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Attempt on the life of a defense attorney or representative of a person in connection with legal assistance

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Abstract

Using a combination of scientific methods such as comparative and logical-semantic, the article analyzes one of the objective signs of the composition of a criminal offense, which refers to the attempt on the life of a defense lawyer or representative of a person in connection with activities related to the provision of legal assistance. The point of view of scientists on the view of this problem, which relates not only to the noted crime, but also, to the problems of justice in general, is subject to criticism. Bringing a person to criminal responsibility should always be related to the establishment of a socially dangerous act, specific to the actions of a particular person. Under such conditions, it will allow to comply with the letter of the law and ensure the protection and provision of their constitutional rights and freedoms to every citizen. Everything allows to conclude that, the attempted murder of the indicated persons or their close relatives in connection with the activities related to the provision of legal aid can also be committed, both by action and omission. This crime (in the specified form) refers to the intangible component.

Keywords: defense counsel; attempt against life; legal aid; criminal law; purchased law.

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Atentado contra la vida de un abogado defensor o representante de una persona en relación con la asistencia jurídica

Resumen

Mediante una combinación de métodos científicos como el comparativo y el lógico-semántico, el artículo analiza uno de los signos objetivos de la composición de un tipo penal, que se refiere al atentado de la vida de un abogado defensor o representante de una persona en relación con actividades relacionadas con la prestación de asistencia jurídica. El punto de vista de los científicos sobre la visión de este problema, que se relaciona no sólo con el delito señalado, sino también, con los problemas de la justicia en general, es objeto de críticas. Llevar a una persona a la responsabilidad penal siempre debe estar relacionado con el establecimiento de un acto socialmente peligroso, específico en las acciones de una determinada persona. En tales condiciones, permitirá cumplir con la letra de la ley y garantizar la protección y provisión de sus derechos y libertades constitucionales a todo ciudadano. Todo permite concluir que, la tentativa de asesinato de las personas indicadas o de sus parientes cercanos en relación con las actividades relacionadas con la prestación de asistencia jurídica también puede cometerse, tanto por acción como por omisión. Este delito (en la forma especificada) se refiere al componente intangible.

Palabras clave: abogado defensor; atentado contra la vida; asistencia jurídica; derecho penal; derecho comprado.

Introduction

The legislation on criminal liability is a guarantee of protection of a person and a citizen from criminal offenses. This becomes especially relevant under current circumstances threatening the lives and health of people, the stable functioning of economic mechanisms, and the social existence of society (Kharytonov *et al.*, 2021). It also applies to the provision of legal assistance by a defense counsel or representative of the person in relation to legal assistance related activities. The specified problem is directly indicated in the program documents of the criminal law policy in general and legal instruments in particular.

Legislation on criminal responsibility should fight not only crime in general, but also make a great effort to ensure the rights and freedoms of every citizen, protect him (her) from criminal attacks. Protecting the life of the specified persons is of great importance not only in the legal sphere; this demonstrates that the law on criminal liability protects those, who provide legal aid and often become victims of criminal offenses.

Any violation of the law on criminal liability negatively affects not only the rights of a person and citizen, but also creates an atmosphere of mistrust of the law, the search for ways to violate it, a sense of impunity, etc.

Ensuring human rights and legitimate interests permeates all legislation on criminal responsibility and protection of the life of a defense counsel or representative of the person in relation to legal assistance related activities in particular.

Many negative factors (insufficiently balanced judicial and law enforcement system, corruption, socio-economic component, etc.) affect the implementation of crime fighting tasks. One of the main tasks of the legislation on criminal liability should be explicit acknowledgement of an attack on the indicated persons by the victim. Law enforcement and judicial agencies of the State should be guided in their activities, first of all, by the goal of immediate reparation to the victim of the crime. Moral damage and other costs associated with attack on a defender or representative of a person should not be overlooked. The main goal of the State in the crime control and securing constitutional rights and liberties of a person and citizen can be achieved only under such conditions.

The aim of this Article is the establishment of an exhaustive list of methods of attack on the life of a defense counsel or representative of the person in relation to legal assistance related activities.

Solving these important issues will provide for the further maintenance of law and freedom will raise the authority of judicial and security forces.

1. Methodology

To achieve the set goal and solve the research tasks, the following general scientific and special scientific methods were used in the research. Dialectical method was applied for setting the structure of and solving the problems of the Article.

- Dogmatic method helped to examine the views of the scholars on the objective element of an attack on the life of the persons involving in providing legal assistance.
- Comparative approach was helpful when comparing the opinions of the scientists on the stated problem.
- Logical and semantic made it possible to conduct thorough study of the corresponding conceptual apparatus.
- The method of systematic analysis was used to clarify the internal structure and place of the crime enshrined by Article 400 of the Criminal Code of Ukraine.

- With the help of dogmatic method relevant legal instruments regulating the studied issue were investigated.
- Summarization method was applied to *draw appropriate conclusions* of the research.

2. Literature Review

There are a significant number of sometimes contradictory views on the concept of the objective aspect of the criminal offense provided for in Art. 400 of the Criminal Code of Ukraine in the legal literature. Some authors note that the objective element of this act lies in the attack on life, which is recognized as murder or attempted murder of the victim connected with providing legal assistance (Tiutiuhin and Borysov, 2011; Chuvakov, 2001).

The others insist on the fact that the objective element of this criminal offense is characterized by attack on life of the specified victim and can be manifested in: 1) intentional murder; 2) attempted murder (this criminal offense is considered completed in its first form – from the moment of the victim’s death; in the second form – from the moment of committing actions constituting an attempt to kill him) (Melnyk and Havroniuk, 2010). The third claim that the objective element of the attack on life of a defense counsel or delegate of the person or their close relatives constitute as acts resulting in the death of these persons (murder) and actions that caused the possibility of death (attempted murder) (Kuznetsov, 2017). Smikh (2011) notes that this criminal offense can be committed both by act and omission.

The analysis of the existing views on the concept of the objective element of the offense provided for in Art. 400 of the abovementioned legal act testifies that Tiutiuhin and Borysov (2011), Chuvakov (2001) rewrite the provision of the article, noting that this provision is the objective element, but do not name the mandatory features of this aspect of the criminal offense. They also mention the moment of completion of this action, but do not refer to these criminal offences in the form of a description of their objective element.

Kuznetsov (2017) takes some steps towards describing the mandatory features of the objective element of this criminal offense, namely, he notes that it is committed in the form of an action, but does not attempt to describe its construction.

The description of the objective element of this offense by Smikh (2011) is more successful. He correctly notes that it can be committed both by act and omission and certifies that this criminal offense is formal and material one. However, his judgment has certain shortcomings, which we will reveal in the course of our research.

3. Results and Discussion

It is a generally accepted view that objective element of a criminal offense is the set of signs established by the law on criminal responsibility, which characterize the external manifestations of criminal offense (Dudorov and Havroniuk, 2014). External features (signs) of a criminal act are partially reflected in the law. Of all the structural elements of a criminal offense objective element contains the most information necessary for the qualification of the act. The common-sense explanation of the signs of the objective element of the investigated act is an important prerequisite for compliance with the law in the law enforcement activities of the corresponding agencies, since accountability of a person is connected with the establishment of the conduct of a specific socially dangerous criminal offence, which is referred to in the law.

The signs of the objective aspect of the investigated criminal act are reproduced in general terms in the Law. Mandatory signs of the objective element of this criminal offense include act and omission, the consequences of “murder” and the necessary cause-and-effect relationship – the death of the victim. The moment of completion of the criminal offense in the case of attempted murder is the commission of an action (act or omission) aimed at deprivation of life of the defender or representative of the person. Establishing mandatory features of the objective element of the investigated criminal offense is not only of scientific, but also practical importance.

It is important to emphasize the fact that criminal responsibility for attack on the life of a defense counsel or representative of the person in relation to legal assistance related activities occurs only for the lawful activities of the specified persons, that is, for those that are performed according to the enshrined procedure and not by means prohibited by law (Melnyk and Havroniuk, 2010), i.e., legal activity. This is also confirmed by scientific sources; in particular, liability under Art. 400 of the Criminal Code of Ukraine takes place only if the victim’s activity regarding the provision of legal assistance is carried out when it was legal (Tiutiuhin and Borysov, 2011).

Common to these definitions are: 1) such activity is performed in the order established by law and not by means (methods) prohibited by law; 2) using a broader scope, namely, any legal measures taken by a defense counsel or a delegate of a person to protect the rights and interests of persons on whose behalf or on behalf of whom they act in criminal, administrative, civil or economic proceedings.

Therefore, legal services activity by the defense counsel or other person should be understood as any legal measures to protect the rights and interests of persons on whose behalf or on behalf of whom they act in criminal, administrative, civil, economic processes that are carried out

in accordance with the procedure prescribed by law and by means and methods not prohibited by law.

Art. 400 of the specified should first of all protect legal activities be the specified persons, since otherwise it would be contrary to the intention of the legislator and the fact that advocacy is an independent activity of a lawyer to grant protection, representation and other kinds of legal support to the client, then such the activity should not contradict the current legislation.

However, based on the provisions of Art. 45 of the Criminal Procedure Code (Law of Ukraine No. 4651-VI, 2012) of Ukraine, one should know that a defender cannot be a lawyer who is not entered in the Unified List of Lawyers of Ukraine or for whom the Unified Registry of Ukrainian Lawyers contains information on the suspension or cessation of the right to deal with legal issues. Therefore, the activity of such a defender will be unlawful in criminal and administrative proceedings.

According to Art. 47 of the said Code, the defender is obliged to use the means of protection provided for by this act and other legal instruments in order to guarantee the rights, liberties and lawful interests of the perp, convict and to find out the facts that deny assumption or assertion, reduce or preclude criminal liability.

Adult close relatives or family members, as well as the representatives of tutorship and guardianship agencies, establishments and organizations, in whose care or guardianship a juvenile, incapable or a person with limited legal capacity resides, may be involved as legal representatives of the suspect, accused. Such a legal representative enjoys the procedural rights of the person whose interests he (she) represents, except for those whose implementation is carried out directly by the suspect, the accused and cannot be entrusted to the representative. Based on this, his legitimate activity cannot cover the limits of procedural rights that can be exercised only by the accused or the suspect.

Based on the provisions of Art. 58 of the Criminal Procedure Code of Ukraine Code (Law of Ukraine No. 4651-VI, 2012), a victim in criminal proceedings may be represented by a person who has the right to be a defender. It should be noted that the representative of the victim enjoys the procedural rights of the victim, whose interests he (she) represents in addition to procedural rights, the implementation of which is carried out directly by the victim and cannot be entrusted to the representative. It is important to stress on the fact that if the victim is a minor or a person recognized as legally incapable or partially capable, a legal representative is also involved in the procedural action along with him (her) – such a representative enjoys the rights of the victim.

On the basis of the above, it can be concluded that the lawful practice of defense counsel or representative of the person in relation to legal

assistance should be understood as duly certified legal measures regarding protection or representation of a of the rights and interests of persons and legal bodies, on whose behalf they act before the courts, as well as in other government agencies, local authorities, with other individuals and legal persons in accordance with existing legislation.

We emphasize the fact that murder of the indicated persons is considered the act with a material composition. The act that encroaches on the lives of the above-mentioned persons is a manifestation of an active influence on the victim. It can be in the form of a physical impact on the victim, that is, a direct physical impact on the human body, which is accompanied by a violation of the function or anatomical integrity of the vital organs of the person (for example, inflicting blows, gunshot injuries to vital organs, dropping, holding under water, squeezing the neck, stabbing vital organs, poisoning) (Matviychuk, 2008).

Physical impact in the act of murder also includes the influence through any environmental factors, in particular: 1) effect of low or high temperatures; 2) effect of electric current; 3) effect of poisoning; 4) effect of explosives; 5) effect of radioactive materials, etc. An active act in murder of these victims can occur through physical influence, for example: 1) inflicting mental trauma on the victim, which, according to the plan of the perpetrator, leads to death; 2) by means of intimidation, which caused the death according to the plan of the perpetrator; 3) by providing information that intends to cause a heart attack; 4) by hypnotic suggestion to cause death (Matviychuk, 2008).

Instead, committing the murder of a defense counsel or representative of the person in relation to legal assistance related activities or their close relatives may also be committed through omission. Taking into account that omission is a passive element of the act, it should be recognized that responsibility for the murder of the indicated victims can only be in the presence of objective and subjective prerequisites, namely: 1) duties specifically assigned to the person to protect life by law, profession, contract; 2) a person has a real possibility to prevent death. That is, it is about the perpetrator failed to prevent the death of such victims, provided that such a person was obliged and could have prevented death, but does not do so (intending to take the life of such a victim).

The examples that clearly confirm that the murder of the indicated persons or their close relatives through omission are: 1) when a person is a medical worker, who, in view of the performance of his (her) professional duties is obliged to provide appropriate medical assistance to the specified persons, does not provide such assistance intending to cause death to these victims; 2) when the official, who is entrusted with the functions of activating the relevant mechanisms and signaling systems at railway and train stations, in sea and river ports, at airfields, having had the intention to

kill the listed victims in these vehicles, did not fulfill these duties; 3) when a teacher or head of a children's preschool institution, intending to cause the death to the child (children) of the listed persons, knowing that a child (children) under the age of 18 has (have) entered the carriageway and may die, does not take measures to prevent this.

Therefore, biological death of the victim or victims, enshrined in the disposition of the studied Article of the Law of Ukraine No. 2341-III (2001) is a mandatory sign of a completed criminal act. From this moment, this act in the specified form is finished. A person is considered dead from the moment when the person's condition is defined as irreversible death, that is, when the irreversible death of the brain is established (in all other cases, we can only talk about attempted murder, in the presence of direct intent to kill the victims).

This form of criminal offence requires a causal link between the actions of the perpetrator (act or omission) and the consequences (the death of another person – the victim (victims), which occurred. The time of the victim's death is not a decisive factor. It is also important to establish the intent to achieve such a result. It should be noted that the causal link between these actions and the consequences must be necessary – the death of the victim is a natural result of the intentional act of the guilty person.

We agree with the opinion that the creation of conditions for the commission of the murder of the listed persons (finding means, tools, development of a plan, conspiracy of accomplices, etc.) should be qualified as the preparation for this criminal offense under Part 1, Art. 14 and Art. 400 of the Criminal Code of Ukraine. When the murder of these persons is committed by means of torture, then the act should be qualified just under Art. 400 of the said Code; additional qualification under Art. 127 is not required.

Art. 400 provides for criminal offenses that are characterized (differ) in their number (they are not regulated by the General Part of the Criminal Code of Ukraine, but presented as analyzed in the Special Part of this act and some other legal instruments). Such a division has an independent meaning in the criminal defamation legislation, which is why it is subject to separate consideration on the basis of a corresponding study.

Let us consider the second form of committing criminal offense provided for in Art. 400 – attempted murder of a defense counsel or representative of the person in relation to legal assistance related activities. We can state that the specified criminal act can be committed both by act and omission. This is evidenced by Part 1, Art. 15 of the Criminal Code of Ukraine, which states that an attempt to commit a crime is the commission of an action (act or omission) by a person with direct intention, designed to commit criminal offense provided for by the relevant provision of this Code, if the offense has not been completed for reasons beyond its control.

This criminal offense (in the specified form) refers to the intangible component. It is a composition in which there is no sign of a socially dangerous consequence, in our case – the death of the victim (or victims), the list of which is enshrined in Art. 400. Composition of criminal offense is considered formal, where the public dangerous behaviour of the perpetrators is fully described. Instead, in our opinion, which follows from the current legislation, the composition of criminal offense resulting from the existing legislation, should be considered truncated.

It is important to focus on the fact that the composition of criminal offenses is divided according to the following characteristics: 1) simple one; 2) complex one. Simple are those features that are not structured, and complex ones are those that have a structure. Difficult ones are also divided according to the following characteristics: 1) alternative; 2) adjacent. Characteristics of the actions in the two forms of manifestation of the criminal offence attributes for alternative features as they are structured.

Therefore, one cannot agree with the opinion by Smikh (2011), who claims that crimes with so-called “truncated components”, including the component of assaulting the life of a person’s defender or representative or their close relatives, should be recognized as completed only in those cases when the criminal offense included the signs of the completed offence, the description of which is contained in the disposition of the corresponding article. The author ignores the provisions of criminal legislation, where there is a description of two components of a criminal offense, namely murder and attempted murder, which are outlined as signs of completed components of the criminal offense.

His claim would be correct if the disposition were described as a title of Art. 400 of the Criminal Code of Ukraine (description of the signs of the related crime). Therefore, the evidence of attempted murder is not deduced in the second form second form of manifestation of a criminal offense beyond the limits of this composition (its manifestation in the second form); in addition, in the regulation of the named rule we observe two single criminal offences: 1) murder and 2) attempted murder.

Therefore, the act in the second form of manifestation contains a criminal offence, which is characterized by the so-called truncated composition of the act.

Conclusions

Having studied the purview of Article 400 of the Criminal Code, we came to the next conclusions:

1. the objective element of the criminal offense based on the signs of murder of defense counsel or representative of the person in relation to legal assistance related activities is characterized by the following mandatory characteristics of the objective party as an action (act or omission), the consequence of which is the death of the person (persons) due to the necessary link between the action and the resulting consequences;
2. there are two forms of committing criminal offense under the specified Article – murder and attempted murder of the listed persons or their close relatives;
3. murder of the indicated persons is considered the act with a material composition – this offense can be committed both through act (physical impact on the victim(s)) and omission (the perpetrator failed to prevent the death of such victims, provided that such a person was obliged and could have prevented death, but does not do so).
4. attempted murder of the indicated persons or their close relatives in connection with activities related to the provision of legal aid can also be committed both by act and omission. This criminal offense (in the specified form) refers to the intangible component.

Bibliographic References

- CHUVAKOV, Oleh. 2001. Crime against justice. Criminal Code of Ukraine. Commentary. Odissey. Kharkov, Ukraine.
- DUDOROV, Oleksandr; HAVRONIUK, Mykola. 2014. Criminal Law: textbook. Vaite. Kyiv. Available online. In: <https://www.osce.org/files/f/documents/8/9/358166.pdf>. Consultation date: 03/03/2022.
- KHARYTONOV, Evhen; KHARYTONOVA, Olena; KOLODIN, Denis; TKALYCH, Maxym; LARKIN, Mikhail; TOLMACHEVSKA, Yuliia; ROJAS-BAHAMON, Magda Julissa; ARBELÁEZ-CAMPILLO, Diego Felipe; PANCHENKO, Olha Ivanivna. 2021. “Distance learning in the conditions of Covid-19: problems and prospects of their solution” In: Amazonia Investiga. Vol. 10, No. 48, pp. 157-169.
- KUZNETSOV, Aleksandr. 2017. Crimes against management: legal characterization, classification problems. In: Problems in Russian legislation. No. 2, pp. 106 – 110.
- LAW OF UKRAINE NO. 2341-III. 2001. Criminal Code of Ukraine. Official Web site of the Verkhovna Rada of Ukraine. Available online. In: <https://>

zakon.rada.gov.ua/laws/show/2341-14#Text. Consultation date:
03/03/2022.

LAW OF UKRAINE NO. 4651-VI. 2012. Criminal Procedure Code of Ukraine. Official Web site of the Verkhovna Rada of Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>. Consultation date: 03/03/2022.

MATVIYCHUK, Viktor, ed. 2008. Criminal Law of Ukraine. Special Part-chapter 1, 2: Practicum. KNT. Kyiv, Ukraine.

MELNYK, Mykola; HAVRONIUK, Mykola. 2010. Scientific and practical commentary on the Criminal Code of Ukraine. Yuridychna dumka. Kyiv, Ukraine.

SMIKH, Vasyl. 2011. Criminal liability for violation of the person's right to legal aid. PhD Dissertation. Lviv State University of Internal Affairs. Lviv, Ukraine.

TIUTIUHIN, Volodymyr; BORYSOV, Viacheslav. 2011. Crimes against justice: tutorial. Pravo. Kharkiv, Ukraine.



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