

UKRAINIAN GOVERNMENT CRIMINAL LAW POLICY IN REGULATION IMAGINARY (MISTAKEN) DEFENSE

In the Article the author researched Ukrainian government criminal law policy in regulation imaginary (mistaken) defense. It is studied normative (legal) understanding of imaginary (mistaken) defense and its varieties.

Key words: mistaken defense, imaginary defense, varieties of mistaken defense.

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INTRODUCTION

Imaginary (mistaken) defense at Ukrainian criminal law has been the subject of theoretical and judicial scrutiny for many years. Imaginary (mistaken) defense has been researched by C. Zaripova, G. Geert-Jan, J. Knoops, A. Ashworth, C. Roxin, R. Christopher, N. Jareborg and others.

In Ukraine imaginary (mistaken) defense has been regulated by normative rules (Art. 37 «Imaginary defense» Criminal code of Ukraine 2001). Unfortunately, some legislation positions in regulation imaginary (mistaken) defense has incorrect or non-systemic manner.

The aim of this research is to present and to analyze Ukrainian government criminal law policy in regulation imaginary (mistaken) defense. Therefore, it is necessary to present the subject in normative order (order, what was chosen by the Lawgiver in Art. 37 Criminal code of Ukraine).

The study is divided into four parts.

Part one is devoted to the legislation understanding of mistaken (imaginary) defense: its law nature and legislation understanding. The second part presents normative rules of regulation variety of mistaken (imaginary) defense, when a person had reasonable belief in the presence of any real socially dangerous act, and caused harm, which is adequate to the danger of the trespass or circumstances of the real justified defense. In the third part it is studied legislation disposition of regulation variety of mistaken (imaginary) defense, when a person had rea-

sonable belief in the presence of any real socially dangerous act, and caused harm, which is not adequate to the danger of the trespass or circumstances of the real justified defense. Finally, in the fourth part it is researched varieties of mistaken (imaginary) defense, when a person had unreasonable belief in the presence of any real socially dangerous act.

THE FIRST PART

In law systems it's used different names of researched situation: mistaken defense (this term is used in Anglo-American law system), imaginary defense (it's widespread in civilian law system). In Ukrainian criminal law researched situation is called «Imaginary defense» (Art. 37 Criminal code of Ukraine). Term «Imaginary defense» will be also used in this study.

Ukrainian criminal law separates two situations: necessary defense (Art. 36 Criminal code of Ukraine) and imaginary defense (Art. 37 Criminal code of Ukraine). According to the Ukrainian criminal law policy necessary defense (Art. 36 Criminal code of Ukraine) and imaginary defense (Art. 37 Criminal code of Ukraine) are different situations. The main normative difference between these two situations consists in: necessary defense can be only against real socially dangerous trespass (objective trespass), and it cannot be against imaginary socially dangerous trespass (trespass, what exists in person's consciousness).

Legal definition (understanding) of «imaginary defense» is mentioned in the first part of Art. 37 Criminal code of Ukraine:

The imaginary defense shall mean

actions resulting in a harm caused in the absence of any real socially dangerous trespass where the person, who misinterpreted actions of the victim's, only mistakenly presumed the reality of such trespass [1].

According to the legal definition of imaginary defense it's possible to make mistaken decision, that in law understanding of researched situation Law-giver put only subjective factor, but general analysis of Art. 37 Criminal code of Ukraine gives the basic of the conclusion: law understanding of imaginary defense includes also objective factor – the circumstances.

Imaginary defense is defined by three features in their combining: 1) lack of real socially dangerous trespass in indefinite circumstances; 2) person, being in indefinite circumstances, mistakenly believed victim's conduct to be real socially dangerous trespass; 3) because of mistaken perception, that it was real socially dangerous trespass, person caused harm.

It's difficult to agree with legislation position, that imaginary defense is «actions resulting in harm» [1]. Person's actions resulting in a harm is only a part of the whole situation of imaginary defense. Legal construction of imaginary defense includes:

1. person, who caused harm – he (she) must have all features, what are character for criminal offender (Art. 18 Criminal code of Ukraine);

2. person's psychic, consisting of: mistake (mistakenly presuming the reality of real socially dangerous trespass); consciousness; will;

3. a person, whom caused harm – victim;

4. victim's activity (deed);

5. the circumstances;
6. person's deed;
7. harm, as a result of person's deed.

There is also casual liaison and liaison of dependence between elements of researched construction.

THE SECOND PART

Normative rules of regulation variety of imaginary defense, when a person had reasonable belief in the presence of any real socially dangerous act, and caused harm, which is adequate to the danger of the trespass or circumstances of the real justified defense, are mentioned in the second part of Art. 37 Criminal code of Ukraine:

The imaginary defense shall exclude any criminal liability for the harm caused only if the circumstances involved furnished reasonable grounds for the person to believe that there was a real trespass and that person was not and could not be aware that his/her presumption was mistaken [1].

In Ukrainian criminal law variety of imaginary defense, when a person had reasonable belief in the presence of any real socially dangerous act, and caused harm, which is adequate to the danger of the trespass or circumstances of real justified defense, is justification, but not excuse. This variety of imaginary defense is separate autonomous circumstance excluding criminality of an act.

This legislation position is retained by law practice. The Plenum of The Supreme Court of Ukraine in its Decision recommended to keep up next rules (point 7 of the Decision № 1 «On judicial practice in cases of self-defense», adopted by the Plenum of The Supreme Court of Ukraine on April 26, 2002):

Be distinguished necessary defense from the imaginary defense, under which it is understood harming injury in such circumstances, when real socially dangerous attack was absent, but person was wrong evaluating the actions of the victim, wrongly assumed the existence of such assault.

Imaginary defense negates criminal liability for damage, only when, the situation gave the person reason to believe that there had been a real attack, and person did not understand and could not understand the error of his assumption. The question, of whether a person had reason to erroneous finding of a socially dangerous assault, must be resolved to the specific circumstances of the case [2].

In Anglo-American law it combines the reasonable imaginary justified defenses with the real justified defenses, i.e. treats reasonable mistaken justified defense as a justified defense. Coke and Blackstone were of the opinion that «Reason is the soul of the law... The centerpiece of this preoccupation with reasonableness is the reasonable man... reasonable is what a reasonable man would do» [3, c. 39; 4, c. 6]. In the Beckford case and the Williams case the court considered D.P.P. v Morgan (1975), in which the court adopted the view that a mistake of fact negates mens rea, regardless of whether or not the mistake was reasonable. One might conclude, that English case law holds, that mistaken self-defense only negates mens rea, and it is not separate circumstance excluding criminality of an act.

THE THIRD PART

Variety of imaginary defense, when a person had reasonable belief in the

presence of any real socially dangerous act, and caused harm, which is not adequate to the danger of the trespass or circumstances of the real justified defense is unlawful in Ukrainian criminal law.

According to the third part of Art. 37 Criminal code of Ukraine:

If a person was not and could not be aware that his/her presumption was mistaken, but acted in excess of defense justifiable under the circumstances of a real trespass, that person shall be criminally liable for the excess of necessary defense [1].

According to the normative rules of criminally liable for the excess of necessary defense (the third part of Art. 37 Criminal code of Ukraine) «The excess of necessary defense shall mean an intended causing of a grievous harm to the trespasser, which is not adequate to the danger of the trespass or circumstances of the defense. The excess of necessary defense shall entail criminal liability only in cases specifically prescribed in Art. s 118 and 124 of this Code (D.P. – Criminal code of Ukraine)» [1]. It means, that in variety of imaginary defense, when a person had reasonable belief in the presence of any real socially dangerous act, and caused harm, which is not adequate to the danger of the trespass or circumstances of the real justified defense, the person can be criminally liable only for murder (Art. 118 Criminal code of Ukraine) or for intended grievous bodily injury (Art. 124 Criminal code of Ukraine). But if in this variety of imaginary defense person inflicted harm (for example, intended minor bodily injury), he (she) would not be punishable (for example, according to Art. 125 Criminal code of Ukraine).

After having made generalizations about law practice of the third part of Art. 37 Criminal code of Ukraine, The Supreme Court of Ukraine came to the conclusion:

If a person was in situation, that had arisen, did not understand and could not realize the error of their assumptions about reality of socially dangerous attacks, but exceeded the limits of protection, which had to be applied, its actions are viewed as exceeding the limits of necessary defense. In this case, the criminal liability is only possible under Art. s 118 and 124 of the Criminal Code [2].

According to the third part of Art. 37 Criminal code of Ukraine it is possible to come to the conclusion that normative rules, mentioned in the fifth part of Art. 36 Criminal code of Ukraine, are spread on the criminal law situation of imaginary defense. In the third part of Art. 36 Criminal code of Ukraine it is said:

The use of weapons or other means or things for protection against an attack of an armed person or an attack of a group of persons, and also to avert an unlawful violent intrusion upon a dwelling place or other premises, shall not be treated as the excess of necessary defense and shall not entail criminal liability irrespective of the gravity of harm caused to the trespasser [1].

It means, than if in criminal law situation of imaginary defense a person even murdered victim, but she (he) had reasonable belief in the presence of any real socially dangerous act of an armed person or an attack of a group of persons, and also to avert an unlawful violent intrusion upon a dwelling place or other premises, the person would not be criminal liability for any harm, even murder.

THE FOURTH PART

Legal rules of varieties of mistaken (imaginary) defense, when a person had unreasonable belief in the presence of any real socially dangerous act, are in the fourth part of Art. 37 Criminal code of Ukraine. According to it:

If a person, under the circumstances, was not aware of, but ought to realize the absence of a real socially dangerous trespass, that person shall be criminally liable for the harm caused by recklessness [1].

In the varieties of imaginary defense, when a person had unreasonable belief in the presence of any real socially dangerous act, the person may be held liable only for negligence, if the perpetration of such action by negligence is punishable under Criminal code of Ukraine. For example, if a person had unreasonable belief in the presence of any real socially dangerous act, and harmed grievous bodily injury or bodily injury of medium gravity, the person shall be criminally liable for the Negligence grievous bodily injury or Negligence bodily injury of medium gravity (Art. 128 Criminal code of Ukraine). But, if a person had unreasonable belief in the presence of any real socially dangerous act, and harmed minor bodily injury, this person shall not be criminally liable for the harm, because in Criminal code of Ukraine there is no criminally liable for minor bodily injury caused by negligence.

CONCLUSIONS

Ukrainian government criminal law policy in regulation imaginary (mistaken) defense concludes:

1. In Criminal code of Ukraine there are special normative rules devoted to imaginary (mistaken) defense;

2. Imaginary defense, first of all, is regulated by Art. 37 Criminal code of Ukraine;

3. According to the first part of Art. 37 Criminal code of Ukraine the imaginary defense shall mean actions resulting in a harm caused in the absence of any real socially dangerous trespass where the person, who misinterpreted actions of the victim's, in such circumstances only mistakenly presumed the reality of such trespass.

4. Variety of imaginary defense, when a person had reasonable belief in the presence of any real socially dangerous act, and caused harm, which is adequate to the danger of the trespass or circumstances of the real justified defense, is circumstance excluding criminality of an act.

5. Variety of imaginary defense, when a person had reasonable belief in the presence of any real socially dangerous act, and caused harm, which is not adequate to the danger of the trespass or circumstances of the real justified defense is unlawful in Ukrainian criminal law, but it shall entail criminal liability only in cases specifically prescribed in Art. 118 and 124 Criminal code of Ukraine.

6. In the varieties of imaginary defense, when a person had unreasonable belief in the presence of any real socially dangerous act, the person may be held liable only for negligence if the perpetration of such action by negligence is punishable under Criminal code of Ukraine.

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Птащенко С. Д. Українська державна кримінально-правова політика в сфері регулювання уявної оборони.

В статті автор досліджує українську державну кримінально-правову політику в сфері регулювання уявної оборони. В статті досліджується нормативне (законодавче) розуміння уявної оборони та її різновиди.

Ключові слова: уявна оборона, різновиди уявної оборони, помилка в наявності стану необхідної оборони.

Птащенко С. Д. Украинская государственная уголовно-правовая политика в сфере регулирования мнимой обороны.

В статье автор исследует украинскую государственную уголовно-правовую политику в сфере регулирования мнимой обороны. В статье исследуется нормативное (законодательное) понимание мнимой обороны и ее разновидности.

Ключевые слова: мнимая оборона, разновидности мнимой обороны, ошибка в наличии состояния мнимой обороны.

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