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БЛАНКЕТНІ ДИСПОЗИЦІЇ ВІЙСЬКОВИХ ЗЛОЧИНІВ: ПРОБЛЕМИ КВАЛІФІКАЦІЇ

Анотація. *Стаття аналізує механізм та проблеми кваліфікації військових злочинів, що стосуються бланкетної диспозиції. Досліджено праці науковців з відповідної тематики, проаналізовано норми Кримінального Кодексу України. Розкрито зміст та ознаки бланкетних кримінально-правових норм, наведена їхня класифікація. Досліджена природа бланкетних диспозицій кримінально-правових норм у юридичній доктрині. Виявлено, що недотримання послідовності при кваліфікації військових злочинів може призвести до порушення принципу законності відповідними правоохоронними органами. Зроблено висновок, що основною проблемою при кваліфікації військових злочинів є порядок несення військової служби, який регулюється великою кількістю нормативно-правових актів. Запропонований алгоритм, що повинен урегулювати суперечності та забезпечити правильну кваліфікацію військових злочинів.*

Ключові слова: військовий злочин, військовослужбовець, бланкетна диспозиція, кваліфікація.

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БЛАНКЕТНЫЕ ДИСПОЗИЦИИ ВОИНСКИХ ПРЕСТУПЛЕНИЙ: ПРОБЛЕМЫ КВАЛИФИКАЦИИ

Аннотация. *Статья анализирует механизм и проблемы квалификации воинских преступлений, касающихся бланкетных диспозиций. Исследованы труды ученых по соответствующей тематике, проанализированы нормы Уголовного Кодекса Украины. Раскрыто содержание и признаки бланкетных уголовно-правовых норм, приведена их классификация. Исследована природа бланкетных диспозиций уголовно-правовых норм в юридической доктрине. Обнаружено, что несоблюдение последовательности при квалификации воинских преступлений может привести к нарушению принципа законности соответствующими правоохранными органами. Сделан вывод, что основной проблемой при квалификации воинских преступлений является порядок несения военной службы, который регулируется большим количеством нормативно-правовых актов. Предложенный алгоритм, который должен урегулировать противоречия и обеспечить правильную квалификацию воинских преступлений.*

Ключевые слова: воинское преступление, военнослужащий, бланкетная диспозиция, квалификация.

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BLANKET DISPOSITIONS OF MILITARY CRIMES: PROBLEMS OF QUALIFICATIONS

Abstract. *The article analyzes the mechanism and problems of the qualification of military offenses concerning blanket dispositions. The works of scientists on the relevant topics are re-searched, the norms of the Criminal Code of Ukraine are analyzed. The content and signs of blanket dispositions are disclosed, and their classification is given. The nature of blanket dispositions in legal doctrine is investigated. It was found that violation of the sequence during the qualification of military offenses could lead to violation of the principle of legality by the relevant law enforcement agencies. It is concluded that the main problem in the qualification of military offenses is the military service procedure, which is regulated by a large number of legal acts. An algorithm which should resolve the contradictions and ensure the correct qualification of military offenses is proposed.*

Keywords: military offense, serviceman, blanket disposition, qualification.

INTRODUCTION

Traditionally, the scientists use the term “qualification” in two meanings:

- corresponding process for one or another crime elements features establishment
- result of law enforcement bodies and court activities in assessing the same act and in its revealed conformity with the criminal law, which has official recognition and affirmation in a legal act.

Criminal and legal effect for crimes qualification can hardly be overestimated, as this is one of the central elements in the system of measures for criminal legislation norms application. Qualification of crimes which disposition has a blanket nature (and section XIX of the Criminal Code (CC) of Ukraine is built in this way), causes significant difficulties in law enforcement activities, as in addition to criminal law application, legal norms of other branches of law shall be carefully analysed. Proper qualification of crimes is a guarantor for the rights and legitimate interests of the perpetrator, promotes criminal responsibility individualization and punishment in accordance with the General and Special Parts of the Criminal Code of Ukraine provisions [1].

Qualification of crimes is quite an important concept in the science of criminal law, which involves establishment of exact correspondence of the socially dangerous act committed to the features of one or another element of crime as provided for by the law on criminal liability and criminal and law assessment of illegal act.

That’s for sure, qualification combines crime element (abstract legal model) with the features of a specific crime [2, p. 11]. Qualification of the latter is one of the stages of the criminal and legal norm application consisting of decision-making, which

norm or norms should be applied (distinguishing socially dangerous act from related crimes), whether it is necessary to refrain from applying criminal law in the absence in any person behavioursome features of crime elements.

Qualification of crimes is a purely subjective category, which reflects in any person mind, who makes a legal assessment of the deviant behaviour of the subject, features of a socially dangerous act committed by that person, its predictability by a criminal law and coincidence of one with another. In its essence, the legal concept reviewed is always related to a need to obligatorily establish and prove 2 extremely important circumstances by criminal and procedural and forensic means:

- fact of a socially dangerous act committed by the person (subject of crime), in particular, a specific act of its behaviour (act) in the form of action or commission;
- exact conformity of the this act features to the features of crime elements as provided for by the article of the Special Part of CC, which are the grounds of the criminal and legal qualification.

Some jurists position is not quite correct who use the term “criminal and legal qualification” for actions assessment that do not have the features of crime (socially dangerous act of insane person or a person who is under age from which criminal offence may occur; acts are committed under circumstances that exclude their criminality) [3, p. 6]. In our opinion, in such cases you shall refrain from using the term “qualification”, since only criminal and legal assessment of socially dangerous acts, which have no features of crime in general, or lack of some of them, can be involved.

Both the state and the subject of crime after committing socially dangerous act by the latter have the reciprocal rights and obligations. Correct qualification of crime is a responsibility of the state and also the right of the subject to a fair assessment of its actions for further criminal prosecution with or without punishment. Correct qualification of crimes as one of the elements of the criminal law application, strict observance of the legal language – basic foundations of the most important principles of criminal law – principle of legality and principle of equality of citizens before law. Qualification of crime is a formal recognition of criminal law relations between the state (legally represented by the authorized persons and bodies) and a person who committed a crime and social-political and legal assessment of these relations. Mistakes in qualification can result in punishment that does not correspond to the degree of public danger of crime towards prescription of too severe punishment, and vice-versa very light punishment. In the future, this may also impact on a number of other legal restrictions or incentives, namely: calculation of limitation periods, maturity and expunction of record, application or non-application of amnesty, release on parole, etc.

The purpose of the article is to analyse the rules for crimes qualification with blanket disposition as exemplified by war crimes. Article materials constitute value for the criminal law specialists teachers of the “Criminal liability for war crimes” discipline, legal faculty students, practical workers, lawmakers, etc.

1. MATERIALS AND METHODS

Theoretical foundation for study involves works reviewing war crimes qualifications. In particular, works of such scientists were reviewed: V. K. Hryshchuk [4], N. D. Kvasnevska [5], M. I. Melnyk and M. I. Khavroniuk [6], V. O. Navrotskyi [3], M. I. Panova [7], H. Z. Yaremko [8] and others. Criminal law norms of the Criminal Code of Ukraine are the normative legal foundation for study [1].

Various theoretical methods for in-depth analysis of the war crimes disposition and their qualifications were used by the author. The most effective of them are:

- method of scientific analysis and synthesis, which allowed to mentally split the criminal law provisions of Section XIX of CC of Ukraine into constituent parts for further study, research them and integrate into single piece;
- method of system analysis, which allowed to perform qualitative research of the processes and phenomena in legal sciences.

2. RESULTS AND DISCUSSION

It is sometimes difficult to qualify war crimes, first of all, due to specifics in presentation of the specified elements disposition, namely, their blanket nature. Blanket disposition (Fr. *blanc* is a white, clean sheet with partly executed text, in another part of which it requires additional filling) – this is a part of the criminal legal norm, the content of which is determined not only by the law on criminal liability, but also the norms of other laws not related to the criminal legal norms, or certain delegated legislation: instructions, charters/statutes, standards, etc. [5, p. 49].

The specific features of the blanket norms are the content and the scope of the crime elements to be defined both by the criminal legal norm and the norms or their elements from other branches of law. Moreover, the latter do not expand and do not increase the scope, content and limits of crime elements, but only clarify and specify the relevant features of the latter, set out in the law, as a rule, in general [7, p. 21]. Dispositions only in general terms indicate the source of law, in which certain norms should be established, for violation of which penalty shall be imposed. Specific features of the blanket method for presentation of CC norms disposition in the scientific legal literature is fairly seen in describing the elements of crime by generalizing signs and signs-concepts which, so to say, are “encoded” (their content does not logically appear from the disposition of the criminal legal norm), and therefore their clarification requires to recourse to other branches of laws related to the criminal ones [9, p. 54–63].

In reviewing matter of articles which disposition has a blanket nature (i.e., all war crimes), the courts shall clarify and specify in sentences as thoroughly as possible:

- what exactly was the offence;
- norms of which rules, instructions and other regulations are not met;
- is there a causal relationship between the violations committed and socially dangerous consequences set forth by law [10, p. 6–7].

In addition to objective element of crime in terms of blanket disposition, it is necessary to establish the guilt both in violation of the criminal law prohibitions and other regulations governing the relevant relations in the military sphere.

Blanket disposition of the criminal legal norm has a general and specified content. The general content of the blanket disposition is transmitted verbally in a documentary form of the relevant article of the Special Part of the Criminal Code of Ukraine, and specified content provides for certain provisions of other regulations detailization, which fills in the criminal legal norm with a more specific content. The studies show that the blanket sign can refer to any regulatory act of one or another branch of law [11, p. 3–11]. In our opinion, some scholars unreasonably expand the scope of legal requirements, considering the content of the blanket disposition of the criminal legal norm can be established not only through the recourse to the regulatory act, but even to the legal practice [8].

At the bottom of the nature of blanketness is the real relation between the requirements of the criminal law and the norms of other legal branches, which arises regardless of the law enforcement bodies positions, since blanketness is only a reflection of objectively existing inter-branch relationships [2, p. 13]. The blanket nature of the criminal act signs affects the limits of the criminal illegality [12, p. 346] of war crimes. Therefore, in case of blanket structure of the criminal law, the criminal legal norm is implemented in the criminal law only in part, and its blanket part is expressed in other normative legal acts. The norms specifying content of the relevant dispositions may be issued before the law on criminal liability, which contains blanket disposition, entry into force simultaneously with or after its publication: these norms can be changed, but the norm of law on criminal liability, which has blanket disposition, remains unchanged [13, p. 44].

The nature of criminal legal norm blanket disposition in the legal doctrine is interpreted differently. Some lawyers (with the point of view of whose, as a matter of fact, we do not agree) believe that normative legal acts of other branches of law can be a source of criminal law [14, p. 69–72; 15, p. 16]. Most lawyers believe that the blanketness of the criminal legal norm does not extend the range of sources of criminal law [16, p. 7], and connection between the normative legal acts and criminal law is only informational – they interpret the terms and concepts contained in the criminal law [17, p. 99].

The scientists distinguish the following signs of blanket criminal legal norms:

- the norm is contained in the text of the criminal code;
- the norm may contain a reference to the normative legal act, which has or has no criminal legal nature;
- criminal liability is provided for these norms violation;
- in most cases the norm is related to certain rules violation to which it refers [18, p. 14].

On the one hand, criminal act elements establishment with specific rules is more easy task than clarifying some of the evaluative concepts or other features, which simple disposition includes. On the other hand, contradiction and obscurity of some administrative legal acts causes considerable difficulties in applying criminal law [19, p. 12].

The norms of war crimes, in essence, do not establish full content of the criminal legal prohibition; their disposition does not outline the features of the crime elements or does it only partially. Its content is determined not only by law on criminal liability, but also by the norms of military and administrative law. In other words, the essence of the blanket features of a particular war crime depends on another norm, in most cases regulatory one, which belongs to another branch of law. The title of Section XIX of the Criminal Code of Ukraine – Crimes against the established order of military service (war crimes) – allows to state that all the norms of this section are blanket.

The order shall mean the rules according to which something is done, i.e. the actual arrangement or mode. Specific methods of rule-making technique used by lawmaker when formulating norms in the law on criminal liability relating to the war crimes, provides the opportunities to distinguish between two types of blanket dispositions – direct (explicit) and indirect (implicit) [5, p. 49].

Direct is a blanket disposition, which directly indicates the violation of the relevant order of military service, which constitutes the majority in Section XIX of the Criminal Code of Ukraine:

- violation of the weapon handling rules, including substances and objects representing increased danger to the wider public;
- violation of the flight rules or preparation for them;
- violation of the border guard service rules;
- negligent attitude to military service etc.

In the indirect blanket disposition there is no direct indication on the violation of certain legal norms in the articles of the criminal law contained in the normative legal acts of a particular branch of law or legislation. However, they specify the crime features, which are contained not only in the disposition of the criminal law, but also in the norms of other regulations. These features are as follows:

- head, military unit, place of service;
- weapons, ammunition, explosives or other combat agents;
- vehicles, military and special machinery, military property;
- objects posing increased danger to the wide public, radioactive materials;
- military information constituting state secret;
- documents or items containing military information constituting state secret;
- means of warfare, warship;
- prisoner of war, special period, state of martial law, combat situation.

From our point of view, as a sign of war crimes disposition, blanketness shall be considered in two planes: in a broad and narrow sense. In the broad sense, all military crimes violate the relevant rules (order) of military service, and any norm provided for in Section XIX of the Criminal Code of Ukraine should be viewed through the lens of prescriptions violation on which military service is based. In the narrow sense, when it is required to clearly establish for the proper war crime qualification which particular item of the relevant rules (special prescriptions) was violated by a serviceman, which, in its turn, is a constant for building an objective side of the military crime. It is precisely the blanketness of the war crimes disposition in the narrow sense that indicates the existence of regulations in other legal branches, which prescriptions are involved in the criminal legal prohibition formulation.

In-depth study of the prohibitions provided for in Section XIX of the Special Part of the Criminal Code of Ukraine assists in statement that the blanketness of the war crimes disposition revealed first of all when establishing both the signs of their objective side (places, time, circumstances, tools, means and methods of criminal act commitment and its effects) and when establishing special subject of crimes studied. In her thesis, Z. H. Yaremko made in-depth analysis of the blanketness issue in the criminal law and made a conclusion that blanket dispositions are widely used that characterize such crime element features as socially dangerous acts, subject and signs of special subjects [8, p. 193]. This is also true for war crimes dispositions.

Servicemen activities during military service are clearly arranged, which causes certain difficulties in qualifying crimes committed by them, since in this case, a systematic analysis of the rules of their behaviour outside the legal regulation of the criminal law is required.

Along with the laws regulating the Armed Forces of Ukraine and other military groups activities, there are a lot of regulations, instructions and guidelines governing the relevant aspects of life and activities of servicemen (eligible for military duty). Therefore, when establishing the elements of crime provided for by articles of Section XIX of the Criminal Code of Ukraine, it is necessary to also apply the relevant norms of other normative legal acts that regulate the order of military service, and to find out exactly which legislative prescriptions were violated when a war crime was committed. Criminal legal norms of Section XIX of the Criminal Code of Ukraine practical application assumes compliance with the relevant requirements that substantially complicate the processes of the crimes under consideration qualification:

- firstly, it is necessary to determine the norms of which regulatory legal (non-criminal) act were violated by a serviceman when a war crime was committed;
- secondly, one shall ensure that this regulatory legal act was valid when a socially dangerous act was committed;
- thirdly, one shall establish the content of the violation of the relevant rules (order) of military service;

– fourthly, one shall determine a specific article, clause or other structural unit of the regulatory legal act that allows identifying the relevant offence.

Failure to comply with this sequence in the war crimes qualification may cause the principle of legality violation by the relevant law enforcement agencies. Legal experts believe that when applying the criminal legal norm with blanket disposition two stages of qualification are inevitable:

- interim evaluation on the basis of additional grounds;
- final evaluation on the basis of legal norm that provides for legal consequences and used as a basis for decision-making on the case [20, p. 90–94].

CONCLUSIONS

The study of this problem allows making the following conclusions: the main problem of the war crimes qualification is the order of military service, which is regulated by a number of normative legal acts. To properly qualify these crimes, one shall adhere to the algorithm proposed:

- establish the prescriptions of which (non-criminal) act were violated;
- establish the content of this violation;
- identify crimes;
- finally qualify according to the relevant article of the Criminal Code of Ukraine.

When qualifying war crimes with a blanket disposition, two types of evaluation shall be involved:

- establishment of the legal content of blanket features provided by other branches of law, used to build the relevant article of war crime;
- general conclusion on the entirety of features (blanket and non-blanket) conformity to the elements of crime.

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