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Features of Fixing and Interpretation of Some Estimating Signs of the Criminal Law

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The article is devoted to features of fixing and interpretation of estimating signs of the criminal law. Special attention is given to «heavy consequences» and «essential harm» signs which have a universal character and widely applied to any socially dangerous consequences occurrence expression.

Keywords: criminal law, qualification of a crime, the estimating sign, heavy consequences, essential harm.

There are two fundamental principles in any branch of legislation construction inherently: stability and dynamism. The principle of stability of legislation (in general theory of law the given principle can be called formal definiteness) means that legislative definitions formulation needs calculating on a long term as the law is passed not for a week, for months but for years. Stability of the law its long invariability represent social value thanks to which the feeling of the law importance becomes stronger, its authority is strengthening. Thus, it is necessary to select public relations subject to criminal-legal regulation carefully, to match descriptions of corresponding signs in the law precisely. The task of strengthening and observance of legality corresponds to the concept of exact meaning which accurately identify a circle of the covered phenomena. These concepts add quality of formal definiteness to the law.

Efficiency of the criminal law in many respects depends on the exact and full description

of the dangerous acts in it identified as crimes. The analysis of reasons causing errors in law enforcing activity, testifies, that among them not the last place is occupied with ambiguity, insufficient clearness of legal instructions that is law illegibility. The exact, full and understandable in the form wording of the norms of Especial part of the RF Criminal Code has an important meaning for correct qualification of crimes, definitions of character and degree of their public danger, imposition of punishment fit the crime. So, Brajnin J.M. specifies:» It is necessary to aspire to those or other concepts to be used in criminal laws dispositions in identical meaning. Infringement of this requirement creates difficulties in judicial practice and leads to occurrence of futile discussions in the theoretical literature»¹. The formalism as a part of a crime is especially important, as here the external and internal limit of the criminal law is concretised in the criminal liability basis.

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On the other hand, owing to their monosemanticity limitation of the covered phenomena circle of exact meaning concepts do not always satisfy criminal law problems. A problem of any branch of law including the criminal one is in adequate reflexion of the public relations making a subject of legal regulation, and development of these relations. However, full conformity between law and public relations is never reached owing to certain reasons, specific features of the object of law (change of public relations), to obsolescence of the law, etc. Therefore, the stability principle should be combined with the dynamism principle. Dynamism of criminal law can be achieved by various ways – by analogy of law or the law (to the force of p. 2 art. 3 the R F Criminal Code, in criminal law this way is excluded) or with use of abstract and estimating categories. Estimating concepts of criminal legislation are those which concept is directly revealed only in the course of rules of law application within the generality fixed by the law, by estimation of concrete circumstances of each case on the basis of sense of justice of the subject applying the norm². The norms containing instructions on additional heavy consequences occurrence, causing essential harm by a crime commission, which are widespread in criminal law should be referred to the given group.

In the criminal law theory two principal reasons for the use of a similar sort of signs in the law are separated out: objective and subjective. The objective reason is an extreme variety of socially dangerous subjects, properties and phenomena requiring their account as they are and a constant control over dialectic processes proceeding with them. The subjective reason consists in creation of special method of the legislative techniques necessary for reflexion of the diverse phenomena and processes of a public life in law. Two basic functions are peculiar to

estimating concepts. Function of economy of a legislative material which consists in coverage by the content of an estimating sign of the entire sphere of those social and legal properties and relations for the sake of which regulation of the concrete criminal-legal norm is created, and also in adjustability of the latter to various criminal-legal situations, despite specificity of the latter and variety of their social shades. The replacement function is expressed in the form of possibility of the use of estimating signs identical in a verbal designation for reflexion of the various criminal-legal contents³.

However, the given way is not universal either as it leaves wide frameworks for the judicial discretion. Rarog A.I. highlights: «to formulate the rules limiting frameworks of the judicial discretion at application of such qualifying signs as heavy consequences, essential harm, considerable damage, is practically impossible»⁴. Therefore, principles of stability and dynamism of criminal legislation should supplement each other mutually. At creation of criminal law the more correct approach is the optimum parity of its formal definiteness and flexibility. Application of estimating concepts in those cases where it can be avoided is deemed to be unreasonable in criminal law. So, for example p.1 of article 247 of the RF Criminal Code and p. 2 of article 252 of the RF Criminal Code provide such a sign as «essential grievous bodily harm to the person». Consequences in the form of essential bodily harm to the person do not meet the system of consequences in the form of essential bodily harm developed in the RF Criminal Code and do not facilitate uniform application of the law. Therefore, in our opinion, there should be a direct indication on the form of caused bodily harm (grievous, average or easy) or limitation of the general indications on bodily harm in the given norm. At designing criminal law norms the legislator uses various concepts differing

from each other in width and depth of reflexion of legal validity. A widely-spread method in the law is reference to «heavy consequences» or «essential harm» occurrence by any crime commission. The given concepts are estimating signs of a mixed type which assumes quantitative and qualitative estimation presence. Terms «heavy consequences» and «essential harm» in criminal law have a universal character they are also widely applied for any socially dangerous consequences expression. The legislation analysis, and also existing explanations of the Supreme Court of the Russian Federation allows to refer to consequences under consideration : large material damage, long disturbance of work of an enterprise, establishment, a long suspension or disorganisation of work of the organisation, switching-off of consumers from life-support sources, leaving victims without habitation or livelihood, suicide or attempted suicide of the victim, development of his narcotic addiction, serious disease, contamination of HIV- infection, inflicting bodily or life harm to the person, etc. Such a wide coverage of possible consequences of both character, and volume results in big difficulties in interpretation of the given signs in theory of criminal law and in practice.

The main thing for definition of estimating signs content of a similar kind is establishment of the standard of the given concept which is understood as «the concentrated idea about objective properties of the phenomenon designated in the law by estimating concept with which concrete circumstances of the case» are compared. At the heart of such ideas objective properties of the phenomena designated by estimating concepts should be laid down.

First of all, it is necessary to define the standard of estimating concept directly in a context of a criminal-legal norm. Thus, it is necessary to proceed from the analysis of all constructive signs of a concrete structure of a crime: the basic

object of a crime, specificity of objective and mental elements, features of the subject, etc. It is attributed to the fact that many estimating concepts (including «heavy consequences» and «essential harm») perform a replacement function, that is assume possibility of the use of estimating signs identical in a verbal designation for reflexion of the various criminal-legal content that is not typical to concepts of the exact meaning . So, for example, p. 3 of article 227 of the RF Criminal Code and p. 2 of art.274 of the RF Criminal Code provide «heavy consequences» occurrence as a qualifying sign, however the standard of the given consequences will be unequal. It is obvious, that breaking of the COMPUTER operation rules cannot entail infliction of bodily harm or death of the victim what is impossible to say about piracy consequences and on the contrary piracy cannot entail the consequences provided by p. 2 of article 274 of the RF Criminal Code. And in article 349 of the Russian Federation Criminal Code «Violation of handling weapon and subjects representing heightened danger to social surroundings rules» careless consequences in the form of death of the person are all together separated out in qualifying and especially qualifying structures and are not covered by a considered sign accordingly. Therefore, it is necessary to recognise erroneous opinion of those scientists who without specificity of concrete criminal-legal norm's account extend interpretation of «heavy consequences» over all structures containing the given sign⁵. Naumov A.V. singles out four kinds of heavy consequences of those crimes in which this sign represents itself as the qualifying: inflicting bodily and life harm, damage to property, infringement of normal activity of establishments or enterprises, violation of the personal non-tangible rights (injured feelings)⁶. According to the scientist, «causing death and also inflicting heavy or average bodily harm is a general criterion of a concept «heavy consequences» in all crimes' structures within

the frameworks of which inflicting bodily harm is conceivable. Firstly, gravity of harm in this case should be defined proceeding not from specificity of the way (mechanism) of its causing as the latter can differ essentially. Gravity of harm in similar cases is necessary to define proceeding from identical in the meaning (in all considered structures of crimes) of the object of causing bodily or life harm. Secondly, interests of strengthening legality at administration of justice in criminal cases require that the same concepts used by the legislator at the description of crimes' structures were interpreted identically. At coincidence of a terminological meaning of concepts there should be coincidence of their content as the legislator using identical concepts attributes uniform sense to them⁷. If it is possible to agree with the first argument, the second, with reference to a sign «heavy consequences» causes objections. If to recognise that at terminological coincidence of criminal-legal concepts meaning their content always coincides it is necessary to recognise, that a «heavy consequences» sign covers identical in their character consequences in all crimes' structures. In that case, the sign «heavy consequences» loses a character of estimating (becomes formal-defined) and should be interpreted uniformly for all structures of crimes or be formalized directly in legislation. However, it does not occur. The volume and character of possible consequences are defined by the content of the entire structure of a crime that is what criminal acts can lead to what heavy consequences.

In criminal law the issue on the subjective relation to heavy consequences occurrence and essential harm is not developed. In a number of articles of Especial part the RF Criminal Code reference to careless relation towards consequences occurrence is provided, in other norms such notification is wanting. With reference to the first version of the norms

it is possible to assert, that relation towards consequences should be exclusively careless in the presence of intention an act should be qualified either by other signs of structure or on the strength of other articles if such consequences form an independent structure. It is necessary to notice, that the legislator not always consistently approaches to indication of the careless form of guilt in relation to heavy consequences occurrence. As an example, it is possible to give p. 2 of article 273 of the RF Criminal Code »creation use, and distribution of the harmful computer programs» where heavy consequences occurrence by negligence as a result of the specified actions is provided. In criminal consequences initially, basic signs of an act and an object of a crime are reflected in the first instance. For the first it is intensity and for the second – pithiness⁸. It is deemed obvious, that programs under consideration are created, used and distributed to do harm defined by the object specially. If these programs are harmful their founder and the distributor either wishes criminal result occurrence or deliberately admits its occurrence. The legislator himself comes to such a conclusion specifying in p.1 of article 273 of the RF Criminal Code that the given programs obviously have a harmful character. Therefore, for example, in p. 2 of article 273of the RF it is necessary to refuse to indicate on negligence in relation to heavy consequences occurrence.

In overwhelming majority of cases where the legislator indicates careless guilt in relation to heavy consequences occurrence, the description of a structure sign that serves for partial disclosing of its content by means of enumeration of its possible displays (for example, p. 2 of article 167of the RF Criminal Code ; the item «v» p.2 of article 333of CC, etc.). As a rule, this description contains indications on causing of death or bodily harm to the person. Such consequences are typical. « If the estimating sign

is formulated as other heavy consequences, – A.Rarog writes – closing legislative list of particularly designated consequences referred to heavy ones (grievous bodily harm to the victim, contamination him with HIV-infection at rape) then consequences consisting of causing harm to the same or similar direct objects ,causing damage to which is expressed in consequences directly specified in the law (with reference to rape such objects are life and health) should be referred to other heavy consequences. Thus, the consequences referred to heavy, in degree of the public danger should be comparable to danger of the consequences which list is closed by other heavy consequences «⁹. Therefore, it is necessary to agree with N.F.Kuznetsova in the point that the legislator should have been more correct in order to avoid errors at qualification a sign of heavy consequences occurrence whenever possible to be more specific¹⁰, for example by means of giving a longer list of their possible number of occurrences.

It is more difficult to resolve an issue with interpretation in those cases where there is no indication on the form of guilt in relation to consequences occurrence. The criminal law theory, and also decisions of Plenum of the Supreme Court of Russian Federation do not give the unequivocal answer. Because criminal-legal consequences, relation of the guilty to which is characterised in the form of intention should certainly entail more severe punishment, than for the careless relation to the same consequences occurrence, it is possible to assume, that a sign «heavy consequences» in those cases where there is no indication on the form of guilt should raise the sanction of the basic structure of a crime considerably higher, than in articles where a careless form of guilt is provided. However, such comparative analysis of sanctions does not bring special clearness in the decision of the given issue. Sanctions of norms with indication on careless

relation to heavy consequences increase from 4 years of imprisonment (p. 2 of article 235 of the RF CC) to 12 years of imprisonment (the item «v» p. of article 126 of the Russian Federation CC). Sanctions of norms without indication on the form of guilt in relation to heavy consequences increase within the limits from 1 year (p. 2 of article 342 of the RF Criminal Code) to 7 years of imprisonment (p. 4 of article 183 of the RF Criminal Code). Commenting p. 3 of article 301 of the RF Criminal Code Kuznetsova N.F. points out: «the given structure concerns the third category, that is – a grave crime. Hence, intended murder under article 105 of Criminal Code is excluded, however other kinds of intended murders – in the state of passion with excess limits of necessary defence or detention, and also causing heavy or average bodily harm, incitement to a suicide can quite take place, let alone careless murders and bodily harm»¹¹.

It should be noticed, that norms without indication on the form of guilt in relation to heavy consequences occurrence, in overwhelming majority of cases do not contain a description of the given sign either. Exceptions are article 305 of the RF CC, article 333 of the RF CC and of article 334 of the RF CC. The greatest interest represents article 305 of the RFCC which provides liability for passing an obviously unlawful sentence. Part 2 of the given article provides liability for the same act connected with passing an unlawful sentence of court to imprisonment or entailing other heavy consequences. Passing an obviously unlawful sentence to imprisonment in this case is considered a version of «heavy consequences». From the point of view of legislative techniques such a formulation is not quite correct. Passing an unlawful sentence to imprisonment more likely concerns not consequences but a character of the act, the heavy consequences in the given case will be consequences of such condemnation for the accused person.

Nevertheless, passing such a sentence assumes imputed knowledge so, assumes intention concerning illegality both of the sentence, and gravity of its consequences. Point «v» p. 2 of article 333 of the RF CC and the item «v» p. 2 of article 334 of the RF CC provide liability for resistance or violent actions towards an officer fulfilling duties of military service, with causing heavy consequences. Thus in the given norms description of heavy consequences including causing heavy or average bodily harm is fixed. In operating edition the Russian Federation Criminal Code causing average bodily harm by negligence is decriminalized (exception is only p. 1 of article 124 of the RF CC) therefore, in considered norms the matter of deliberate causing of average bodily harm (article 112 of the RFCC) is qualified according to a sign of causing heavy consequences. Hence, at least, in some articles of the Russian Federation CC the legislator assumes the deliberate relation of the guilty to heavy consequences occurrence or essential harm.

It appears, that for the consequences content definition in those cases where there is no indication on the form of guilt, it is necessary to proceed from an operating edition p. 2 of article 24 of the RF CC: «the act committed only by negligence is identified as a crime only in the case where it is specially provided by a corresponding article of the Especial part of the present Code». In those structures where the sign of causing consequences contains indications on the negligent form of guilt, the relation of the guilty can only be negligent. There, where the sign of causing consequences does not contain indication on the form of guilt, the relation to them can be not only careless, but deliberate as well. However, the final conclusion proceeds from the analysis of the entire norm content.

In certain cases standards of estimating concepts are formulated in the form of explanations of Plenum of the Supreme Court. As A.I.Rarog

highlights: «to formulate the rules limiting frameworks of the judicial discretion at application of such qualifying signs as heavy consequences, essential harm, considerable damage is practically impossible. Therefore, Plenum of the Supreme Court of the Russian Federation in order to avoid full arbitrariness in practical application should give recommendations on application of such signs, but granting possibility to courts to be guided by justice and humanity»¹². Thus, article 8 of the decision № 1 of Plenum of the Supreme Court of the Russian Federation on April 29th, 1996 «On court sentence» establishes the general requirement:» In a sentence it is necessary to motivate conclusions of court concerning qualification of a crime under this or that article of the criminal law, its part or point. Finding the defendant guilty of crime commission according to the signs referring to estimating categories (heavy consequences, large or considerable damage, essential harm, responsible official capacity of the defendant and others), the court should not be limited to reference to a corresponding sign, and is obliged to provide for circumstances formed the grounds for conclusions on the given sign presence in a declaration of a sentence». Applying the norm containing an estimating concept, the court is obliged to specify the grounds for estimation in the sentence, that fact data which have led to its conclusion on presence of the given sign in the act. Especially it concerns norms in which estimating character of criminal consequences defines the presence of public danger of the entire act.

At interpreting signs heavy consequences and essential harm, it is also necessary to consider, that excessive qualification where factual consequences will not be identified heavy or essential as well as insufficient qualification of a crime will be identified incorrect. The situation of insufficient qualification can take place where actual consequences in character and degree of intensity will be beyond the frames provided by

a concrete norm and will require independent criminal-legal estimation. Therefore, to define standards of considered signs in order to overcome insufficient qualification it is advisable to use sanctions comparison method. Especially, it concerns cases where signs heavy consequences or essential harm form a so-called divisible crime including several independent acts. The following considerations lay down in the foundation of sanctions comparison method. The legislator in dispositions of separate articles of Especial part the Russian Federation Criminal Code has not designated accurate borders of elements of a crime covered by them, for example, in the norms providing heavy consequences occurrence or essential harm. However, the legislator has provided a typical character and degree of public danger of the acts covered by the given norm within the limits of the general sanction of a divisible crime. Thus, it is necessary to proceed from the fact that cumulative public danger (severity of the sanction should correspond the degree of a crime danger as a whole) is adequately reflected in the

law. So, to sum up if the sanction of any structure providing given consequences is higher than the sanction of the entire divisible crime then the act provided by a given structure, is not covered by the norm and qualification in the aggregate is required. Otherwise, the criminal will actually be less liable for two acts rather than for committing one of them, legality and justice principles will be violated where less socially dangerous act will be punished more severe, than a more socially dangerous act.

The offered rule based on a sanctions comparison method contributes to realisation of a liability fairness principle in which basis the system consistency of sanctions of articles of RF Criminal Code Especial part in particular is laid down. Such consistency is reached by means of bringing kinds and sizes of punishment to conformity, firstly, with tasks of the RF CC secondly, with a principle of equality of citizens before the law, thirdly, with gravity of crimes and, fourthly, with interests of combating criminality.

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- ¹⁰ Kuznetsova N.F. Qualification of complicated crimes' structures.// Criminal law. 2000. № 1. P. 29.
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Особенности закрепления и толкования некоторых оценочных признаков уголовного закона

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Статья посвящена особенностям закрепления и толкования оценочных признаков уголовного закона. Особое внимание уделено признакам «тяжкие последствия» и «существенный вред», которые носят универсальный характер и широко применяются для выражения наступления каких-либо общественно опасных последствий.

Ключевые слова: уголовное право, квалификация преступления, оценочный признак, тяжкие последствия, существенный вред.
