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Concept of Circumstances Excluding Criminality of Act

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Nowadays, it is given a lot of attention in literature to the circumstances excluding criminality of act. However, the majority of publications on the given issue concern separate circumstances that refer to the given category. A general characteristic of the circumstances excluding criminality of act is quite a rare object of research and, as a rule, it's presented only to that extent when it is necessary to consider the issues on one of the circumstances of the given list. Thus, even definitions of concept of circumstances excluding criminality of acts given by different authors essentially differ from each other. At the same time, we consider to be rather important such problems as characteristic of general signs of circumstances excluding criminality of act and revealing basic, essential features which can be laid down in the foundation of a concept definition of these circumstances. Their decision will facilitate explanation of the legal nature and features of the given institution and results in perfection of legislation in a corresponding part and practical activities on its application. An act provided by Especial part of the Criminal Code of Russian Federation is not always considered to be a crime. For such an act to be considered a crime it should possess all signs of a crime which are listed in the General part of the criminal law. In the domestic theory of criminal law, it should be almost everywhere recognized that the presence of the circumstance excluding criminality of act, testifies the absence of this or that sign of a crime in the act (this exactly contains the general view of the legal nature of the circumstances excluding criminality of act).

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However, while characterising a legal nature of the given circumstances, it is necessary to notice, that an issue is disputable enough in which the sign of a crime is desirable in the act with the presence of the circumstance excluding its criminality. Some authors consider that the given circumstances exclude public danger of an act¹. Others believe that these circumstances exclude illegality². The opinion that the given circumstances exclude simultaneously all signs of a crime is also expressed: public danger,

illegality, guilt and punishability³. Besides, some authors consider, that various circumstances excluding criminality of act, exclude various signs of a crime, but not one and the same sign⁴. All listed points of view have one common feature. All of them accept that presence of circumstance excluding criminality of act excludes this or that sign of a crime or several signs at once. An act cannot be considered a crime if there is any of a crime sign desirable. Accordingly, irrespective of the fact which point of view to adhere, it

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is possible to call the given circumstances as circumstances excluding criminality of act. Thus, the name used by the legislator “circumstances excluding criminality of act” is acceptable to any point of view listed above.

Circumstances similar to those in the Russian criminal law are called circumstances excluding criminality of act are also available in foreign legislation. In criminal law of the USA the given circumstances are called circumstances of “protection” against accusation, in the Criminal Code of Australia and that of the Peoples Republic of China - circumstances excluding criminal liability, in the Criminal Code of France - the bases of non-occurrence of criminal liability, in the Criminal Code of Spain - the bases of releasing of criminal liability. It is possible to single out the following signs typical to all circumstances excluding criminality of act:

1. *The given circumstances can take place only at committing an act provided by the Especial part of the criminal law.* This means, that an issue on presence or absence of circumstances excluding criminality of act with reference to act, not provided by article of the Especial part is deprived of practical sense as in any case it cannot be considered a crime.
2. *The circumstances excluding criminality of act can take place only in the event where public relations which are an object of act provided by the Especial part of the criminal law norm, could be or could have been a subject to essential harm.* If an act does not cause and cannot cause essential harm to these public relations then to discuss an issue on presence or absence of circumstances excluding its criminality from the criminal-legal point of view does not have any sense either, as it is impossible to consider such an act a

crime owing to its insignificance in any case.

3. *Establishment of the circumstances excluding criminality of act in the law serves socially useful purposes* - provides possibility of protection against socially dangerous encroachments by inflicting harm to the person making such encroachment, possibility of protection of more significant public relations by means of a trespassing with less significant, implicit execution of orders and instructions etc.
4. *Each circumstance excluding criminality of act consists of set of the obligatory conditions which observance at committing a certain act provided by the Especial part of the criminal law entails recognition of this lawful act.* These conditions are called legitimacy conditions. Thus for each circumstance excluding criminality of act, there are their own conditions of legitimacy. Non observance of at least one of these conditions entails recognition of a corresponding act to be a crime.
5. *Conditions comprising circumstance excluding criminality of act are established by the law.* The circumstance not established by the law in this quality cannot be considered the one excluding criminality of act. With the reference to such a case it is possible to talk only about absence of those or other signs of a crime, but not about presence of the circumstance excluding criminality of act.

Circumstances excluding criminality of act should be separated from such legal institutions as insignificance of act, voluntary refusal, releasing of criminal liability and releasing of criminal punishment. The main difference of voluntary refusal, releasing of criminal liability

and releasing of punishment from circumstances excluding criminality of act is in that in the act committed in the presence of circumstances excluding its criminality there are no the signs necessary for its recognition a crime initially. With reference to voluntary refusal, releasing of criminal liability and releasing of punishment, on the contrary, it is possible to say that at committing a corresponding act there are all signs of a crime or not completed crime in it. Thus, voluntary refusal equal to the basis of releasing criminal liability and the basis of releasing punishment cannot be referred to circumstances excluding criminality of act as having another legal nature.

Another situation concerns the differentiation of circumstances excluding criminality of act and insignificance of an act. Here, it is necessary to notice, that in criminal legislation of some states, insignificance of an act is referred to circumstances excluding criminality of act (for example, in the Criminal Code of Uzbekistan). In an insignificant act, also as well as in the act committed in the presence of circumstances excluding its criminality, there are not all signs necessary for recognition of such an act a crime. The difference here is that an insignificant act cannot initially cause essential harm to the public relations referring to a category of public relations being a subject of criminal-legal protection therefore it does not possess a sign of public danger and accordingly is not a crime. The act committed in the presence of circumstances excluding criminality of act on the contrary, can cause and does cause essential harm to public relations. Even if to join the point of view of the authors considering, that the circumstances excluding criminality of act exclude only its public danger and nothing more, it is necessary to notice, that in this case an act is not socially dangerous for another reason - because harm is caused within the limits established by the law to

achieve a socially useful purpose. It is necessary to notice, that an act committed in the presence of circumstances excluding its criminality is considered to some extent socially useful as well (some authors say that in certain cases such an act is socially neutral)⁵. Thus, an act which is not considered a crime exclusively owing to its insignificance, can hardly be considered not only socially useful, but even socially neutral either. Estimating such an act from the point of view of its public value we, most likely, can speak only about its public harm. Thus, it is necessary to consider quite reasonable the existing of a division into insignificance of an act and circumstances excluding criminality of act due to various legal nature of the given institutions both in domestic theory of law and domestic legislation. The criminal code of Russian Federation provides six circumstances excluding criminality of act:

1. Necessary defense (article 37 of the Criminal Code of Russian Federation);
2. Inflicting bodily harm to the person committed a crime during his detention (article 38 of the Criminal Code of Russian Federation);
3. Emergency (article 39 of the Criminal Code of the Russian Federation);
4. Physical or mental compulsion (article 40 of the Criminal Code of the Russian Federation);
5. Reasonable risk (article 41 of the Criminal Code of Russian Federation);
6. Order or instruction execution (article 4 of the Criminal Code of Russian Federation).

Other circumstances not known to the RF CC quite often specified in legislations of other states can be referred to circumstances excluding criminality of act. The following ones can be separated out of them: consent of a victim (§ 226 of the Criminal Code of Germany); staying among accomplices of a crime under a

special order (article 38 of the Criminal Code of Belarus); implementation of operative-search actions (article 34¹ of the Criminal Code of Kazakhstan); performance of a special task on prevention or disclosing criminal activity of the organised group or criminal organisation (article 43 of the Criminal Code of Ukraine); duty execution, lawful enjoyment of the right, professional or official duties (article 21 of the Criminal Code of Spain); an action performed under the instruction or permission of the law or by-law (p. 1 article 122-4 of the Criminal Code of France); the action performed on request of legitimate authority (p. 2 article 122-4 of the Criminal Code of France), execution of law norms (article 10.5 of the Criminal Code of Australia); action performance according to legislation, or due to realisation of lawful employment (article 35 of the Criminal Code of Japan). In the domestic theory of criminal law a number of authors also separate out circumstances excluding criminality of act absent in Russian legislation. For example: consent of a victim, realisation of socially useful professional functions, enjoyment of the right, law execution; lawful application of the weapon etc⁶.

It should be noticed, that a circle of circumstances excluding criminality of act has been essentially expanded in comparison with the Criminal Code of RSFSR, 1960 and the Criminal Code of the Russian Federation, 1996. It is likely that the tendency of expansion of the circle of these circumstances will continue to take place in the future. However, it is necessary to pay attention to the fact that a person applying the law is entitled to consider as excluding criminality of act only those circumstances which are provided by the law. In this connection, circumstances excluding criminality of act listed above, not specified in the Criminal Code of Russian Federation have more scientific rather than practical value.

With the reference to the circumstances excluding criminality of act it is also necessary to pay attention to an issue whether the norms regulating given circumstances are referred to encouraging. A number of authors consider that these norms are encouraging⁷. Others hold another opinion⁸. Here, most likely, it is necessary to agree with those authors who consider, that norms about circumstances excluding criminality of act, cannot be considered encouraging. Proving such a conclusion, it is possible to notice, that the lawful behaviour in this case does not entail any positive consequences for the subject and does not improve his position in comparison with that condition in which he has been before a corresponding act committing. It is deemed, that on the basis of the stated it is possible to make rather an exact definition of circumstance excluding criminality of act. And it is thought, that methodologically it will be more justified to give a definition not to circumstances excluding criminality of act as a whole, but namely to circumstance excluding criminality of act in singular similar to such basic concepts of criminal law as a crime, punishment etc. which are defined in singular as well. Proceeding from the noted basic moments characterising essence of any circumstance excluding criminality of act it is possible to give the following definition to such a circumstance: *Circumstance excluding criminality of act is a set of conditions established by the law at which presence the act provided by the Especial part of the criminal law causing or capable of causing essential harm to the public relations making its object is not a crime.*

The suggested definition covers any circumstances excluding criminality of act, containing in the Criminal Code of Russian Federation and in criminal legislation of other states, irrespective of possible changes of their lists.

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- ⁶ *The course of Soviet criminal law*. In 6 v. V. II. Crime. M., 1970, p. 342; Baulin Y.V. *Circumstances excluding criminality of act*. Kharkov, 1991. pp. 41-79.
- ⁷ Elvonsky V.A. *Encoiraging norms in criminal law*. Khabarovsk, 1984; Golik Y.V. *Positive stimulus in criminal law (concept, content, prospects)* . M, 1994.p. 34-35; Baulin Y.V. *Criminal-legal problems of a doctrine about circumstances excluding criminality (public danger and unlawfulness)* Kharkov, 1991. p. 16, 26; Sabitov R. A. *Postcriminal behaviour (concept, regulation, consequences)*. Tomsk, 1985. p. 67-68.
- ⁸ Zvecharovsky I.E. *Criminal-legal norms encouraging postcriminal behaviour of a person*. Irkutsk, 1991. p. 46; Berestovoy A.N. *Reasonable risk, as the circumstance excluding criminality of act*: SPb., 1999.p. 10; Orekhov V.V. *Necessary defence and other circumstances excluding criminality of act*. SPb. 2003. p. 22.

Понятие обстоятельств, исключающих преступность деяния

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В настоящее время в литературе достаточно много внимания уделяется обстоятельствам, исключающим преступность деяния, однако большинство публикаций по данным вопросам касаются отдельных обстоятельств, относящихся к данной категории. Общая характеристика обстоятельств, исключающих преступность деяния, становится предметом исследования достаточно редко и, как правило, лишь в той мере, в которой это необходимо для рассмотрения вопросов, касающихся одного из обстоятельств, входящих в данный перечень. При этом зачастую даже сами определения понятия обстоятельств, исключающих преступность деяния, даваемые различными авторами, существенно отличаются друг от друга. Вместе с тем, характеристика общих признаков обстоятельств, исключающих преступность деяния и выявление основных, существенных черт, которые могут лечь в основу определения понятия этих обстоятельств, представляются весьма важными задачами. Их решение будет способствовать уяснению правовой природы и особенностей данного института и, как следствие, совершенствованию в соответствующей части законодательства и практической деятельности по его применению.

Ключевые слова: обстоятельства, исключающие преступность деяния.
