

SOME ISSUES OF GUILTINESS IN AFFECTIVE MURDER

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Abstract

The given article deals with the interests towards fit of passion of murder in the Science of Criminal Law of Georgia which already exists for a long time. It is stipulated by two causes: firstly, by permanent necessity towards investigation – judiciary practice which demands precise criteria of qualification of the act; secondly, by essential changes of criminal law doctrine in Georgia which caused working out of the new approach towards the problem of guilt. Consequently, Georgian scientists had to review a whole range of conceptions which did not answer demands of the present day. It is clear that due to complexity of the issue, it is hard to discuss approach of all conceptions in one article. We shall light briefly peculiarities of approach of Georgian scientists towards some conceptions. We should single out only so called argumentations of estimation for criminal and subject conceptions of psychological crime of guilt.

Keywords: Murder, punishment, guiltiness, crime investigation

Interest towards the affective murder in criminal science of Georgia has existed for a long time. It is stipulated by two reasons: first, with the permanent demand towards investigational-judicial practice which requires exact criteria of qualification of the given act; second, by essential change of criminal doctrine in Georgia which required the development of a new

approach towards problem of guiltiness. In this regard, the Georgian scientists had to revise a great number of concepts that do not meet the requirements of modern times. Naturally, due to the complexity of the issue it is difficult to consider all the conceptual approaches in one article. We will try to briefly highlight peculiarity of Georgian scientists' approach towards some concepts. Among them we will distinguish the argumentation of assessment of concepts of guilt, the so called crime subject and guilty person.

1. The idea that guilt was a psychic attitude towards act and result and was dominant in the Soviet literature. For example, T. Shavgulidze considered that guilt was a person's psychic attitude towards his/her unlawful activity. In his opinion, when lawmaker indicates the consciousness of social danger of an act as to the necessary element of intent, he/she means a person's psychic attitude towards the social peculiarities of his/her act at the moment of committing the crime and not only the knowledge of an act peculiarity. For substantiation of intent during the affect, it is not difficult to prove whether the offender knows that murder is socially dangerous. But it is difficult to prove whether the offender realizes the social importance of his/her act at the moment of committing the crime. The psychological concept of guilt is especially dominant in Russia's criminal law. As it is stated here, the affective murder "is less socially dangerous than a crime committed in the condition of calmed psyche".

Pure psychological notion of guilt has considerable defect due to which the qualification of act remains in a blind-alley. According to the doctrine, it turns out as though the social danger depends on psychic condition. According to O. Gamkrelidze, "During affective murder the degree of severity of injustice, its social danger cannot depend on psychic condition. Here, we deal with the case of diminished mental capacity which reduces the quality of social danger of guilt and not injustice, i.e. illegal act.

A person being in affective state is in the state of reduced mental capacity despite the fact whether he/she is an especially dangerous recidivist or extremely decent person. Person shall be in affective state if he/she “calmly plans the entire process of commission of offence” and it will not affect the more or less danger. Here we deal with the guilt quality and not with the person’s danger”.

2. When criticizing the so called subject concept the Georgian scientists also consider the issue of affective crime. In this case, the starting point is a provision that mental capacity-incapacity, age, psychic illness and any other event are connected not with the subject of crime, but with the issue of criminal responsibility. And a criminal responsibility preliminary implies the subject of crime; the subject, i.e. man is the leader of criminal responsibility. It should be taken into account that under-aged and mentally ill person can commit a criminal injustice. But how can the creature, who is not the subject of crime, commit the criminal injustice! In reality, the issue is decided totally otherwise. The point is that we have the subject of crime in the indicated cases, but we have no enough bases for criminal responsibility and, therefore, we free the offender and terminate the case proceedings towards him.

For the illustration of this provision, O. Gamkrelidze considers the Article 111 of the Criminal Code, which deals with the special case of limited mental capacity. As they indicate, this time a person is in the state of limited mental capacity which diminishes the quality of his guilt. The fact that physiological affect does not exclude the criminal responsibility, but only attenuates the committed crime indicates that affect attenuates offender’s responsibility at the expense of diminishing his guilt. But the quality of injustice of murder this time remains the same; it does not diminish.

3. While developing the Article 111 of the Criminal Code, the Georgian scientists were consistently accomplishing the requirement of criminal principle of act. The provision that the affective state creates conditions that offender should be considered socially less dangerous compared with when offender calmly and without any affect plans the entire process of commission of offence, was denied from the start.

As it is stated, the injustice of murder (illegal act) which is the basis of content of act described in the Article 111 does not differ from the injustice of contents described in the Articles 108 or 109. For instance, intentional murder of “two or more” persons is severely punished under the paragraph A of the Article 109, and murder of the same amount of persons in affective state causes mitigating responsibility under the Article 111. Thus, injustice of one and the same severity is severely punished by the Article 109 and that of mitigatingly by the Article 111.

This provision is based on the normative notion of the guilt, which, compared to the criminal law psychological concept of the then Soviet Republics, is dominant only in the criminal law of Georgia. According to the mentioned normative notion, when the court establishes injustice it starts to impute fault upon this injustice for its commission, if, of course, there is no any circumstance excluding the fault. During imputing, the following should be taken into account: 1. Degree of committed injustice; 2. Degree of guilt. According to it, imputing can be: 1) Full, 2) Enhanced, 3) Diminished. Correspondingly, imposing the responsibility and defining the type and size of punishment depend on this gradation. Imputing fault upon injustice should be led by ascertainment of consciousness of illegality, i.e., ascertainment of whether the accused knew that he/she committed the forbidden act and breached the prohibition.

The view that responsibility established by the Article 111 is reflected in the form of diminished mental capacity can be found in German literature as well. As the German lawyers state, the section 213 of the criminal law (“Less Serious Case of Manslaughter”) describes not the content of the act, but the rule of mitigation of punishment. In the opinion of Zh. Wessels and M. Hettinger, this paragraph describes the condition of applying the norm. G. Wolf also shares this opinion and states that section the 213 describes the provision of delivering judgment in the case which belongs to the cases generally described in the paragraph 212 (“Murder”). As O. Gamkrelidze states, the content of the act described in the Article 111 of the Criminal Code differs from the content described in the Article 106 of the Criminal Code of Georgia of 1960. The accurate list of circumstances causing affect under the Article 106 of the Criminal Code of Georgia of 1960 was unjustly restricting the circle of the cases that really enable to mitigate the responsibility. Formulation of the Article 111 of the current code shall facilitate the correct legal qualification of the mentioned cases and just punishment of offender. As it seems, the author shares the idea that the condition of possibility of mitigation of responsibility is given in the Article 111 of the Criminal Code.

Here it should be noted that in the Criminal Code of German Federative Republic, the paragraph 213 is formulated obscurely and raises many questions. According to the mentioned paragraph, the performer is considered a person who committed murder without his/her fault during strong agitation, which was caused by provocative action towards the offender or his relatives. According to the mentioned novel it turns out that there exists illegal action, but the fault does not exist. Then, the issue arises, why is the person punished, if there is no fault? In reality, we deal with the reduction of fault degree and not with nonexistence of fault. Fault may not

exist in case when the person is sure that the powder handed on to him/her, which he/she has to give to an ill person, is a drug, but in reality it is a poison. As it has already been mentioned, during affective murder we have totally different picture – a diminished fault. This approach has been successively realized in the Article 111 of the Criminal Code (intentional murder in a state of sudden, strong mental agitation caused by illegal violation, severe abuse or other immoral act by victim towards the offender or his close relative, as well as psychic trauma stipulated by illegal or immoral act of victim). Therefore, compared to the paragraph 213 of the German Code, the Article 111 of the Criminal Code is more refined and accurate.

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