

ABSTRACT

Terpeliuk E. V. Person's subjective attitude to the objective features of the criminal offence and its criminal law role. – Qualification scholarly paper: a manuscript.

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The dissertation is devoted to the criminal law analysis of the phenomenon of person's subjective attitude to the objective features of the committed crime and its role in the criminal law of Ukraine. Taking into account the existing theoretical frameworks, the experience of normative regulation and practical realization of relevant legislation provisions, its doctrinal, historical, ideological, criminal and political, legislative and law-enforcement aspect are investigated.

The author of the dissertation analyses the connection between this idea and the principles of criminal law, and also takes into account the domestic traditions of constructing the grounds of criminal liability as the existence of sum of specific signs in the person's behavior, covered by the legal construction «body of the criminal offence», determining the place of the person's subjective attitude to the objective features of the committed crime in the system of criminal law of Ukraine.

It is proved, that the requirement of the existence of person's subjective attitude to the objective features of the criminal offence, is a part of the principle of fault-based liability in the criminal law of Ukraine, and is also a derived one from recognition of fault as a compulsory feature of the mental element of the body of criminal offence. That is why, both development and investigation of the above-mentioned idea provide the criminal-legal policy with the ideological component, and also provide the respect for the human rights while applying the responsibility. Both the measure of such responsibility and the grounds of its application, are determined to a large extent with the person's attitude (his/her knowledge, awareness and estimation) to the external features of the committed infringement

which characterize the object, subject, causal link, objective and substantive conditions of commission of the act.

The legal acts of the X–XXIth century as well as the latest legislative developments in terms of regulation of the mental element, fault, differentiation of its' forms and types, intellectual and volitional moments by them, were studied. It was detected, that the explored phenomenon has been already known in criminal law back in the days of Rus' Justice, and has later been represented in the Lithuanian Statutes, Sudebnik, Law, by means of which the little Russian nation litigates, and also in Russian imperial legislation, Soviet criminal legislation and the legislation of independent Ukrainian State. At the same time, the legislative regulation of the subjective attitude was carried out with diverse detailing and quality. There is a further need for a more detailed legislative regulation of the subjective attitude for guilt, including the offender's attitude to the objective features of the committed offence.

The review of the ways of regulatory controls of the criminally significant person's subjective attitude to the committed infringement (including the attitude to the objective features) in criminal legislation of foreign States (countries of Western and Eastern Europe) and in international criminal law (in the Rome Statute of the international criminal tribunal), has been carried out. The traits of similarity and distinction between these acts and the Criminal Code (herein and after – CC) of Ukraine in terms of the regulation of the above-mentioned question, were discovered.

The scientific position, particularly developed by the modern theory of criminal law, which involves the recognition of the social relation as such a direct object, that is, the links between the subjects of relations, that are emerging in the process of their material or spiritual activity, was used for the scientific analysis and explanation of the person's subjective attitude to the object of the criminal offence. The cases of causing damage to separate structural element of breeched relations are illustrated (on examples of particular judicial decisions). The offender's subjective attitude to the object is suggested to be determined by his attitude to the specific item of the criminal unlawful influence, which is a structural component of the relations.

The peculiarities of the offender's subjective attitude to the object while

causing damage to the object «from outside», when the offender makes an infringement on the carrier (the subject) of social relations, were examined. In such cases the perpetrator penetrates the social relations by means of the exclusion or elimination of the carrier (subject) of the relations, severs or destroys them. The influence on the item of social relations generally occurs while carrying out an encroachment on the social relations, the item of which are considered to be the goods and values of the material nature. It has been proved, that even if not complete destruction or damage takes place despite the form of the expression of the infringements, then at there is least the transformation of social property relations, where the offender receives an ability to use the property by demonstrating his negative attitude to the rights of others, and actual exemption of the property, even without the owner's loss of the right of possession, on its own makes all legal operations with it impossible. There are two ways or forms of the influence on the social relations: «from the inside» and «from the outside» in cases when the community link is an item of the criminal influence. In case of severance of the social connection «from the inside» a person, being one of the subjects of social relations or acting on behalf of a collective subject (for example, a legal entity), unlawfully does not perform or improperly performs the duties, that were entrusted to him/her, «excluding» himself/herself or the subject, the representative of which he/she is, from these relations. The infringement on the social link by the means of the influence on social relations «from the outside» is carried out by the person, which is not a participant of the social relations.

It is stated, while investigating the attitude to the item of the criminal offence, that the item is recognized by the offender and he expresses his attitude to the value of the thing, its social importance, but not to the form. In so doing, the attitude to this thing is negative or indifferent. According to the character of the criminal-forming features of the item of the criminal offence, it is offered to single out: the items of criminal offences, which are concurrently the items of the social relations; items – sources of enhanced danger, the turnover of which is limited or forbidden in this regard; items, the turnover of which is forbidden according to the current

legislation and international contracts and Treaties. The above-mentioned classification of the items allows to investigate the offender's subjective attitude to the items of the criminal offence on the basis of their content, but not on the basis of the form of their consolidation in the CC of Ukraine.

It is stated that the offender's attitude to the victim and his features in the CC of Ukraine is actually modeled in one of two forms: realization and knowledge. The above-mentioned categories determine, how fully the certain features of the body of the criminal offence have been realized and displayed in the offender's mind. The realization includes the understanding of the victim's presence (including as a feature of the body) and understanding of the existence of certain features, that characterize him. The knowledge is the most exact awareness of all these features, and so it characterizes the confidence in the victim's existence, the awareness about his/her special characteristics. The offender demonstrates his negative attitude to the victim's features, which are an integral part of the core body by means of «realization» or «knowledge».

It is stated that a criminal offense is a psychophysical unity of the objective (external – physical) and subjective (internal – mental) aspects of the action as an act of volitional behavior of a person. The external part ensures the manifestation of the person's behavior in the objective reality, and is expressed in forms of commissions and omissions, aimed at the changes in the social environment, consequences, causal link between them and other features, prescribed by the legislation. The internal part includes psychical processes, which occur in the person's mind, characterize his/her will and determine the relevant behavior. Such division is conditional and is provided only with the aim of the deeper studying of each side, figuring out their unique features and criminal-legal meaning of the person's subjective attitude to the features, which characterize the objective part of the criminal offence.

It is justified, that the person realizes the commission of the specific, socially dangerous, unlawful, volitional act, by committing an active criminally unlawful behavior (act). The realization of the socially dangerous character of his/her action

in the form of the criminally unlawful omission occurs not only under conditions, when the person realizes the above-mentioned attributes (the compulsory element of the subjective attitude to the action), but when the person also realizes the existing obligation to act in a specific way and the existence of the real opportunity to perform active force, which are required (an additional element of the subjective attitude to the action in the form of omission). At the same time, the person's realization of the socially dangerous character of his/her action (commission or omission) includes the offender's realization that such criminally unlawful act on its own or conjunction with other objective and/or subjective features is determined in the legislation on criminal liability and a criminal offence.

It is determined, the criminal law qualification of actions in case of the legal error in such conditions is implemented on general grounds except for the legal error in criminal not unlawfulness (non-crime) of the action. In this regard, it is emphasized the need to supplement Section V of the General Part of the current CC of Ukraine with a new provision: «Article 25-1. Legal Error» and the author's version of this provision is also offered. It is proved that criminal liability is possible when committing such an act through negligence is also criminally punishable in the presence of a negative error in the character (social danger) of the act (in the absence of factual features that form the objective side of the criminal offense).

It is established that the socially dangerous consequences defined by legislation in most criminal offenses with material composition are not the consequences of a criminal offense, but are a feature of normative nature, which indicates a certain amount or volume of damage and is the only possible mechanism for isolating the infringements, which correspond to the social danger of such a social phenomenon as a criminal offense by their level and nature, out of the total of all infringements. The above-mentioned is subject to a necessity of the person's appropriate mental attitude not only to the criminal offense and its consequences, but also to the features of normative nature – socially dangerous consequences in their established understanding of the doctrine of criminal law.

The attention is focused on the fact, that Articles 23–25 of the CC of Ukraine in determining the guilt, intention and its types, negligence and its types don't mention the person's mental attitude to the place, time, situation, method or means of committing a criminal offense, as well as person's mental attitude to the development of a causal link between a criminally unlawful act and its socially dangerous consequences. Moreover, the provisions of Articles 23 and 24 of the CC of Ukraine don't provide and ability to apply them to the norms of the Special section of the CC of Ukraine, which have a legislative construction as criminal offences with formal body or preventive offences. The relevance to determine the person's mental attitude not to the specific objective features of the committed infringement (socially dangerous actions and socially dangerous consequences), but to all features, which characterize the body of the crime, prescribed by the CC of Ukraine (by the Special section of the CC of Ukraine), is also justified. The author's edition of the above-mentioned articles of the Act on Criminal Responsibility is offered with this aim.

Keywords: subjective attitude, objective features, body of the criminal offence, mental element of the criminal offence, guilt, intention, negligence, knowledge, realization, error.