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CONCEPTUAL PROBLEMS OF CRIMINAL LIABILITY FOR THE CREATION OF ILLEGAL MILITARIZED OR ARMED FORMATIONS AND PARTICIPATION IN THEM

Conceptual problems of criminal liability for the creation of illegal militarized or armed formations and participation in them dealing with uncertainty of precise juridical nature of such criminal formations, criminal and legal encouragement of their participants to positive post crime actions, delineation of crime predicted by Art. 260 of the Criminal Code of Ukraine from the related crimes, and also its qualification in combination with other crimes are researched in the article.

Keywords: illegal militarized formation, illegal armed formation, criminal unit, participation, criminal law encouragement, delineation of crimes.

According to the Art. 3 of the Constitution of Ukraine, the person, his life and health, honor and advantage, immunity and safety are recognized in Ukraine the highest social value.

Human rights and freedoms determine the content and orientation of the state activity. The state is responsible to the people for its activity. The establishment and protection of human rights and freedoms are the main duty of the state. For today, especial place in realization of this state duty belongs to the people's protection from the socially dangerous acts due to the active growth of separate kinds of crimes. The increase of crimes dealing with functioning of criminal units and terrorism causes serious concern. The creation of illegal militarized or armed formations and participation in them belongs to this category of crimes.

In investigative and judicial practice there are many difficulties with application of the Art. 260 of the Criminal Code of Ukraine

establishing criminal liability for the creation of illegal militarized or armed formations and participation in them.

Separate problem issues of criminal and legal characteristic of such crime are considered in the works of M. Akimov, J. Baulin, R. Chorny, M. Khavroniuk, P. Khriapinskyi, M. Korzhanskyi, V. Navrotskyi, S. Sahynej, I. Shapkin, V. Robak, V. Tykhyi, A. Vozniuk and other scientists. In the same time among foreign scientists this problem was considered by V. Abdukhamitov, A. Adzhyiev, D. Badushev, B. Beibulatov, A. Dmitrenko, T. M.-C. Mahomedov, A. Pavlinova, I. Smirnov, A. Sygynbaeva, F. Usbekov and others scientists. Despite the significant achievements of scientists in development of mentioned problem, there are still many unsolved problems. It affects on effectiveness of criminal legal norm provision predicted by Art. 260 of the Criminal Code of Ukraine and causes necessity of proposal formulation on its improvement.

For this purpose it is necessary to research conceptual problems of criminal liability for the creation of illegal militarized or armed formations and participation in them.

1. First of all it is necessary to stress that scientists determine the criminal and legal nature of such criminal units differently, besides they refer them to the group of persons by prior agreement, organized group, criminal organization. In the same time, in the note 1 and 2 of Art. 260 of the Criminal Code of Ukraine, where these formations are determined, there is absent the note about its identity to the certain form of participation. Moreover, in such definitions there is no indication on the goal of certain crime committing. It is possible to assume that illegal militarized or armed formations can exist outside the institute of participation. Thus, in our view, illegal militarized or armed formation predicted by Art. 260 of the Criminal Code of Ukraine can belongs to certain form of participation and also be outside.

V. Navrotskyi is right that the definition of illegal militarized or armed formations is given in the notes to Art. 260 of the Criminal Code of Ukraine. But it doesn't contain all necessary essential and sufficient features of such criminal organizations. In particular, in the notes 1 and 2 of Art. 260 of the Criminal Code of Ukraine there is no feature specified in the title and disposition of the part 1 and 2 of this Article, namely these formations are not predicted by the laws. Besides, it is incompletely disclosed specific features of such organizations, that doesn't give the possibility to distinguish them

from other kinds of organization [1, p. 800]. O. Smahliuk and T. Pryhodko follow the same position [2, p. 596]. Certainly, the features of such criminal formations are not completely disclosed, but it isn't possible to agree with scientists that illegal militarized or armed formations are exclusively criminal organizations.

2. The actual question is delineation of crime predicted by Art. 260 of the Criminal Code of Ukraine from the related acts, for example, predicted by the Art. 187, 257, 258³ Criminal Code of Ukraine. The most number of problems while distinguishing of researched crime from robbery and banditry are arisen in the case of participation of illegal militarized and armed formations members in an attack on citizens. In this case, it is arisen the question if it is possible to qualify the crime predicted by Art. 260 of the Criminal Code of Ukraine additionally with Art. 187 of the Criminal Code of Ukraine. Considering the Unified state register of court decisions we haven't found such sentences.

In the opinion of M. Korzhanskyi researched crime is distinguishing from banditry (Art. 257 Criminal Code of Ukraine) for the political goal and problems for which solving are created and acted such formations and groups [3, p. 426–427]. J. Karmasin is a supporter of such position, he notes that specified crime composition is distinguishing from banditry (Article 257 Criminal Code of Ukraine) by political reason and motives for which such formations and groups are created and acted [4, p. 457]. Although N. Dejnega claims that for results of research in 87 % of cases banditry is committed with useful purposes, in 9 % of cases it is accompanied by the goal of political character, in 4 % – by other goals [5, p. 181]. Some scientists admit the possibility of banditry committing from hooligan motives [6, p. 258] and revenge motives [7, p. 282; 8, p. 78–79] etc. Instead, the creation motives of illegal militarized or armed formations and participation in them are considered first of all as political [3, p. 426–427; 9, p. 197; 10, p. 60], although social and domestic, nationalistic are admitted [10, p. 60].

One should agree with the opinion of I. Ralchenko, who notes that in the presence of a common feature «attack» in the composition of the crimes provided by part 1 of Art. 444, Art. 257 (banditry), part 4 of Art. 260 of the Criminal Code (an attack of illegal militarized or armed formations on enterprises, institutions, organizations or citizens), there are no distinctive features in them,

which makes it impossible to distinguish them in qualifying of offense [11, p. 9].

Even more problematic is the delineation of the crime provided by Art. 260 of the Criminal Code of Ukraine from a crime provided by Art. 258³ of the Criminal Code of Ukraine. In some cases, the courts qualify the actions of participants of illegal militarized or armed formations as the participation in illegal militarized or armed formations, and in others as participation in terrorist organizations.

3. The encouraging criminal law norm provided by part 6 of Art. 260 of the Criminal Code of Ukraine is also imperfect. There are preconditions for release from criminal liability only on the basis of part 6 of Art. 260 of the Criminal Code of Ukraine: 1) the creation of illegal militarized or armed formations; 2) participation in their activities. At the same time, there is no possibility to release from criminal liability the participants of illegal militarized or armed formations who controlled the above-mentioned formations, financed them, supplied them with weapons, ammunition, explosives or military equipment, as well as took part in them in the attack on enterprises, institution, organization or citizens.

In our opinion, the legislator is a little bit inconsistent in the preconditions for release from criminal liability. It means that if a person has created illegal militarized or armed formations, then he may be released from criminal liability, and if he has given a weapon or was the chief of such formation, then no. Therefore, we consider the legislative position as illogical and non objective. By the degree of social danger of the illegal militarized or armed formations creation is the closest to their leadership. The legislator follows this position, for example, in part 3 of Art. 27 of the Criminal Code of Ukraine, according to which the organizer is a person who has formed an organized group or criminal organization or has managed it. Therefore, it should obviously to prohibit the release from criminal responsibility for any organizational actions, including the creation of these criminal organizations. Especially in similar criminal law norms provided by part 2 of Art. 255 and part 2 of Art. 258³ of the Criminal Code of Ukraine, the prohibition on the release of the organizers and leaders of criminal units is established. Or it is possible to allow releasing from criminal liability for both acts. We consider it is necessary to allow releasing from criminal liability only for participation in activities of illegal militarized or armed formations. At the same time, to a person who has committed other acts,

provided by Art. 260 of the Criminal Code of Ukraine, other measures of criminal legal encouragement should be used, but not releasing from criminal liability on the basis of mentioned norm.

For release from criminal liability on the basis of part 6 of Art. 260 of the Criminal Code of Ukraine it is necessary to perform in complex the following conditions: 1) voluntary withdrawal from such formation; 2) a voluntary notification of its existence to public authorities or local self-government bodies.

The state actually forgives the person his socially dangerous acts only in return for their termination and notification of them. In our view, there is not enough such positive post-criminal acts for release from criminal liability. Instead, in the presence of such conditions, it should be better to raise the issue of release from punishment, but not from criminal liability. In our opinion, for this type of criminal law encouragement should be more serious requirements. A person shall be released from criminal liability if he voluntarily informed the investigator, prosecutor, other official authorized to accept and register applications and reports of criminal offenses, on his participation in the formation, voluntarily handed over weapons, ammunition, explosives or military equipment (in in the case of the presence of such objects), and actively promoted the detection, termination, disclosure, investigation of crimes committed in connection with the creation and operation of such formations, as well as prevention thereof.

Moreover, this is not the only one encouraging criminal legal norm that can be applied to members of illegal militarized or armed formations. As A. Vozniuk rightly observes, it is possible to apply to participants of illegal militarized or armed formations such measures of criminal legal influence, as prosecution, its exclusion, release from it, as well as mitigation of punishment. The scientist proposes a differentiated approach to the encouragement of these subjects. In his opinion, participants of illegal militarized or armed formations who commit crimes against the interests of the Ukrainian state and its citizens can be released from criminal liability in the case of active assistance in the detection, termination and investigation of these crimes, as well as their prevention. At the same time, participants of illegal militarized or armed formations committing socially dangerous acts in order to protect state sovereignty, constitutional order, territorial integrity and inviolability of Ukraine should not be brought

to criminal liability within the circumstances that exclude criminal acts [12, p. 42–47].

4. Many problems are arisen in the qualification of certain crimes committed by participants of illegal militarized or armed formations. In this regard, the position of V. O. Navrotskyi deserves attention, which notes that by parts 4 and 5 of Art. 260 of the Criminal Code of Ukraine it is covering the crime commitment by the participants of illegal militarized or armed formations provided by other articles of the Special Part of the Criminal Code, which consist in an attack. At the same time, by part 5 of Art. 260 of the Criminal Code of Ukraine is covered crime commitments, the feature of composition is the negligent death of several persons, causing of moderate or severe bodily injuries with any form of guilty. Commitment of more dangerous crimes provided by Art. 260 (including robbery, intentional murder of qualifying features) is qualifying in complex with the relevant articles of the Special Part of the Criminal Code. Part 4 of Art. 260 does not cover the participation of persons who are not members of illegal militarized or armed formations, since the law provides the responsibility for participating in the attack as a member of such organization. Taking into account the specific circumstances of the case, the participation of individuals, along with members of the illegal militarized or armed formations, should be qualified according to the articles of the Criminal Code, which provide the responsibility for crimes constituting an attack, and for complicity in an offense established by part 4 of Art. 260 [1, p. 801].

A. Sygynbaieva rightly observes that the possibility of the growth of illegal armed formations in connection with certain features (the formation of a gang and attacks) into banditry or the organization of a criminal community (a criminal organization) is not excluded.

The process of qualifying crimes provided by Art. 229 of the Criminal Code of the Kyrgyz Republic often includes additional stages of their qualification in complex with such crimes as abuse of power (Art. 304 of the Criminal Code of the Kyrgyz Republic), the involvement of a minor in a criminal group (part 4 of Art. 156 of the Criminal Code of the Kyrgyz Republic). At the same time, the illegal wearing or possession of weapons does not form a set with considered crime (Art. 241 of the Criminal Code of the Kyrgyz Republic), mercenaries (Art. 375 of the Criminal Code of the Kyrgyz Republic) [13, p. 16].

Obviously, such rules of qualification of this crime both in Ukraine and in other countries are caused by its legal nature. A. Vozniuk is right that the crime provided by Art. 260 of the Criminal Code of Ukraine, is complex. Peculiarity of complex crimes provided by Art. 255, 257, 260 of the Criminal Code of Ukraine, is that, despite the fact that they are covered by one article, certain crimes committed as part of criminal associations require qualification in combination with other articles, that contradicts the general rule of qualification of complex crimes according to one article as a single crime, and not a set of crimes. Established by the legislator construction of crimes composition provided by Art. 255, 257, 260 of the Criminal Code of Ukraine, raises numerous problems during their qualification in the totality of crimes, and also forms the basis for violation of the principles of criminal law and the qualification of crimes. The construction of crimes provide by art. 255, 257, 260 of the Criminal Code of Ukraine, eliminates the assignment of committed crimes in order to adequately assess the social danger of the relevant attacks and to simplify their qualifications.

Consequently, the construction of crimes provided by Art. 255, 257, 260 of the Criminal Code of Ukraine, as composed is ungrounded. In this regard, the researcher proposes to exclude from the dispositions of these articles such an act as participation in crimes committed by a criminal unit. Instead, participation in a criminal unit will involve participation as members of a criminal union, as well as its other participants [14]. In our opinion, this position should be agreed as it will contribute to ensuring the proper qualification of the crime provided by Art. 260 of the Criminal Code of Ukraine, as well as eliminate certain difficulties related to its separation from related offenses.

On the basis of the research, one can conclude that the criminal legal norm provided by Art. 260 of the Criminal Code of Ukraine, needs to be improved as it creates difficulties in qualifying these crimes and their separation from related offenses. The most perspective directions for such improvement are: 1) determination of a clear legal nature of illegal militarized or armed formations 2) improvement of the disposition of Art. 260 of the Criminal Code of Ukraine in order to exclude unwarranted competition of criminal law norms, elaboration of clear criteria for delineation of crime stipulated in Art. 260 of the Criminal Code of Ukraine, from related offenses, as

well as the prevention of violation of the principles of criminal law and the qualification of crimes; 3) ensuring a differentiated and equitable approach to the criminal law encouragement of illegal militarized or armed formations participants.

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Концептуальні проблеми кримінальної відповідальності за створення не передбачених законом воєнізованих або збройних формувань та участь у них

Досліджено концептуальні проблеми кримінальної відповідальності за створення не передбачених законом воєнізованих або збройних формувань та участь у них. Аргументовано, що зазначені проблеми пов'язані з відсутністю чіткого юридичного визначення природи цих злочинних об'єднань, кримінально-правовим заохоченням їх учасників до позитивних післязлочинних дій, відмежуванням злочину, передбаченого ст. 260 Кримінального кодексу України, від суміжних злочинів, а також його кваліфікацією за сукупністю з іншими злочинами.

Ключові слова: не передбачене законом воєнізоване формування, не передбачене законом збройне формування, злочинне об'єднання, співучасть, кримінально-правове заохочення, розмежування злочинів.