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Differentiation of criminal responsibility for crimes against property: Theft and Robbery (Article 185, 186 of Criminal Code of Ukraine)

In recent decades, the dynamics of crimes against property in total amounts of crimes is relatively stable. Traditionally, theft and robbery remain the most common crimes against property. Unlike the approaches that were used during differentiation of responsibility for the covert and overt abduction of property in most European countries, in the Criminal Code of Ukraine – besides differentiation of the criminal liability for covert and overt abduction of another's property – there is also another distinction. Specifically, responsibility for the violent seizure of thing is differentiated, depending on the amount of the violence applied. If the offender uses the violence that is not dangerous for life or health of the victim, his actions shall be qualified as violent robbery (p. 2 Art. 186 of the Criminal Code of Ukraine). However, if the intensity of violence is higher and the offender in the course of obtaining property uses violence that is dangerous to life or health of the victim – such actions shall be qualified as brigandism (p. 1 Art. 187 of the Criminal Code of Ukraine). This differentiation of criminal responsibility depending on the intensity and volume of the violence applied is not characteristic of the criminal

laws of European countries. It is a traditional element of the criminal codes of the so-called «post-Soviet states».

Theft is a covert stealing of somebody else's property (part 1, art. 185 CC). Theft is considered less socially dangerous act in comparison with robbery and brigandism. However, at certain stages in development of the state an approach to determine the extent of social danger of theft was radically opposite. Specifically, I. J. Foynytskyy noted that thief caused more contempt than the robber, because he acted humiliatingly[1].

The main direct object of theft is ownership (property law), because the object of encroachment is somebody else's property.

By construction of the objective side, this crime belongs to the material type of criminal offenses. Mandatory features of the objective side of theft are:

– socially dangerous act – stealing;

– socially dangerous result – caused damage;

– causality between socially dangerous act and the result of it, which means that the caused damage is the result of the actions of subject of crime;

– a way of crime – covertness.

Cases connected with traced covert stealing of somebody else's property appear in many scientific researches as well as in the Resolution of Plenum of the Supreme Court of Ukraine «On judicial practice in cases of criminal offenses against property» of November 6, 2009 № 10 and in previous Resolution of Plenum of the Supreme Court of Ukraine «On judicial practice in cases of mercenary criminal offenses against private property» of December 25, 1992 № 12.

The criteria of covertness are distinguished in criminal law. Their determination gives reason to find out the content of way of the crime and helps to differentiate theft with non-violent robbery or fraud. There are two criteria of covertness: objective and subjective. Besides the criteria of covertness we must provide generalized forms of theft, i.e. any incidents when stealing should be considered covert.

Stealing is covert if:

– stealing of somebody else's property occurs in the absence of extraneous people (owner or other people). This is the simplest and, simultaneously, the most common form of theft. Offender acting alone or in a group with other criminals and knows exactly that the victim or third parties are not watching for exerted encroachment and are unaware of the fact of encroachment;

– stealing is happened in the presence of other people, but is unnoticed by them. The simplest example of this encroachment is pickpocketing: there is a victim, and there are other people, but no of them notices action of thief. It should be emphasized when these actions are noticed by other people and offender knows about it but continues to seizure the property the covert stealing of somebody else's

[1] I. Fojnickij, *Kurs ugolovnogo prava. Chast' Osobennaja. Posjagatel'stva lichnyja i imushhestvennyja, Izdanie chetvertoe*, Sankt Peterbyrg, tip. M. M. Stasjulevicha, 1901, http://www.knigafund.ru/books/39783.

property grows in overt, i.e. theft turns into non-violent robbery. However, if offender's actions were seen by others, but these people don't demonstrate it, and offender continues to believe his acting is covert, following actions are qualified as theft.

– stealing is happened in the presence of other people with their silent consent and these people, according to offender thoughts, will not give up him (relatives, friends, etc.). In the criminal literature it is indicated that offender expects appeasement of such persons. The circle of such persons sometimes includes accomplices. We believe that theft in the presence of accomplices should refer to the first signs of covertness, because stealing is happened in the absence of other people. If anyone from them declare his willingness to give up the theft, stealing should be considered as committed overtly;

– stealing is happened in the presence of other persons, but because of their physical or mental characteristics they don't realize the fact of stealing (young, mentally ill, persons in intoxication, sleep, etc.) and offender knows about it. Under a physical characteristic is meant inability of healthy person to understand the fact of illegally seizing the property because of certain physiological condition (during sleep, fainting, blindness, etc.). Mental characteristic means inability of healthy person to understand the significance of offender's actions (young age, mental illness, intoxication, etc.). It is wrong to use «physical or mental disabilities» instead of the phrase «physical or mental characteristics». For example, sleeping is a natural feature, but cannot be considered as physical disabilities. Simultaneously, stealing in the presence of person who sleeps, should be considered as committed covertly;

– stealing is happened in the presence of people who believe that offender acts legally and the offender expects for it. Observers understand that property is taken. However in contrast to those who because of their physical or mental characteristics do not realize the fact of seizure of property, victim or third parties are convinced of legality of the actions of thief during the illusion of legitimacy.

– the offender considers his actions as unnoticeable to others, although victim or third parties are watching the stealing, but the offender is not aware about it (somebody watch for theft in a distance, or using cameras, etc.). The need in indicating this feature concerns the fact that offender's actions still are watched by victim or other people, and witnesses are aware of the wrongfulness of seizing of property. If the offender realizes that other people observe him, theft grows in robbery. Let us analyze actions of person who knows that stealing will be in the room where there is video surveillance, and considering this, commit a crime in the mask. Fact of the presence the mask does not effect on the assessment actions, as they are committed covertly or overly. After all, if the offender realizes that somebody watches his actions or using surveillance, there are no subjective signs of covertness of the theft. Covertness means covertness of socially dangerous act, and not means attempts of offender to make his face «covert». The situation changes

significantly, if the offender knows that there is video surveillance in the room, and he stops the process of observation (for example covers video device with something). In fact, no one will observe his actions, and he will understand it.

To recognize the crime was committed covertly, objective and subjective criteria of covertness usually should be established. Objective criterion refers to the fact of committing a criminal offense in the absence of such persons who are aware of the fact of stealing. The subjective criterion means that the offender is aware that his actions has no observers or believes that commits an offense unnoticed by those who can be aware of the fact of stealing.

Traditionally, the «invisibility» is interpreted through the facts of visual perception of offense. However, this approach is narrowed unfairly and artificially. It is necessary to claim that offender knows the victim is not aware of the fact of stealing in any form of perception (hearing, seeing, etc).

Pointing out a subjective criterion of covertness scientists claim that during stealing, offender thinks that makes it unnoticed to the victim or other persons. Such designation is not enough because stealing should be recognized as covert even when the offender seizes property in the presence of the victim or other persons, but these persons due to physical and (or) mental characteristics do not realize the fact of stealing or he seizes property in the presence of persons whose connivance he can expect or commits theft by creating the illusion of legitimacy.

Considering this, it is worth to indicate that offender, stealing property, commits an offense unnoticed to those who are aware of the fact of stealing. It should be remembered that such persons can prevent the offender's seizure of property.

If the person's action who commits covert stealing became overt to other people, depending on further action of the offender there may be following options of qualification:

– if the offender stops to commit offense – such actions are qualified as attempt on the theft;

– if the offender despite the fact his actions are identified by others continues to withdraw property or attempts to escape with stolen property – actions should be qualified as non-violent robbery;

– if the offender continues to withdraw property or tries to escape with stolen and uses violence to the victim or a third party – such actions are qualified as violent robbery or brigandism depending on the character of caused violence;

– if the offender got a real opportunity to dispose of or use illegally seizure property but used violence only to avoid the arrest – there is no escalation and the offender's actions are qualified depending on the way of seizure the property as theft or robbery and violence is needed a particular qualification as a criminal offense against life and health of individuals depending on caused consequences;

– if the offender had not the real opportunity to dispose of or use property which tried to seize, he leaved the property, which planned to steal and use

violence only to avoid the arrest – there is no escalation and such actions are qualified as an attempt on theft or robbery and violence is needed to obtain a particular qualification as a criminal offense against life or health depending on caused consequences.

As theft should be qualified stealing the property of deceased. However we must remember that intent on taking property which is at the deceased should arise after his death. If the offender kills a person for the purpose of taking possession of the property, actions should be qualified as murder for mercenary motives and robbery. Stealing things that are beside the body should be assessed as a criminal offense against property as long as the body of the deceased is not transferred to the burial place for repose. After this ritual transfer of body, stealing things that are located near the body is qualified as desecration of graves or other burial place of the deceased (art. 297 of Criminal Code of Ukraine). If the offender believes that his actions are overt, but, in fact, they are not, we cannot qualify it as theft, because it does not take into account offender's subjective attitude to the crime. These actions are qualified as attempt on non-violent robbery because there is a mistake in the action (in particular, in the way of an action).

In P. 4 of Resolution of Plenum of the Supreme Court of Ukraine «On judicial practice in cases of criminal offenses against property» of November 6, 2009 № 10 it is indicated that theft should be considered completed from the time when offender seized property and had a real opportunity to dispose of or use it. However, we believe that this definition of the end of crime is tied to two separate points: seizure and the possibility to accomplish certain actions. Without denying this general approach, in our opinion, the end of crime should be more precisely defined by following: theft is considered complete from the moment when offender had a real opportunity use or dispose of seized property.

Robbery (article 186 of Criminal Code of Ukraine)

There are two types of robbery in the theory of criminal law: violent and non-violent robbery. Criminal liability for non-violent robbery is provided by part 1 of Art. 186 of the Criminal Code, and for the violent by part 2 of the same Article.

Non-violent robbery is overt stealing of somebody else's property.

Violent robbery is overt stealing of somebody else's property combined with violence that is not dangerous to life or health of the victim or the threat of such violence.

Ownership is the main direct object of robbery. An additional direct object of violent robbery is health or physical integrity. Only health (but not the life) is additional direct object of this crime. This thesis is confirmed by the contents of the violence which can be used by offender.

An additional object of robbery which is committed with unlawful breaking into a residence or any other premises or shelter is the right to inviolability of residence or other property.

The target of robbery is somebody else's property.

Objective side of the non-violent robbery includes four signs:

– socially dangerous act – stealing;

– socially dangerous result – caused damage;

– causality between socially dangerous act and the result which means that caused damage to the victim is the result of action of the subject of crime;

– a way of the crime – overtness.

It should be emphasized that the distinction between theft and non-violent robbery is carried by the way of committing a crime: theft is committed covertly and robbery is committed overtly.

Overtness as a way of robbery has two criteria – objective and subjective. The essence of objective criterion is that stealing are watched by victim or other people who are aware of illegal actions of the offender. Subjective criterion means that the offender understands the fact of overtness, i.e. his actions are watched by somebody else who understands the wrongfulness of his actions.

In sec. 2 P. 3 of Resolution of Plenum of the Supreme Court of Ukraine «On judicial practice in cases of criminal offenses against property» of November 6 2009 № 10 it is indicated that offender is aware that his actions are noticed and are assessed as stealing while committing robbery.

Describing the objective and subjective criteria of overtness, we should devote its physical and mental features. Physical feature of the objective criterion is that stealing is watched by victim or third parties. Mental feature means that these persons are aware of illegality of offender's actions. Physical feature of the subjective criterion means that the offender physically perceive (see, hear comments etc.) the fact of the overtness of his actions. Mental feature means the offender realizes that his actions is observed by somebody else who understand the fact of illegality.

Stealing is overt in the following cases:

– stealing is happened in the presence of other people who understand the illegality of the offender's actions or at the attention of such persons;

– stealing is happened in the presence of other people and offender expects their connivance but these persons take measures to stop the illegal seizure of property;

– stealing is happened in the presence of other people who understand illegality of seizing the property but they scare to intervene in the happening and offender realizes this fact.

If offender's actions are started covertly then were detected by other persons and the offender, despite this, continued to seizure property or trying to keep it by himself, there is escalation the theft into robbery.

Violence in the violent robbery. Part 2 of Art. 186 of Criminal Code provides liability for robbery that combined with violence that is not dangerous to life or health of the victim or with the threat of such violence. By the nature of effects on the person, there are physical and mental violence.

Physical violence is the real causing of damage to tissues of human organs, effects on the human body, and mental violence is potentially possible application of physical violence. The damaging factors can be chemical, physical, biological or mechanical. Chemical impact is the use of various chemicals (alkalis, acids, etc.). Physical impact may occur in the application of temperatures (low and high), pressure, power etc. The mechanical impact means using the kinetic energy of the object, i.e. energy of motion (punch, cut, lumbago, hitting, etc.). Biological impact means infecting by viruses of specific diseases, the insertion of drugs or psychotropic substances.

Under violence which is not dangerous to life or health of the victim scientists understand causing a kick, beating, minor bodily injury that has not caused a short-term health problems or a minor disability; imprisonment, use to the victim without his consent drugs, psychotropic, toxic or potent substances (gases), and other violent actions which are not dangerous to life or health of the victim.

Violence, that is not dangerous to life or health, is a constitutive feature of violent robbery, so the part 2 of art. 186 of the Criminal Code is the whole rule and competes with part-rules (part 1 of art. 125, part 1 or part 2 of art. 126, p. 1 of art. 146 of the Criminal Code).

The issue of criminal law qualification of joint using narcotic, psychotropic, intoxicating, toxic substances for further seizing the property from the victim causes a lot of debate in the criminal literature. One group of scientists qualified as violent robbery or brigandism the introduction of such substances into victim's body covertly or by using cheating[2]. Supporters of different positions asserted that such actions should be qualified as theft and criminal offenses against health (if there are all reasons) because covert or deceptive effect on the internal organs is not connected with use of physical force and is not associated with exposure to body inviolability[3]. According to representatives of the second position violence includes insertion the substance into the body of victim by compulsion.

Analyzing these positions scientist O. I. Boytsov points out that the representatives of the second positions are mixed physical violence with use of physical force[4]. As already was emphasized, the impact on the victim's body can be chemical, biological and etc. That is why we believe that O. I. Boytsov correctly claim about substitution of concepts.

The essence of physical violence is impact on the body of another person beyond her will. Beyond persons will is also violent insertion of relevant substances and the insertion of such substances beyond the knowledge of this fact by victim (either covertly or using deception). Covert or deceptive insertion of nar-

[2] L. Gauhman, *Bor'ba s nasil'stvennymi posjagatel'stvami*, Moscov 1969, s. 19-20; A. Santalov, *Grabezh i razboj. Voprosy kvalifikacii*, Kriminologicheskie i ugolovno–pravovye problemy bor'by s nasil'stvennoj prestupnost'ju, Leningrad 1988, s. 157.

[3] V. Simonov, *Kak sleduet kvalificirovat' dachu odurmanivajushhih veshhestv*, Sb. aspir. rabot. Sverdlovs'k 1971, Vyp. 13, s. 239-247; V. Vladimirov, *Kvalifikacija pohishhenij lichnogo imushhestva*, Moscov 1974, s. 69-70.

[4] A. Bojcov, *Prestuplenija protiv sobstvennosti*, s. 447.

cotic, psychotropic or other substances cannot be considered as voluntary, as far as voluntariness prescribes the awareness of all relevant circumstances (for example, the quality and nature of used substance). For criminal assessment it is important to establish whether victim took related substances voluntarily and intentionally, or they were in his body beyond his will and knowledge. The offender actually uses deception or covertly inserts intoxicating, narcotic or other substances in order to suppress the resistance of the victim, neutralize his real wishes. Specifically, A. I. Santalov analyzed this issue and says that both violent and deceptive use of intoxicating substances aims to deny the possibility of victim's body to resist the stealing[5]. Scientist O. I. Boytsov argues about joint signs of violent deceitful or covert insertion of drugs and substances: the purpose of insertion of substances is to either limit or prevent the will of victim body to resist[6].

O. O. Dudorov correctly notes that in determining criminal assessment of the cases concerning «turning off» the consciousness of persons using various substances for withdrawing the property we must take into account that the concept of physical violence covers also illegal influence on the internal organs[7]. With this purpose the scientist proposed to clarify the content of physical violence in the Resolution of Plenum of the Supreme Court of Ukraine «On judicial practice in cases of criminal offenses against property».

So deceitful or covert insertion into the victim's body narcotic, psychotropic, toxic and other similar in effect substances beyond comprehension of victim the fact of such impact is estimated as use of physical violence.

Mental violence is expressed in the relevant threats in robbery. The threat in robbery is real, immediate and particular. The reality of the threat is characterized by objective and subjective criteria. Objective feature proves that crime situation (place, time, demonstration of gun etc.) indicates on the potential opportunity for immediate implementation of threat. Subjective feature means perception of threat by victim. Immediacy of threat means that the offender making a mental impact on the victim by his actions shows that in the case of not giving property he will apply physical violence to the victim immediately. Concreteness of threats includes two features: the content and volume. By the content the threat in robbery is a threat to use a physical violence. As for it volume, it is about violence that is not dangerous to life or health of the victim.

It has been correctly indicated in the scientific literature that threat in robbery is used with the same purpose as the violence, i.e. it helps to suppress the will of persons that impede access to property, obtaining property or retention property by robber[8].

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[5] A. Santalov, *Grabezh i razboj. Voprosy kvalifikacii*, Kriminologicheskie i ugolovno–pravovye problemy bor'by s nasil'stvennoj prestupnost'ju, Leningrad 1988, s. 157.

[6] A. Bojcov, *Prestuplenija protiv sobstvennosti*, s. 450.

[7] O. Dudorov, *Vybrani pratsi z kryminal'noho prava*, MVS Ukrainy Luhans'kyj derzhavnyj universytet vnutrishnikh sprav im. E. O. Didorenka, Luhans'k RVVLDUVS im. E. O. Didorenka, 2010, s. 939.

[8] V. Navrots'kyj, *Zlochyny proty vlasnosti*. Lektsii dlia studentiv iurydychnoho fakul'tetu, s. 37.

Mental violence means threat to use a violence threat that is not dangerous to life or health. The addressee of such threat is a person from whom the offender removes or attempts to remove property. However, in practice there may be cases when the offender uses or threatens to use violence to another person who is not the owner of property. Specifically, V. O. Navrotskyi notes that threat can be addressed to persons who prevent or may prevent stealing[9]. The person which receive physical violence or which is threatened to receive such violence and the owner of the property does not necessarily have to be the one person. However, we believe that we should not only indicate the possibility of expressing threat while committing robbery to persons who actively prevented seizure of property from the owner or could do it. In practice there were considered cases where the offender expressed threat to young or other people in the presence of the owner, whose property offender planned to seizure. Specifically, for example, the media reported about the case where the offender went into the elevator and ordered victim to give her handbag threatening with violence to a minor boy who was also in the cabin of elevator. At such cases, the property owner can accept the threat of using violence to another person or actual use such violence as threats of physical harm to herself. So recipient of threat in robbery or brigandism also can be not only the owner of property.

Let us analyze criminal assessment of so-called «robbery-dash». Offender uses this kind of overt stealing hopes on suddenness of the offense that, consequently, will cause no opposition from the victim.

Actually, the offender wants to seizure property but does not plan to cause health damage. Therefore, majority of researchers suggest qualifying the caused violence in such cases as a separate negligent assault on the health (negligent grievous bodily injury or negligent bodily injury of medium gravity). Encroachment on the property during robbery-dash is qualified as non-violent robbery.

However there are cases of sudden tearing of property (such as earrings, chains, etc.), which are characterized by binding causing the physical harm. Since, without causing such damage it is impossible to seizure property. Such cases should be assessed as violent robbery. Therefore, damage to ears during tearing the earrings should be qualified as violent stealing of somebody else's property taking into consideration the severity of caused damage.

Robbery (violent and non-violent) is a crime with material composition and it is considered to be completed since the offender has real opportunity to use or dispose of the seized property.

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[9] V. Navrots'kyj, *Zlochyny proty vlasnosti*. Lektsii dlia studentiv iurydychnoho fakul'tetu, s. 37.

2. L. Gauhman, *Bor'ba s nasil'stvennymi posjagatel'stvami*, Moscov 1969, s.120.
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7. O. Dudorov, *Vybrani pratsi z kryminal'noho prava*, MVS Ukrainy Luhans'kyj derzhavnyj universytet vnutrishnikh sprav im. E.O. Didorenka, Luhans'k RVVLDUVS im. E. O. Didorenka, 2010, s. 939-951.
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Streszczenie

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Dyferencjacja odpowiedzialności karnej za przestępstwo przeciwko mieniu: kradzieży i rozboju (art.art. 185, 186 KK Ukrainy)

W artykule zbadane zostały cechy charakterystyczne dwóch najbardziej powszechnych przestępstw przeciwko mieniu: kradzieży i rozboju. Ukazano, że w KK Ukrainy odpowiedzialność jest zróżnicowana. Przestępstwo kradzieży cudzego mienia przybiera postać zuchwałą (jawną) i zwykłą (niejawną). Zwykła kradzież ma charakter przestępczy (art. 185 KK Ukrainy). Kradzież jawne bez użycia przemocy jest kradzieżą zuchwałą bez przemocy (ust. 1 art. 186 KK Ukrainy).

Akcent został położony na osobliwości ukraińskiego prawa karnego, a zwłaszcza na to, że odpowiedzialność za zawładnięcie cudzym majątkiem z użyciem przemocy jest zróżnicowana w zależności od zakresu przemocy użytej przez przestępcę. Jeżeli przestępca, chcąc zawładnięć cudzym mieniem, używa przemocy, która nie jest niebezpieczna dla życia bądź zdrowia pokrzywdzonego, wtedy jego działania kwalifikowane są jako kradzież zwykła (ust. 2 art. 186 KK Ukrainy). Jednak jeżeli intensywność przemocy używanej przez przestępcę jest o wiele większa, a także jeżeli przestępca, w celu zawładnięcia cudzym mieniem, używa przemocy, która jest niebezpieczna dla życia bądź zdrowia pokrzywdzonego, to w tym wypadku jego działania są kwalifikowane jako rozbój (ust. 1 art. 187 KK Ukrainy).

W kodeksach karnych obowiązujących w państwach europejskich nie znajdujemy dyferencjacji odpowiedzialności karnej ze względu na intensywność i zakres użytej przez przestępcę przemocy. Takie podejście jest charakterystyczne dla kodeksów karnych obowiązujących w państwach postradzieckich.

W artykule dokładnie objaśnione zostało, jakie przestępstwa mogą zostać uznane za niejawne, a jakie za jawne. Podana została lista kryteriów i cech niejawności, które są wyodrębnione w doktrynie ukraińskiego prawa karnego. Istnieją obiektywne i subiektywne kryteria niejawności kradzieży. Pod obiektywnym kryterium należy rozumieć fakt doko-

nywania przestępstwa pod nieobecność osób, które były świadome faktu kradzieży. Kryterium subiektywne stanowi fakt, że przestępca ma świadomość tajności działania. Kradzież jest tajna, gdy: przestępstwo przeciwko mieniu dokonywane jest pod nieobecność innych osób; kradzież dokonywana jest w obecności innych osób, ale w sposób dla nich niewidoczny; kradzież dokonywana jest w obecności innych osób i te osoby, według przestępcy, są tego nieświadome; kradzież dokonywana jest w obecności osób, które ze względu na swój stan fizyczny albo psychiczny nie są świadome faktu kradzieży mienia (osoby małoletnie, psychicznie chore, przebywające w stanie upojenia, osoby, które śpią itp.) i przestępca ma tego świadomość; kradzież dzieje się w obecności osób, które uważają, że przestępca działa zgodnie z prawem, co przewiduje przestępca; przestępca uważa, że jego działania są niewidoczne dla innych, jednak pokrzywdzony albo osoby trzecie są świadkami kradzieży, ale przestępca nie jest tego świadomy (kradzież jest obserwowana na odległości, np. za pomocą kamery).

Autor publikacji zaprezentował znamiona przestępstwa oznaki grabieży połączonej z przemocą, tzn. rozboju. Za przemoc w grabieży należy uznać takie działania, które nie są niebezpieczne dla życia bądź zdrowia pokrzywdzonego (uderzenie, cięgi, lekkie urazy), które nie powodują krótkotrwałego zaburzenia zdrowia albo znikomej straty zdolności do pracy; Należy także uznać takie działania, jak pozbawienie wolności; stosowanie wobec pokrzywdzonego – bez jego zgody – środków odurzających, trujących lub substancji silnie działających (gazów) oraz inne rodzaje przemocy, pod warunkiem, że nie miały one skutków niebezpieczna dla życia bądź zdrowia pokrzywdzonego.

Autor wyodrębnił także znamiona przemocy psychicznej w przestępstwie kradzieży. W tym kontekście przemoc psychiczną należy rozumieć jako groźbę użycia przemocy, która jest niebezpieczna dla życia bądź zdrowia pokrzywdzonego.

Słowa kluczowe: dyferencjacja odpowiedzialności karnej, kradzież, rozbój, mienie (własność), kodeks karny Ukrainy.

Резюме

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Диференціація кримінальної відповідальності за злочини проти власності: крадіжка та грабіж (ст.ст. 185, 186 КК України)

У статті досліджено ознаки двох найпоширеніших злочинів проти власності: крадіжки та грабежу. Показано, що у КК України диференційовано відповідальність за таємне та відкрите викрадення чужого майна. Таємним викраденням є крадіжка (ст. 185 КК України). Відкрите викрадення без застосування насильства – це ненасильницький грабіж (ч. 1 ст. 186 КК України).

Наголошено на особливостях вітчизняного кримінального права і звернуто увагу на те, що відповідальність за насильницьке заволодіння чужою річчю диференційована, залежно від об'єму застосованого винним насильства. Якщо злочинець застосовує для заволодіння майном насильство, яке не є небезпечним для життя або

здоров'я потерпілого, його дії кваліфікуються як насильницький грабіж (ч. 2 ст. 186 КК України). Однак якщо інтенсивність насильства більша і злочинець у ході заволодіння майном застосовує насильство, яке є небезпечним для життя чи здоров'я потерпілого, – дії кваліфікуються як розбій (ч. 1 ст. 187 КК України).

Така диференціація кримінальної відповідальності залежно від інтенсивності, об'єму застосовуваного винним насильства не властива кримінальним кодексам європейських держав. Вона є традиційною характеристикою кримінальних кодексів так званих «пострадянських держав».

У статті детально роз'яснено, які посягання варто вважати таємними, а які – відкритими. Наведено перелік критеріїв і ознак таємності, які виділені у доктрині кримінального права України. Критеріями таємності викрадення є об'єктивний і суб'єктивний критерії. Під об'єктивним критерієм потрібно розуміти факт вчинення злочинного посягання за відсутності осіб, які усвідомлюють факт викрадення. Суб'єктивний критерій полягає в тому, що винний усвідомлює, що за його діями ніхто не спостерігає, або вважає, що вчинює посягання непомітно для тих осіб, які можуть усвідомлювати факт викрадення.

Викрадення є таємним, якщо: викрадення майна відбувається за відсутності сторонніх осіб; викрадення відбувається в присутності сторонніх осіб, але непомітно для них; викрадення відбувається в присутності сторонніх осіб і ці особи, на думку винного, не видадуть його; викрадення відбувається в присутності осіб, які через свої фізичні або психічні особливості не усвідомлюють факту викрадення майна (малолітні, психічнохворі, особи, які перебувають у стані сп'яніння, сплять тощо), і винний про це знає; викрадення відбувається в присутності осіб, які вважають, що винний діє законно, і винний на це розраховує; винний вважає свої дії непомітними для оточуючих, хоча потерпілий або треті особи спостерігають за викраденням майна, однак винний цього не усвідомлює (за викраденням спостерігають на відстані, за допомогою камер стеження тощо).

Детально досліджено ознаки насильницького грабежу. Під насильством у грабежі потрібно розуміти насильство, яке не є небезпечним для життя чи здоров'я потерпілого (удар, побої, легкі тілесні ушкодження, які не спричинили короткочасного розладу здоров'я або незначної втрати працездатності; позбавлення волі, застосування до потерпілого без його згоди наркотичних засобів, психотропних, отруйних чи сильнодіючих речовин (газів), інші насильницькі дії, за умови, що вони не були небезпечними для життя чи здоров'я потерпілого).

Названо ознаки психічного насильства у грабежі. За змістом під психічним насильством розуміють погрозу застосування насильства, що не є небезпечним для життя чи здоров'я.

Ключові слова: диференціація, крадіжка, грабіж, власність, Кримінальний кодекс України.