

Problem of Determining the Chance (Casus) in Criminal Law

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ABSTRACT

The article considers a concept of chance (casus) in criminal law and its main features. A definition of chance (casus) was analyzed as faultless causing of harm from a perspective of delimitation of the concept from carelessness in the form of criminal negligence. Particular attention is paid to the legislative definition of faultless causing of harm, which is found in criminal codes of foreign countries. Based on the study, the author has identified characteristic features of the chance (casus), which included: special form of mental attitude of a person to his deeds (the absence of such attitude), faultless causing of harm, absence of fault, objectively random effects, commission of acts that resulted in socially dangerous consequences by a person who has all the features of the perpetrator. The concept of chance (casus) in criminal law was determined and substantiated. A chance (casus) is faultless causing of harm by a person who has all the features of the perpetrator when committing an act that led to socially dangerous consequences when the person was not aware of and could not recognize socially dangerous consequences of his actions or did not foresee the possibility of socially dangerous consequences and circumstances and should not have or could not foresee them. As a result of research, the author proves the necessity of legislative regulation of chance (casus) in domestic criminal law, on the basis of which it is proposed to include Article 25-1 "Chance (casus)" in the Criminal Code of Ukraine.

KEYWORDS

Casus (chance), faultless causing of harm, criminal negligence, perpetrator, foresight of socially dangerous consequences

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Introduction

One of the essential component elements of a crime on the criminal law theory is a mental element of crime. Like other component elements of a crime, the mental element of crime has its own characteristics (mandatory and non-binding). Guilt is the main indicator of mental element of crime. According to Article 23 of the Criminal Code of Ukraine, the guilt is a mental attitude of a person to committed act or omission as provided for by the Criminal Code, and its consequences, expressed in the form of intent or carelessness (Criminal Code of Ukraine, 2016).

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However, apart from characteristics of mental element of crime established by the legislation in the form of intent or carelessness, there is also such a thing as faultless causing of harm, which is called "chance" or "casus" in literature. This concept should be distinguished from criminal negligence.

The issues of faultless causing of harm emerge full blown in the context of determination of acts that resulted in serious consequences (for example grievous bodily harm), which have been committed without intent, under the influence of certain insurmountable factors or difficult circumstances. The issues related to the establishment of the content of the chance (casus) are primarily due to the fact that this concept and its attributes are not defined at the level of the criminal law. Enough attention was not paid to comparative analysis of the definition of chance (casus) from a position of comparison of relevant rules of the foreign law and the development of specific suggestion on improving the domestic legislation in terms of the definition and characteristics of faultless causing of harm. Although, according to scientists, comparative legal researches are an important aspect of the criminal legal science (Pogribnyi, 2015; Adamjan, 2014; Veresha, 2002). According to A. V. Landina, comparative legal aspects of criminal legal studies can be the basis for making suggestions on the improvement of national legislation (Landina, 2014).

Modern conditions of development of criminal legal science are characterized by the fact that more attention is paid to the person of an offender and subjective factors that influence a commission of a crime. It makes the issue of definition of all the mental element of crime particularly topical. The problem of ascertainment of guilt in the context of crime determination, as well as the determination of those acts, which have resulted in faultless causing of harm are of heightened interest.

Thus, considering the abovementioned, we can conclude that the chosen topic of the research is promising and has great scientific-theoretical and practical significance for domestic criminal legal science and for the development of criminal legal theory in the world.

It should be noted that issues related to the definition of the chance (casus) in criminal law was not studied enough. A number of researchers have concerned a matter in their works studying the question of mental elements of crime or offense as a whole (Pogribnyi, 2015; Adamjan, 2014; Veresha, 2002). Generally, among the works devoted to this problem it seems appropriate to name those studies that solely determine the chance (casus) in criminal law, and general legal works, including the works of foreign scientists.

The work of S. I. Nezhurbida (2001) should be revisited among domestic researches. In his thesis work "Criminal negligence: concept, mechanism and countermeasures" he studied the problem of differentiation of various types of negligence as a form of guilt, as well as the problem of separating the faultless causing of harm from criminal negligence.

Works devoted to the definition of casus are primarily related to performance of professional duties (Rarog, 2003; Dagel, 2009; Valieva, Orazbaieva & Shaiheslyamova, 2016) or certain aspects of negligence.

The concept of chance (*casus*) was not directly investigated in foreign countries. There are works concerned general concepts of perpetrator and his mental attitude to committed socially dangerous act (Badar, 2013; Jefferson, 2013; Kiely, 2001). Most of researches of these authors do not define the concept of faultless causing of harm, but describe some of its characteristics (Samaha, 2014; Baker, 2011).

It should be noted that a significant part of this work is devoted to an analysis of the criminal legislation of a number of foreign countries in terms of legislative definition of faultless causing of harm. Relevant legal rules of about seventy foreign criminal codes have been investigated.

Aim of the Study

The purpose of this study is to determine the concept of chance (*casus*) in criminal law and to establish its features.

Research questions

How does the chance (*casus*) differ from criminal offenses?

Method

Methodology of criminal legal research includes some methods of developing certain conclusions, suggestions and recommendations. Conducting research in the sphere of criminal law, the methods of different levels are used. In particular, the study of determining the chance (*casus*) in criminal law included such general scientific and special methods:

- dialectical (dialectic materialism) method was used to cognize faultless causing of harm in the context of integrity and simultaneous difference of its characteristics and characteristics of negligence;
- method of system-structural analysis was used in the defining of the chance (*casus*) in criminal legal science;
- method of legal analysis was used in determining the characteristics of chance (*casus*), and their features in criminal legal science;
- historical method was used in the study of development of scientific views on the definition of chance (*casus*) in criminal legal science;
- comparative method was used for the analysis of the legislative definition of faultless causing of harm in the criminal law of foreign countries;
- generalization method was used to summarize studied material and output the most accurate definition of the chance (*casus*) in criminal law, as well determining it on the level of domestic criminal law;
- other methods.

Scientific methods were used interdependently, that contributed to the comprehensiveness and objectivity of the study, the validity of the theoretical conclusions and practical recommendations.

Chosen methodology was determined by an object of study, which is the criminal legal aspect of the concept of chance (*casus*) analysis.



Data, Analysis, and Results

The scientific novelty of the work lies in the fact that we gave a definition of the concept of the chance (*casus*) in criminal law, determined its specific features, and proposed draft amendments to the criminal law on normative consolidation of the concept.

Before moving on to direct investigation of paper's problematics, we think that it is necessary to note a significant disadvantage of domestic criminal law – the absence of regulatory definition of *casus* and its features. Moreover, this issue is hardly covered, besides those already mentioned lack of definition and features of chance (*casus*) in criminal law, even at the level of the general criminal legal investigations (books or individual papers devoted to issues of component elements of a crime).

Primarily, the importance of chance (*casus*) features selection in criminal law should be noted. In this regard, we share the opinion of S. I. Nezhurbida (2001), who indicates that the chance (case) verges on criminal negligence. Therefore, there are problems with the determination of an offense in practice, if there is faultless causing of harm.

In general, the concept of *casus* or chance is seen not only in criminal legal science, but also from the standpoint of common terms of unscientific and special purpose. This is evidenced by the fact that the term is interpreted in some dictionaries. In particular, encyclopedic dictionary states, "chance in criminal law is such a set of circumstances when a person was not aware and could not understand the qualities of accomplishes action, or did not and could not foresee its consequences" (Nezhurbida, 2001). Dahl's Explanatory Dictionary determines the chance (*casus*) in following way: used to express the concepts of randomness, unpredictability, surprise, involuntariness, etc. (Dahl, 1882). Other specialized publications also help to define the concept of chance (*casus*). Thus, chance (*casus*) is determined by the criminal law as a set of circumstances when harmful effects occur without the fault of the person (Criminal Code of Ukraine, 2016).

Although these definitions cannot be attributed solely to the criminal law, they define the essence of the phenomenon. Nevertheless, it should be noted that they do not bear the full nature of the chance (*casus*) as a criminal-legal phenomenon. S. I. Nezhurbida (2001) notes about the concept of chance in Law Dictionary, "this definition provokes objections on the basis that it is equally acceptable for other circumstances, which also can exclude criminal responsibility". We believe that the same can be said for other definitions given above.

The concept of chance (*casus*) in criminal law is determined in the same way. There is a widely believed thought in domestic criminal legal science that the reasons, due to which the responsible person is not aware of the dangers of his /her behavior and does not envisage its consequences, do not have criminal legal effect (Adamjan, 2014; Veresha, 2002). O. I. Rarog (2003) said, "The absence of inability to foresee the consequences preclude criminal guilt, regardless of the reasons for which a person could not foresee the consequences".

This thought, apparently, is not the only one in the criminal legal science. P. S. Dagele notes that in some cases, carrying out an activity that requires special knowledge, the subject brings socially dangerous consequences, the occurrence of which he could not foresee; there are grounds for criminal legal blame, because subject's mental attitude to his actions does not fit the casus and acquires the features of a particular type of negligence, which he calls ignorance (Dagele, 2009).

In general, the science of criminal law considers the chance as a special form of mental attitude of a person to his/her actions and their consequences (Nezhurbida, 2001). This definition, in our opinion, only determines the general nature of the chance, but does not specify its distinctive features in terms of criminal law.

Other well-known criminal law experts give more nuanced definitions; chance is the attitude of a person to his/her actions and their consequences, in which he/she did not have to, but was obliged to, but could not have foreseen unlawful consequences of own actions (Adamjan, 2014).

However, N. F. Kuznetsova and I. M. Tyazhkova (2002) notes that "chance (casus) in contrast to the guilt should not be considered as mental attitude of a person to committed act (it does not exist), but as a special mental state of the person, who acted (or did not acted) in the appropriate situation that excludes social danger". Continuing her thought, N. F. Kuznetsova and I. M. Tyazhkova (2002) make provisions that if there were a mental attitude of a person to his/her acts and consequences of committed it would be qualified as criminal negligence that entails criminal liability. In fact, the chance is not characterized by a particular form of mental attitude of person to the consequences of actions, but by the lack of a certain mental attitude to the consequences of his/her actions (Rarog, 2003).

It is difficult not to agree that the subject cannot foresee the possibility of socially dangerous consequences of his actions, but this action is culpable, and he should have and could have foreseen consequences. If there is no such advance knowledge, then we are talking not about the crime, but about chance, which does not include mental attitude of a person to the consequences of his acts (Nezhurbida, 2001). Taking into account this fact, S. I. Nezhurbida (2001) considers that the chance (casus) is faultless causing of harm, when person's liability is excluded and criminal legal guilt of person is absent. Such a definition is generally correct, but in our opinion, it is abstract and insufficiently specific.

There are most complete and detailed features of the chance (casus):

- 1) theoretical elaboration of issues related to the definition of "chance" is very important because it allows to avoid unfounded bringing to responsibility and contributes a strengthening of law, increases efficiency in ensuring the constitutional rights of citizens;
- 2) in the theory of criminal law, criminologists usually considered the concept of "chance" as a subjective category. It is considered to investigate this issue in close connection with the objective side. If objectively necessary consequences in the subjective aspect can be a "chance" only in the context of certain mandatory conditions, objectively random effects in the subjective



relation would always be the "chance" for persons who have caused harmful effects;

- 3) harmful effects can be recognized as random in the context of existence of a causal link between the person's behavior and the consequences, socially dangerous nature of the effects, the absence of guilt in the behavior (the latter is determined by the fact that the person was not imposed with obligation (function) of anticipation and prevention of harmful effects; if such an obligation took place, there was no practical possibility of preventing the harmful results in particular situation;
- 4) science creates the most favorable conditions for effective offensive activity to prevent and eliminate "random" harmful effects in an interaction of human and technology ("random" events (traumatizing) allows the absence of the event of a crime in the behavior of certain individuals);
- 5) the problem of the "chance" is often seen in the context of a close relationship with the occupational (technical) hazard: court practice and theory of law recognize occupational hazard as a circumstance precluding guilt of the subject, if the hazard was necessary in the interests of production and was aimed at preventing the inevitable grave consequences even at cost of harm, but, of course, less than withdrawn damage. However, there are situations when a normal occupational hazard is complemented by "accident", which cannot be predicted and warned - this kind of socially dangerous consequences associated with injuries, should be considered as a "chance";
- 6) such socially dangerous consequences when the person should have been and could foresee the social danger of his/her actions in normal situation, but in specific situation, because of the special mental or physical condition, almost was not able to do it, should be also considered as a "chance" (Nezhurbida, 2001).

In our opinion, the difference of chance from criminal negligence in the form of criminal presumption and carelessness, and ignorance is shown in the table proposed by M. V. Miroshnychenko (2013) (Table 1).

Table 1. Criminal ignorance, negligence, casus

	Awareness of the social danger of an act	Foresight of socially dangerous consequences	Duty to foresee the consequences	Ability to foresee the consequences
Presumption	Yes	Yes	Yes	Yes
Carelessness	No	No	Yes	Yes
Ignorance	Yes	No	Yes	No
Casus	No	No	No	No

Source: (Miroshnychenko, 2013).

We have repeatedly pointed out that there is no rule in domestic criminal law that defines the concept and features of faultless causing of harm (chance or casus). In turn, analysis of criminal laws of some foreign countries indicates that many of them have such a category, as a chance (faultless causing of harm) and it is defined at the level of the criminal law.

In general, it was found in the criminal codes of some countries has not definition of casus, and in some of them, this concept is enshrined in law. For example, in the criminal law of Israel, Argentina, Belgium, Denmark, Norway, the Republic of Bulgaria, the Republic of Korea, Thailand, Turkey, the Federal Republic of Germany, Switzerland, Sweden and Japan does not provide such subjective circumstances of acts that resulted in socially dangerous consequences as faultless causing of harm. We believe that this is not necessarily indicates on the imperfection of the criminal code, even though we could hardly accept the fact that there are no cases of faultless causing of harm in these countries. In addition, many of these criminal codes and the Criminal Code of Austria, the Georgian Criminal Code, the Criminal Code of Spain and others have is the rule, which determines the error (subjective and objective), which has led to a socially dangerous consequences.

As for foreign criminal legislation, which provides the concept and features of the chance (casus), the corresponding rule exists in the criminal codes of countries of the former Soviet Union, in a number of countries in Western Europe, the Far East and Australia. We consider that it is necessary to review these rules in detail. The need to update the legislative regulation of public relations, search for opportunities in order to avoid the mistakes of those states that have successfully passed the appropriate period of development, expansion of Ukraine's international contacts - all this is an indisputable fact of the need to maximize the work in the field of comparative law.

For example, the Criminal Code of Australia has Article 10.1 "Intervening conduct or event". This rule says, "A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if: a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and b) the person could not reasonably be expected to guard against the bringing about of that physical element (Criminal Code Act of Australia, 1995). Interestingly, the chance (faultless causing of harm) is not assigned to the subjective side, but to circumstances that are related to external factors (to a certain type of circumstances that exclude crime).

According to the criminal law of the Netherlands, the rule, which determines the features of the chance (force majeure), refers to Part III «Exclusion and Increase of Criminal Liability". Section 40 notes that "any person who commits an offence under the compulsion of an irresistible force shall not be criminally liable" (Criminal Code of the Netherlands, 2012). In Danish «irresistible force» means «overmatch, force majeure", which also means a chance or casus.

Criminal Code of China also contains a provision that defines the event, and assigns it to the paragraph 1 "Crime and Criminal Liability" section 2 "Crime", where article 16 states that the actions, which objectively led to harmful effects, but were caused by force majeure or failure to foresee them, are not recognized as criminal (The Criminal code of the Republic of China, 1919). By its nature, such cases are faultless causing of harm.



The chance is also defined in the Criminal Code of France. Chapter II "Grounds for Absence or Attenuation of Liability", Article 122-2 says, "a person is not criminally liable who acted under the influence of a force or constraint which he could not resist" (Penal Code of France, 2005). Although this provision does not state that a person shall be criminally responsible for causing specific harm, if the damage was caused as a result of the chance; but, in our opinion, the phrase «under the influence of a force» includes causing harm as a result of casus (chance).

Features of the chance (casus or faultless causing of harm) are secured in legislation of former Soviet Union countries. Thus, according to the criminal law of the Kyrgyz Republic, the norm, which defines such a thing as faultless causing of harm (chance), is provided in Article 25. "An act is deemed to be committed innocently if the person who committed it did not realize, was not supposed to and could not be aware of the social danger of his/her actions (omission) or did not foresee socially dangerous consequences and circumstances and should not have foreseen them" (Criminal Code of the Kyrgyz Republic, 1997). This rule, in contrast to abovementioned international criminal codes, is referred to the subjective side and included in Chapter 5 "Guilt".

The rule, defining the features of faultless causing of harm as a circumstance, which excludes crime, is contained in Chapter 5 "Guilt" of the General Part of the Criminal Code of the Republic of Armenia. According to Article 31 "Faultless causing of harm", an act is deemed to be committed innocently if the person was not aware of and could not realize the social danger of his/her actions (omission) or did not foresee socially dangerous consequences, and could not and should not have foreseen them (chapter 1) (*Republic of Armenia Criminal Code*, 2003). In contrast to the relevant rules of other international criminal codes, Article 31 of the Criminal Code of the Republic of Armenia includes also chapter 2, which states that an act is deemed to be committed innocently even if the person foresaw the possibility of socially dangerous consequences of his/her actions (omission), did not want them to occur, but because of extreme conditions or nervous and mental load could not divert their occurrence.

The norm of the Criminal Code of the Republic of Kazakhstan, which secures in legislation faultless causing of harm, is interestingly enough. Article 23 "Faultless causing of harm" defines a number of provisions of faultless causing of harm: the act is deemed to be committed innocently if the action (omission) and socially dangerous consequences were not covered by the person intentionally; criminal liability for such acts and socially dangerous consequences in the context of negligence is not provided by present Code (chapter 1). According to chapter 2, article 23 of the Criminal Code of the Republic of Kazakhstan, "the act is deemed to be committed innocently if the person who committed it did not realize social danger of his/her actions (omission) or did not foresee the possibility of socially dangerous consequences and circumstances and should not have or could not foresee them. An act is considered as committed innocently if the person who provided socially dangerous consequences, relied on their prevention or could not prevent these consequences due to his/her psychophysiological qualities in

extreme conditions or nervous and psychological stress" (Criminal Code of the Republic of Kazakhstan, 1997). We suppose that all these things can be considered as the concept of the chance.

According to the criminal legislation of the Republic of Moldova, an act is deemed to be committed innocently if the person who committed it did not realize the harmful nature of his/her actions or omission, did not foresee the possibility of an adverse effect and, in accordance with the circumstances of the case, should not or could not foresee them (Article 20 "Faultless causing of harm (case of emergency)" (The Criminal Code of the Republic of Moldova, 2002). Thus, it seems that this norm of the Criminal Code of the Republic of Moldova covers the concept of the chance in criminal law, and at the same time does not contain unnecessary circumstances that complicate the identification of casus.

The criminal legislation of the Russian Federation provides an expanded definition of faultless causing of harm. According to Article 28 "Faultless causing of harm" of the Russian Federation Criminal Code, an act is deemed to be committed innocently if the person who committed it did not realize and might not be aware of the social danger of his/her actions (omission) or did not foresee the possibility of socially dangerous consequences and had not or could not foresee them (chapter 1). The act is recognized as committed innocently if the person who committed it foresaw the possibility of socially dangerous consequences of his/her actions (omission), but could not prevent these consequences due to psychophysical qualities in extreme conditions or nervous and mental stress (chapter 2) (Kuznetsova & Tyazhkova, 2002).

It should be said that the provisions of criminal law of post-Soviet countries, secured in legislation the definition of faultless causing of harm, are nearly similar and contain insignificant differences. However, the definition of chance (casus) differs in the criminal law in Europe, the Far East and Australia.

Discussion and Conclusion

Thus, considering the abovementioned, we can say that there is an urgent need to determine the chance (casus) in criminal law of Ukraine. There are no advanced studies on the interpretation of the chance (casus), or as it is commonly called, faultless causing of harm. It concerns not only the domestic criminal legal science, but also foreign science.

Based on the above definitions, we agree with the position of M. V. Miroshnychenko (2013) about features of casus (chance), which differ it from the criminal presumption and negligence. In the context of casus (chance), a person who commits certain acts, is not aware of the social danger of his/her actions, does not foresee its socially dangerous consequences, and he/she does not have to and is not able to predict such effects.

Despite the fact that a small number of studies in criminal legal science are devoted to the study of issues of chance (casus) in criminal law, the views of scientists on the specified features of the concept are significantly different.

It was found that, in addition to the abovementioned features of chance (casus) are as important as objectively random effects, absence of fault, and a



special form of the mental attitude of a person to his/her actions. In addition, it should be noted that the chance (the case) is possible only when a person, who has committed an act that resulted in socially dangerous consequences, has all the characteristics of perpetrator. If the person, who committed the act that caused socially dangerous consequences, cannot be considered as perpetrator due to certain circumstances (for example, being mentally incompetent), such an act cannot be classified as a chance (casus).

Taking into account the abovementioned, as well as definitions which are fixed in foreign criminal codes, we consider that the chance (casus) is faultless causing of harm by a person who has all the features of the perpetrator when committing an act that led to socially dangerous consequences when the person was not aware of and could not recognize socially dangerous consequences of his actions or did not foresee the possibility of socially dangerous consequences and circumstances and should not have or could not foresee them. Such definition of chance (casus) summarizes the carried out research; and it is worded in criminal legal science for the first time.

We suggest including in the Criminal Code of Ukraine the legal rule in which the definition of chance (casus) would be provided:

"Article 21-1. Chance (casus).

1. A chance (casus) is faultless causing of harm by a person who has all the features of the perpetrator when committing an act that led to socially dangerous consequences when the person was not aware of and could not recognize socially dangerous consequences of his actions or did not foresee the possibility of socially dangerous consequences and circumstances and should not have or could not foresee them.

2. The act is deemed to be committed innocently if the person who committed it foresaw the possibility of the dangerous consequences of his/her actions or omission, but could not prevent these consequences because of his/her psychophysiological state in extreme conditions or nervous and mental stress.

3. Faultless causing of harm excludes criminal liability".

Implications and Recommendations

The study has confirmed that the problem of determining the chance (casus) in criminal law is urgent and fundamental studies of this issue are absent. In addition, we suppose that the absence of a legislative definition of the chance (casus) in domestic criminal law is a disadvantage.

Analysis of existing positions for the definition of chance (casus) in the criminal law confirmed our opinion that there is no clear definition of this concept, and those that exist do not provide all the features inherent for faultless causing of harm. For example, none of the proposed definitions does not specify that the chance (casus) would exist only when the person who committed the act that caused the socially dangerous consequences has all the characteristics of the perpetrator. Otherwise, there will be other circumstances stipulated by the Criminal Code of Ukraine, when a person cannot be held liable for caused socially dangerous consequences.

We support the opinion of scientists who believe that the chance (*casus*) is the absence of the mental attitude of a person to his/her actions and socially dangerous consequences, which occurred as a result.

The analysis of foreign criminal legislation has given us an opportunity to reaffirm the need for legislative determination of the chance (*casus*) in the criminal law of Ukraine. The correctness of such a position is brought by the presence of the relevant standards that reinforce the definition of chance (faultless causing of harm) in criminal codes of Australia, Spain, the Netherlands, France, and the majority of post-Soviet countries.

Considering proposed definition of chance (*casus*) in criminal law, and the need to secure the criminal legal rule that define chance (*casus*), we propose to supplement the Criminal Code of Ukraine with Article 25-1 "Chance (*casus*)".

Disclosure statement

No potential conflict of interest was reported by the authors.

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