of CC. In addition, about criminal responsibility for an unfinished crime speech can be conducted only on the certain stages of realization of intentional crime the stages of its development (commission), that differ realization of objective and subjective parties of its composition after a degree, understand under that.

The purpose of the article is to study the features of criminal and legal estimation (qualifications) of unfinished crime.

In a criminal and legal doctrine distinguish: a) *stages of development of crime* (criminal activity) (from five to seven stages; in particular, forming of intention on the commission of crime, exposure of intention, decision-making on the commission of crime, preparation to the crime, encroaching upon a crime, complete crime, disposing of criminal result), b) *stage of commission of crime* (from two to three stages; for example, preparation to the crime and encroaching upon a crime) and c) *types of crimes after the degree of their completeness* (complete and unfinished crimes). Positions are expounded in relation to impossibility to acknowledge preparation to the crime, encroaching upon a crime and complete crime by the stages of commission of crime. In addition, in legal literature an unfinished crime is named: by previous criminal activity, begun or uncompleted crime, unsuccessful activity in the commission of crime. Unity of opinions of scientists touches presumably only a question about expedience of selection of complete and unfinished crimes.

According to parts 1 and 2 Article 13 CC admits a complete crime act that contains all signs of corpus delict foreseen by the corresponding article of Special part of this Code. An unfinished crime is preparation to the crime and encroaching upon a crime.

Thus, it is necessary to set at the criminal and legal estimation of committed a person act, that it accomplished a complete or unfinished crime. It should be noted that in the criminal legislation of decision of unfinished crime is not contain, and its kinds are only marked. System interpretation of penal law grounds to reason, that an act that does not contain all signs of corpus delict foreseen by the corresponding article of Special part of CC admits an unfinished crime. At the same time, or is it possible to assert that absence of any sign of corresponding element of corpus delict foreseen by the article of Special part of CC testifies that a person accomplished an unfinished crime? For example, in opinion of E.V. Blagov, not establishment of corresponding sign of act can testify not to the presence of unfinished crime, but about absence of crime in general [1, p. 171]. For this reason, most scientists assert that an unfinished crime takes place, when intention guilty not fully realized, the objective side of such corpus delict is not developed, real harm of object of encroachment is not caused. So, for example, absence of reason or aim, as signs of subjective side of certain corpus delict, testifies to absence of this crime in general, but not about an unfinished crime. Thus, it is possible to assert that absence only of *certain* signs of corresponding elements of corpus delict can testify that a crime is unfinished.

In a criminal and legal doctrine position spoke out also, that at an unfinished crime some sign of objective side of corpus delict is never enough [2, p. 121]. With the brought approach over it is impossible unanimously to agree, as at preparation to the crime in general absent signs of objective side of corpus delict foreseen by Special part of CC. The brought decision over can touch only to the crime attempted with material composition, if an act is committed fully, but hazard effects did not come publicly.

Consider that at the criminal and legal estimation of committed a person act, first of all, it is necessary to find out, what certainly complete crime a person gathered (tried) to accomplish, and then set or there are all signs of this corpus delict in its act. In a criminal legislation absent criteria of dissociation of unfinished crime are from complete. It follows to admit the general signs of unfinished crime:

a) commission of intentional act, b) not leading to of crime to the end, c) on reasons that does not depend on will of person.

In addition, for providing of correct qualification of unfinished crime clear dissociation matters: a) preparation to the crime from the exposure of intention (establishment of initial and eventual moments of preparation is to the crime), b) preparation to the crime from encroaching upon a crime (establishment of initial and eventual moments of encroaching is upon a crime), c) complete from the unfinished encroaching, d) attempt upon a crime from a complete crime (establishment of moment of completion of certain corpus delict). The own question of differentiation of the stages (phases) of commission of crime presents most of judicial errors at the dispatch of certain criminal cases.

In accordance with P. 1 Article 14 CC preparation to the crime are seeking out or adaptation of facilities or instruments, seeking out of co-participants or plan on the commission of crime, removal of obstacles, and also other intentional conditioning for the commission of crime.

It should be noted that the use is in the law of approximate list of types of acts that present preparation to the crime, not very a legislative construction pretended for the criminal and legal adjusting. In opinion of separate scientists it is better to foresee or exhaustive list of such acts, or generalized personal concept that would embrace all possible variants of preparatory actions. As overcoming all variety of preparatory to the crime acts is impossible, expedient will be a construction of norm with the generalized family term is conditioning for the commission of crime. Only after formulation of such concept possibly for the orientation of investigational-judicial practice to point the approximate list of such acts. It is expedient also to mark, that conditioning for the commission of crime not always will be characterized as preparation to the crime, as on occasion such conditioning a legislator criminalized as an independent corpus delict.

For correct qualification of preparation to the crime it is necessary to set initial and eventual its moments with the aim of clear dissociation from the exposure of intention and encroaching upon a crime. An initial moment of preparation to the crime is a commission of any act sent to conditioning for the commission of certain complete crime (in case of exposure of intention the certain actions sent to realization of this intention are not accomplished). The eventual moment of preparation is the successful conditioning for the commission of crime, so completion of such creation as a result, but not as begun, however completed process. Thus, for preparation there is characteristic absence of act that is described in disposition of the article of Special part of CC, and the anymore absence publicly hazard effects. Acts, that inherent to preparation to the crime, are outside the objective side of complete corpus delict. For this reason, in scientific literature of preparation to the crime distinguish from encroaching upon a crime on the criterion of beginning of implementation of objective side of corpus delict that a person decided to do. However the use of this criterion is possible only at additional explanations in relation to that exactly it follows to consider beginning implementation of objective side of corpus delict.

In this connection a question appears about qualification of preparation to the crime with reference to the article of Special part of CC, that foresees a complete crime, as an objective side of preparation to the crime is fully described in the norms of General part of CC and only informatively related to the norms of Special part of CC.

Analytical research of investigational-judicial practice testifies that the far of errors at the criminal and legal estimation of unfinished crime touches exactly qualification of encroaching upon a crime. It is related to a number of moments. Firstly, and at encroaching upon a crime, and in case of commission of complete crime the objective side of its composition, that, at the same time, has a different degree of completeness, is executed. Secondly, in CC a legislator foreseen two types of encroaching upon a crime: a) is complete and b) is unfinished. It, certainly, also it must take into account at the criminal and legal estimation of committed by a person act. Thirdly, errors at the criminal and legal estimation of encroaching upon a crime, sometimes arise up as a result of insufficient attention of law-applicants to finding out of moment of completion of certain crime and type of corpus delict depending on the construction of its objective side (a crime is with material or formal composition). Finally, investigational-judicial practice runs into the package of the issues related to establishment of orientation of intention of person and its kind (specified or unspecified) at the commission of corresponding crime and moment of completion of certain types of crimes (simple or complicated: a) continuing, b) extensible, c) composite, and to d) crime that is characterized after consequences), and others like that.

According to P. 1 Article 15 CC encroaching upon a crime are commission by a person with direct intention of act (to the action or inactivity), directly sent to the commission crime foreseen by the corresponding article of Special part of CC, if here a crime was not carried through on reasons that did not depend on its will.

Is there a question at interpretation of this legislative formulation, that it follows to understand under the act directly sent to the commission of crime? Will mark that in opinion of separate researchers an orientation of act is not encroaching upon a crime, but preparation to the crime, because is condition-

ing for its commission, as at encroaching upon the crime of act guilty is the direct commission of crime [3, p. 95]. Consider that in case of encroaching upon a crime is executed *part* of objective side of complete corpus delict. If a person does not begin to execute an act ponderable in the corresponding article of Special part of CC, committed at no terms it is impossible to characterize as encroaching upon a crime. So, unlike preparation to the crime, the objective side of encroaching upon a crime is described both in the norms of General and in the norms of the Special parts of CC. Actually it and predetermines during qualification of encroaching upon a crime to refer both to the article (part of the article) of Special part of CC that foresees responsibility for a complete crime and on corresponding part of Article 15 CC, that regulates the signs of certain type of encroaching upon a crime.

For the correct criminal and legal estimation of encroaching upon a crime it is necessary to set its initial and eventual moments. The initial moment of commission of encroaching upon a crime is beginning of act (to the action or inactivity) that is directly sent to the commission of crime, so beginning of commission of the action or inactivity, marked in disposition of the article of Special part of CC. The eventual moment of attempt is: for a crime with material composition is a commission of the act marked in disposition, that did not entail a dangerous consequence the offensive of that a person wished publicly; for a crime with formal composition is breaking of commission of act, so its partial commission (for an unfinished attempt) and moment of establishment of unsuccessful attempt to accomplish a complete crime (for a complete attempt).

It follows also to pay attention, that encroaching upon a crime present only at its commission with *direct intention*. Indirect intention or commission of crime from carelessness eliminates qualification of act as encroaching upon a crime.

Expounding attitude toward understanding of signs of encroaching upon a crime, Supreme judicial instance of Ukraine underlines the necessity of careful research of signs of subjective side of corpus delict for the decision of question about the presence of encroaching upon a crime or complete crime. Certainly, there is the present pointing in the row of resolutions of Session of Supreme Court of Ukraine, that research of orientation of intention helps correct qualification of committed act, dissociation of encroaching upon a crime from a complete crime. In addition, at establishment of orientation of intention of guilty on a commission crime an important value has taking into account of reason and aim committed, as they testify to the presence of direct intention.

Depending on an orientation and degree of specification of foresight publicly of hazard effects intention is traditionally divided into: a) specified (certain) and b) unspecified (indefinite). The specified (certain) intention takes place, when publicly hazard effects of act the persons clearly specified in consciousness. Therefore if at the specified direct intention consequences that a person wished did not come, then it is possible to talk only about a crime attempted, that a person planned (tried) to do. Thus consequences that came actually by general rule do not need a separate criminal and legal estimation, so the committed does not require qualification after totality of crimes.

The unspecified (indefinite) intention takes place when publicly the hazard effects of act are not certain clearly in consciousness of person. Therefore at the unspecified intention qualification takes place after the actually caused consequences. An at that rate committed act, at presence of all other elements (their signs) of corpus delict, it must characterize as a complete crime.

At the same time it should be noted that at the commission of separate crimes description of orientation of intention becomes complicated by the construction of objective side of corpus delict that, for example, can consist in a commission two or more acts. In particular, encroaching upon raping, so bodily relations with application of physical violence, threat of its application or with the use of the helpless state of suffering person (Article 152 CC) can be present under such circumstances: a) person operates with the aim of commission of coitus, b) application of physical violence, threat of its application or use of the helpless state of suffering person is the means of achievement of this aim.

For the criminal and legal estimation of act as encroaching upon a crime must be set, that *a crime was not carried through*. For this reason, during qualification of committed by a person act, first of all, it is necessary to define, what complete crime a person gathered to accomplish, and then find out or there are all signs of corpus delict foreseen by the corresponding article of Special part of CC in its act [4, p. 170].

In connection with resulted, for the correct criminal and legal estimation of committed act the construction of corpus delict that a person tried to carry out has an important value, as at that rate it follows to establish the incompleteness of objective side of certain corpus delict. So, for establishment of encroaching upon a crime with material composition it is necessary to set absence publicly hazard effects (harm that a person tried to entail) or complete, thus, fully committed act. For establishment of encroaching upon a crime with formal composition it is necessary to set the incompleteness of act that a person planned to do. Thus, confession of committed by a person act upon its commission first of all depends a complete crime or encroaching on the features of

legislative construction of certain corpus delict. For this reason in most resolutions Session of Supreme Court of Ukraine pays attention courts in the moment of completion of certain types of crimes.

It is expedient also to mark, that the obligatory sign of encroaching upon a crime is not bringing to crime conclusion *on reasons that did not depend on will of a person.* Thus a crime is not to the end not from subjective, namely on objective reasons (active behaviour of suffering during a commission crime or active behaviour of eyewitnesses of commission of crime, that stipulated its stopping, timely reacting of workers of law enforcement authorities on a committed crime, absence for the person of the proper (necessary) facilities or instruments at the commission of corresponding act, and others like that). These circumstances must be clearly found out during realization of criminal realization with the aim of reasonable establishment of presence of encroaching upon a crime or voluntary abandonment or effective repentance during the commission of crime.

It is necessary to mark that possibility of encroaching upon a crime with material composition neither in the theory of criminal law nor in investigational-judicial practice does not cause doubts. At the same time possibility of encroaching upon a crime with formal composition causes certain discussions in a criminal and legal doctrine and corresponding complications in practice that predefined, in our view, first of all, by the legislative construction of such syllables of crimes.

Consider that to eliminate possibility of encroaching upon a crime it is impossible with formal composition. However for establishment of attempt it is necessary to find out such:

a) encroaching upon a crime with formal composition is possible in case if an act, as an obligatory sign of objective side of this corpus delict, continues in time and between its beginning and completion there is a certain interval of time (for example, organization of band, if an association did not yet purchase all its obligatory signs);

b) in crimes with formal composition about its not bringing to a conclusion absence of one can testify of two obligatory acts necessary for the presence of objective side of this corpus delict (for example, application of violence and not commission of sexual intercourse in case of attempt to carry out raping);

c) in investigational-judicial practice widespread are cases of commission of crime with formal composition with a characterizing sign, foreseen second or next part of the corresponding article of Special part of CC (for example, P. 3 Article 368 CC foresees criminal responsibility for accepting, promise or receipt of illegal benefit an official person, connected with its blackmail. Own blackmail will testify the official face of illegal benefit to encroaching upon a crime);

d) possible cases, when a crime with formal composition, ponderable in corresponding part of the article of Special part of CC, due to a characterizing sign grows into a crime with material composition. Such cases in practice also cause certain complications in relation to their criminal and legal estimation.

In a criminal legislation, encroaching upon a crime is divided into two kinds. Thus, in accordance with p. 2 Article 15 CC a crime attempted is complete, if a person produced all actions considered that necessary for bringing to an of crime conclusion, but a crime was not complete on reasons that did not depend on its will. According to p. 3 Article 15 CC a crime attempted is unfinished, if a person on reasons that did not depend on its will did not accomplish all actions considered that necessary for bringing to an of crime conclusion.

In the theory of criminal law the debatable is remained by a question about a criterion that is posited division of encroaching upon kinds. Separate researchers suggest to acknowledge to such a subjective criterion – own presentation of guilty about a degree implementation of act at the commission of crime. Other scientists suggest for dividing of attempt into kinds to use an objective test – degree of implementation of objective side of corpus delict. Consider that an objective test is not quite suitable for dissociation unfinished from a complete attempt, as objectively at the commission of any type of attempt always are absent or publicly hazard effects, or not fully committed act, as a sign of objective side of complete corpus delict.

Will mark in the end, that in accordance with Article 16 CC criminal responsibility for preparation to the crime and encroaching upon a crime comes after the Article 14 or 15 and after the that article of Special part of CC, that foresees responsibility for a complete crime. Consider that the use at that rate of term «responsibility» is not quite logical. Firstly, qualification of crime is preceded to bringing in of person to criminal responsibility. Secondly, the marked norm of CC decides a question not about criminal responsibility, but sets the rules of qualification of unfinished crime. Thirdly, the commission of preparation a person to the crime of small heaviness is subject to qualification, however it pulls criminal responsibility (P. 2 Article 14 CC). Finally, the criminal act of person must be skilled, however from criminal responsibility it can be exempt in the order set by a law.

A necessity during qualification of unfinished crime to do reference to the articles that regulate preparation to the crime or encroaching upon a crime, conditioned by that in them the foreseen signs of unfinished corpus delict, what are absent in the articles of Special part of CC.

Count for expedient to set forth the separate rules of qualification of unfinished crime.

1. Establishment for the person of careless form of guilt or indirect intention at the commission of crime eliminates its qualification as an unfinished crime.

2. Establishment of all signs of complete crime, by general rule, eliminates qualification of act as an unfinished crime. An exception is a presence of certain types of actual error in the act of person, thus in case of wrong idea of person about the actual objective signs of committed by its act.

3. It is necessary to set for qualification of unfinished crime, that a crime that a person gathered (tried) to do was not carried through on reasons that does not depend on its will.

4. Every stage of commission of intentional crime comes true consistently and embraces by itself the previous stages (phases) within the limits of one corpus delict (encroaching upon a crime embraces by itself preparation to the crime; a complete crime embraces by itself unfinished crime). At that rate qualification of committed act comes true only taking into account the last stage (phase) of commission of crime.

5. If a person wished to accomplish a certain crime and actually the committed answers all signs of this corpus delict by its, then even during partial realization of intention, act characterized as a complete crime. If a person wished to accomplish a certain crime, however it is actually committed by its does not answer all signs of this corpus delict, then committed is characterized as an unfinished crime.

6. If intention of person contained an offensive publicly of the hazard effects, foreseen by the article (by part of the article) of Special part of CC, that sets responsibility for more grave crime, than it is actually caused, committed it is necessary to characterize as a crime attempted.

7. If intention of person contained an offensive publicly of the hazard effects foreseen by the same article of Special part of CC, that and actually caused, then committed it is necessary to characterize as a complete crime.

8. If acts committed a person at preparation to the certain crime or encroaching upon its commission contain the signs of other complete crime simultaneously, all committed it follows to characterize after totality of crimes, one of that is unfinished, and other complete.

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Summary

Us O. V. **Criminal and legal estimation of unfinished crime.** – Article.

The article is devoted to the features of criminal and legal estimation (qualifications) of unfinished crime. Set lacks of criminal and legal regulation of types of unfinished crime and criteria of dissociation of preparation to the crime from encroaching (complete and unfinished) upon a crime. The expounded suggestions (rules) in relation to the criminal and legal estimation (qualifications) of unfinished crime and its kinds.

Key words: criminal and legal estimation, qualification, complete crime, unfinished crime, preparation to the crime, encroaching upon a crime.

Анотація

Ус О. В. **Кримінально-правова оцінка незакінченого злочину.** – Стаття.

Стаття присвячена особливостям кримінально-правової оцінки (кваліфікації) незакінченого злочину. Встановлені недоліки кримінально-правової регламентації видів незакінченого злочину та критерії відмежування готування до злочину від замаху (закінченого і незакінченого) на злочин. Висловлені пропозиції (правила) щодо кримінально-правової оцінки (кваліфікації) незакінченого злочину та його видів.

Ключові слова: кримінально-правова оцінка, кваліфікація, закінчений злочин, незакінчений злочин, готування до злочину, замах на злочин.

Аннотация

Ус О. В. **Уголовно-правовая оценка неоконченного преступления.** – Статья.

Статья посвящена особенностям уголовно-правовой оценки (квалификации) неоконченного преступления. Установлены недостатки уголовно-правовой регламентации видов неоконченного преступления и критерии отграничения приготовления к преступлению от покушения (оконченного и неоконченного) на преступление. Высказаны предложения (правила) уголовно-правовой оценки (квалификации) неоконченного преступления и его видов.

Ключевые слова: уголовно-правовая оценка, квалификация, оконченное преступление, неоконченное преступление, приготовление к преступлению, покушение на преступление.