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GUARANTEERING THE PROTECTION OF SOCIAL RIGHTS OF CITIZENS IN THE CONTEXT RESEARCH OF CRIMINAL LIABILITY FOR THE CRIME UNDER ARTICLE 175 OF THE CRIMINAL CODE OF UKRAINE

The article analyses the topicality of research of criminal liability under Article 175 of the Criminal Code of Ukraine.

Part 7, Article 43 of the Constitution of Ukraine establishes that the right to timely payment of compensation for work is protected by law. The Article 46 of the Constitution of Ukraine provides citizens with the right to social protection. And the Article 53 of the Constitution of Ukraine declares that the state provides pupils and students with the state stipends and privileges. The research of the corpus delicti of groundless non-payment of wages, stipends, pensions or other payments established by law is highly important because according to the Article 1 of the Criminal Code of Ukraine protection of rights and freedoms of an individual and a citizen, property, etc. is an objective of this Code.

Having noted a role of the international human rights organizations in struggle against groundless non-payment of wage, stipend, pension or other payments established by the law, it is necessary to bring into the open the public danger of this crime. In this context it is accepted that public danger is the main, most essential sign of a researched crime, in particular its determining characteristic. After all it is true that the absence of wagesments vitally necessary for an individual, and in particular when there are all legal grounds, can become dangerous to the person, and it leads to illegal infringement of conditions of his or her existence and threatens public relations which provide protection of the person's life and health. Thus, the main characteristic of this crime and its negative influence is the infringement of the specified public relations and doing harm or threatening them.

The main proof of public danger of the above mentioned crime is its enormous harm. Harm which is caused to the public relations concerning protection of existence of the person, harm to the person, and also the community and finally, to the state is often difficult to estimate.

With their antisocial behavior the persons guilty of groundless non-payment of wage, stipend, pension or other payments established by the law, undermine the stability of life cycle of the person, break the public balance, etc.

Key words: *research, criminal liability, non-payment, wages, pay, salary, stipend, pension, social protection.*

Formulation of the problem.

Importance of research of criminal liability for non-payment of wage, stipend, pension or other payments established by the law for the crime under Article 175 of the Criminal Code of Ukraine, caused by the paramount importance attached by the state of Ukraine

to protect the social rights of citizens and, in particular, to timely payment of wages, stipend, pension or other payments established by the law.

Analysis of recent research and publications. Essential contribution in research of issues of criminal liability for the crime

under Article 175 of the Criminal Code of Ukraine, in particular has been made P.P. Andrushku, A.P. Babiy, S.I. Borodin, J.V. Grodetskiy, I.O. Zinchenko, S.J. Lyhova, M.I. Melnyk, A.V. Tarasenko, V.V. Topchiy, E.V. Shevchenko and others.

The purpose of this research – to investigate the topicality of the given kind of crime as socially dangerous, illegal and immoral phenomenon with which has been combated for a long time and prevented its origin not only the Ukrainian justice, but also the international human rights organizations.

Presentation of the main research material. Norms which initiated social guarantees which act presently, step by step, have been embodied in the legislation of different historical periods since the early times. At present part seventh Article 43 of the Constitution of Ukraine make a provision for the timely payment of wages for work is protected by the law, as well as Article 46 that provides the right to social protection to the citizens [1]. The research of criminal liability for non-payment of wages, stipend, pension or other payments established by the law, provided by Article 175 of the Criminal Code of Ukraine, is important enough, since Article 1 of the Criminal Code of Ukraine provides for protection of the rights and freedom of the individual and citizen, the property, etc. as an objective of the Criminal code of Ukraine [2].

International confederation of free trade unions (ICFTU) has recognized the problem of non-payment to be a threat not only to the living standards of those who are not paid, but to the whole process of democratization and development of a law-based society on which workers' economic and social security depends [3].

The topicality of the research of such a phenomenon as non-payment of wage, stipend, pension or other payments established by the law, provided by Article 175 of the Criminal Code of Ukraine for criminal liability, is testified by the court practice of the European Court for human rights concerning complying with the judgment in the context of the Convention on protection of human rights and basic freedom [4]. The specified Convention was ratified by Ukraine on July,

17th, 1997 [5]; thus one can state that in a year after the Constitution was adopted on June, 28th, 1996, according to which the acting international agreements, with the consent granted by the Parliament of Ukraine, is a part of the national legislation of Ukraine (part one of Article 9 of the Constitution of Ukraine).

Thus, part one of Article 1 „Protection of Property” of the First protocol to the specified Convention provides: „every physical or legal entity has the right to own the property peacefully. Nobody can be deprived the property in any way other than in interests of the society and under the conditions provided by the law and general principles of the international law” [6]. In general, according to part fourth of Article 55 of the Constitution of Ukraine such a right to appeal for protection of the rights and freedom to corresponding international legal agencies or to relevant agencies of international organizations with Ukraine being a member or participant, is granted to every citizen after the use of all national legal remedies. Part one of Article 36 of the specified Convention provides that the court can take over a case only after all national remedies of legal protection, according to the conventional principles of the international law, and within six months from date of the resolution of the final decision at the national level have been settled.

It is possible to consider as the big achievement of the Ukrainian lawmaking the passage of Law of Ukraine “On Enforcement of Judgments and Application of Practice of European Human Rights Court” of February 23rd, 2006 № 3477-I [7] which has settled relations which arise in connection with a state obligation to implement the European Court judgments on human rights in cases against Ukraine, and has also eliminated causes of infringement by Ukraine the Conventions on protection of human rights and basic freedom and the ratified protocols to it, with introduction of the European standards of human rights in the Ukrainian legal proceedings and administrative practice and has created preconditions for reduction of number of applications to the European court under human rights against Ukraine.

Thus, the carried out analysis of cases of the Human Rights European Court has

shown [8] that they were basically initiated not due to the fact of non-payment, etc., but concerning a long delay or failure to enforce judgments pertaining non-payments. All this gives grounds for improvement of legal regulation of observance of law of Ukraine.

Without polemizing with the points of view concerning public danger of constituent elements of the offence as this issue falls outside the limits our research, we only state the proved fact that public danger underlies criminalization of such an action in general and such constituent elements of offence (*corpus delicti*), as groundless non-payment of wages, stipends, pension or other payments established by the law, in particular. It is influenced by such factors: 1) high degree of public danger of this antisocial phenomenon; 2) relative broad spread of these crimes; 3) conformity of a prohibition of groundless non-payment of wage, stipend, pension or other payments established by the law to moral principles of the criminal law and prevention of serious consequences pertaining social relations (the poll of 300 persons testifies that 95% of respondents consider that the prohibition is really necessary and can serve to prevention serious consequences, and only 5% questioned had no definite opinion); 4) procedural probative force of these actionstestifiesthatthisphenomenon is regulated by the criminal legislation and can be estimated by it; 5) coordination of the specified criminally-legal prohibitions with other branches of law and international conventions (the study of other branches of the law that somehow concern organizational, legal issues of protection of wagesment of wage, stipend, pension or other payments established by the law, and also other international legal acts, testifies that they have no substantial controversy to the specified legal prohibitions). On the contrary, the Convention on Protection of Human Rights and the basic freedom, ratified by the Law of Ukraine of July, 17th, 1997, in addition confirms public danger of actions which concern groundless non-payment of wage, stipend, pension or other payments established by the law, including provided with part one of Article 1 of the First Protocol to the specified Convention

of protection of encroachment on property; 6) the specified crime belongs to that category of the criminal encroachments which social danger is proved, as a rule, with the official statistical data – and it also strengthens their public danger. It is necessary to mention that the latent nature of these crimes is also high that in its turn is one of displays of public danger. The victims do not dare to apply for help to law enforcement bodies for various reasons, and local authorities in their reports to statistic bodies conceal the facts of non-payments.

As it is known, the illegal actions formulated by the law should be put in a concept basis of “groundless non-payment of wages, stipend, pension or other payments established by the law”. Adhering to this logic, it is necessary to state that public danger of the researched crime is determined as encroachments on the relations established in a society concerning protection of timely payment of wages, stipend, pension or other payments established by the law.

Public danger of this kind of crime is also aggravated with its frequent direct or indirect connection with other illegal actions, for example, as is proved by the research of criminal cases (approximately 15% of cases from the named file), with misfeasance in office, official negligence. The data of this research as well as periodicals testify that the specified crime is rather common though not all cases reach the trial stage. The specified socially dangerous actions are dangerous as factors which predetermine displays of egoism, greed to unlawful profit which is close to crime.

The research of cases has shown that according to some of them groundless non-payment of wage, stipend, pension or other payments established by the law was made by persons on whom in connection with their official position responsibilities were laid on them to make payments of salary, stipend, pensions or other payments provided by the law, but nevertheless they were not sued (in spite of the high public danger of their actions).

The phenomenon of non-payment of wage, stipend, pension or other payments established by the law can have signs of a crime and be immoral, though having certain subjective and objective

characteristics which exclude the elements of criminal offence. That is the director of a business enterprise, institution or organization irrespective of pattern of ownership or the citizen – the subject of an entrepreneurial activity, can act in such cases within the limits of the law and under the influence of certain circumstances which exclude criminality.

But, unlike other acts of the person, the crime in its social essence is an encroachment on those relations which have developed in a society, display its most important interests owing to what they are protected by the law on criminal liability. The crime always contradicts basic needs and interests of social development. And as it the objective laws of development of a society, its requirement and interests act as criteria, criteria of value or anti-value of human behavior, its conformity or discrepancy to these requirements and interests, the crime is always antisocial behaviour [9, c. 65].

Part 7 of Article 43 of the Constitution of Ukraine states: «The right to timely payment of wages for work is protected by the law». Therefore, groundless non-payment of wage, stipend, pension or other payments imposed by the law to citizens is considered a crime.

Groundless non-payment to citizens their wage, stipend, pension or other payments imposed by the law for the term over one month, made deliberately by a director of a business, institution or organization irrespective of its pattern of ownership forms the *objective party* of the crime provided by part 1 of Article 175 of The Criminal Code of Ukraine. Groundlessness of non-payment takes place when objectively there are no reasons that prevent from making payment [10, c. 103]. The specified non-payment will be considered groundless when it takes place, despite availability of legal basis for payment of wage, stipend, pension or other payment imposed by the law to citizens. There will be no constituent element of offence if the specified payments are not performed for a legal reason (for example, non-payment of a part of a salary as a result of deduction from it to cover a worker's debt to the business enterprise, institution or organizations where he or she works) or non-payment is caused by the objective reasons (for example, incomplete

budgetary financing, absence of finances on accounts for payment of the business, institution, organization) [11, c. 432].

Part 2 of Article 175 provides liability for the same action if it was a criminal conduct owing to wrong-assignment use of the finances intended for these payments, for example, of use of finances of salary funds for acquisition of equipment, for renovation, etc.

Part 3 of Article 175 states that a person is relieved of criminal liability if before being brought to criminal liability the person has paid the wages, stipend, pension or other payment imposed by the law to citizens [10, c. 103–104].

In our papers we have repeatedly established the fact of thousand-year history of the origin of criminal liability for the researched crime. This it in its turn also predetermines a topicality of the research and its urgency. Thus, search of historical preconditions of origin of criminal liability for non-payment of wage, stipend, pension or other payments imposed the law has been performed, as in the third period, since the time of formation of the most ancient source of the Russian right in the Kievan Rus – „The Russian Truth“, and was issue of discussion at the International scientific-practical conference „Urgent problems of jurisprudence, 2010“ which was held on November, 26th, 2010 in „National Academy of Management“, Kiev [12, c. 316–321], as well as later on. The research of historical preconditions of development of criminal liability for non-payment of wage, stipend, pension or other payments imposed by the law from the fourth period till the eighth period of the Ukrainian society and statehood (14 century – our time) has been displayed on pages of scientific legal journal «The Jurisprudence» [13; 14; 15]. Also, the analysis of the criminal legislation of the Ukrainian Soviet Socialist Republic in the context of Article 175 of the Criminal Code of Ukraine was approved on February, 10–11th, 2012 at the International scientific-practical conference „System of Law of Ukraine: The Current State and Development Prospects“, Odessa [16]. On October, 28th, 2011 at the III International scientific-practical conference „Topical Problems of the Criminal Right, Process and Criminalistics“, devoted

to the 10th anniversary of the International Humanitarian University of Odesa, generalization of the specified sources in a historical context was considered [17].

Resulted above means that the most ancient legal acts „The Russian Truth“ which was a living law at the territory of modern Ukraine, as far back as in the XI century for the first time become by the guarantor of certain social security and legislatively embodied the arrangement of wagesment for work of certain strata of population, namely king’s servants, in who performed judicial proceedings and officials [18, c. 127] who were in charge of “town construction” and the construction of bridges.

The main thing is that considered Articles 59 and 60 of The Vast Truth [19, c. 68] or corresponding Article 55 [20, c. 13] (unlike others which only imposed rate of commission for work) though they concerned only hired workers, it is possible to consider as the first sources of criminal liability for non-payment of wages provided by Article 175 of The Criminal Code of Ukraine.

The considered legislative embodiment of corresponding payments encouraged the construction of roads and defense of settlements, and also trade development, economic relations, prevented willfulness of ruler’s servants and his vassals, and thus revolts, that strengthened the princely power. It is important that The Russian Truth not only legislatively embodied for the first time the compulsion of wagesments for certain work, as at that time there was predominantly the subsistence economy [21, c. 7], but also for the first time criminal liability for such non-payment became entrenched.

Having considered almost all basic standard-legal documents beginning from the most ancient source of the Russian right in the state of the Kievan Rus, we have come to an important conclusion that Ukraine has a thousand-year continuous history of application of criminal liability for salary nonpayment, etc. Criminal liability for nonpayment of stipends, pensions or other payments imposed by law has been introduced only in the ninth year of independence of Ukraine.

Conclusions and suggestions. Summarizing the results in this aspect of research, it is necessary to mention that primarily the

topicality is caused by the public danger of this crime which is determined, first, by an encroachment on the social relations that provide conditions of stable life cycle of the person the infringements of which can be dangerous to the person and threaten his or her existence; secondly, by the factors mentioned above, thirdly, direct connection with other illegal actions, that are serious crimes themselves; fourthly, huge harm and severe consequences.

Also it is possible to state that the phenomenon of nonpayment of wage, stipend, pension or other payments imposed by the law in our state is illegal and immoral if there are no certain objective and subjective elements which exclude its criminality. We will follow for an example when such objective reasons as incomplete budgetary financing or absence of finances necessary for payments on accounts of businesses, institutions, organization are made on purpose, and are consequences of someone’s criminal will. Therefore, for direct prevention to such crimes which are also a direct consequence of the specified non-payments, it would be desirable to have adequate criminal acts which will permit to hold certain subjects liable if in their actions or lack of action constituent elements of offence (*corpus delicti*) are revealed.

Considering that Ukraine has a thousand-year continuous history of application of criminal liability for salary nonpayment, etc. and legislatively entrenched and embodied in the ninth year of independence of Ukraine criminal liability for nonpayment of wage, stipend, pension and other payments imposed by the law, this research meets the major requirements of the present.

The Court practice of the European Court for human rights concerning implementation of relevant decisions in the context of the Convention on protection of human rights and basic freedom as well as concern of the international human rights organizations, including International Confederation of Free Trade Unions testifies the topicality of the research.

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Олеїнічук О. М., Родік Т. П. Гарантування захисту соціальних прав громадян у контексті дослідження кримінальної відповідальності за злочин, передбачений ст. 175 КК України

У статті аналізується актуальність дослідження кримінальної відповідальності за статтю 175 Кримінального кодексу України.

Частиною сьомою статті 43 Конституції України, передбачено, що право на своєчасне одержання винагороди за працю захищається законом, статтю 46, що громадяни мають право на соціальний захист, а також статтю 53, що держава забезпечує надання державних стипендій та пільг учням і студентам. Дослідження складу злочину безпідставної невиклати заробітної плати, стипендії, пенсії чи інших установлених законом виплат, є досить важливим, адже в статті 1 Кримінального кодексу України зафіксовано, що його завданням є правове забезпечення охорони прав і свобод людини і громадянина, власності тощо.

Відзначивши роль міжнародних правозахисних організацій у боротьбі з безпідставною невиклатою заробітної плати, стипендії, пенсії чи інших установлених законом виплат, необхідно розкрити й суспільну небезпеку цього злочину. В цьому контексті загальноприйнятним є те, що суспільна небезпечність – це головна, найбільш суттєва ознака досліджуваного злочину, зокрема його визначальна властивість. Адже дійсно, відсутність вкрай необхідних людині виплат, а особливо, коли для цього є всі законні підстави, може стати небезпечним для неї, а це приводить до протиправного порушення умов її існування та утворює загрозу існування суспільних відносин, що забезпечують охорону життя і здоров'я людини. Отже, головною властивістю цього злочину, його негативом є руйнування зазначених суспільних відносин і завдання їм істотної шкоди або загроза завдання такої шкоди.

Головне свідчення суспільної небезпечності зазначеного злочину – його величезна шкідливість. Шкоду, яка завдається суспільним відносинам із приводу охорони існування людини, самій людині, а також суспільству і, в кінцевому підсумку, державі, часто складно обчислити.

Своєю антигромадською поведінкою особи, винні в безпідставній невиклаті заробітної плати, стипендії, пенсії чи інших установлених законом виплат, впливають на стабільність життєвого циклу людини, порушують суспільну рівновагу тощо.

Ключові слова: дослідження, кримінальна відповідальність, невиклата, заробітна плата, стипендія, пенсія, соціальний захист.