THE FEATURES OF INTERPRETATION AND ENFORCEMENT OF LEGAL NORMS CONTAINING EVALUATIVE NOTIONS AND CATEGORIES


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Abstract. Estimated concepts are the typical signs of certain law significant phenomena of a concept of the law which are in details not regulated by the legislator and generalizing in themselves which specification is carried out by assessment within a specific law-enforcement situation. As a result - estimated concepts are indistinct by the logical nature, have no rather clear content, and serve only as a form of typification of any significant signs or circumstances. At the same time, their application is inevitable in the legislation, but conceals in itself a number of dangers and complicates interpretation of the law.

Estimated concepts and categories are used by the legislator at impossibility of detailed settlement of a number of similar circumstances, and also serve for designating the abstract legal phenomena which maintenance has not closed structure. Always remaining opened, it can be established only by means of independent assessment of a specific law-enforcement situation from the person applying the law. Explanation of maintenance of an estimated concept is reached by establishment of its standard. To find the standard, a sample, a standard of an estimated concept - business the difficult, demanding skills interpretation and interpretations of the law from the law enforcement official as this sample directly is not enshrined in the law, and contains in ethical standards, moral values, and sense of justice of people. The specification of estimated categories in legal proceedings is directly connected with a judicial discretion.

Keywords: Estimated concepts and categories, interpretation of the law, legislation, corruption factors.

1. INTRODUCTION

In the Russian legal literature are used as close following designs: "an estimated concept", "estimated category", "the estimated term", "an estimated sign", "the estimated instruction". In foreign sources in similar cases use the following terms: "open-ended concept", "blanket concept", "general clause", "blanket formula" [ex., 1,2,3,4,5,6].

Gave to one of the first in science definition of estimated concepts Y.M. Braynin (Braynin, 1967), specifying that it concepts, "not concretized by the legislator and specified at application of the criminal law".

So, it is possible to give as examples of estimated concepts: "abuse of the law", "damaging evidence", "good reason", "moral harm", "necessary defense", "emergency", "insignificance", "difficult circumstances", "a usual way", "essential harm", "obviously disproportionate consequences", "resistant disability", "disrespect for court", "a false denunciation" etc.

T. V. Kashanina (Kashanina, 1974) offered the little the following formulation of an estimated concept later: "The provision (instruction) expressed normal the rights in which the most general signs, properties, qualities, communications and the relations of various objects, the phenomena, actions, processes are enshrined in details not explained by the legislator it was concretized by assessment in the course of use of the law and allowed to carry out an individual substandard regulation of the public relations within the community recorded in it".

Also the fact that estimated concepts were known already in the Roman law is represented interesting, so Laws XII of tables use the term "thriftless citizen", Digesta Justinian know such designs as "evil intention", "the sufficient bases", "obvious deception", "obvious negligence", "favorable result", etc.

As A. A. Malinovsky (Malinovsky, 2001) truly notes estimated categories it not that other as "generalization of the phenomena and processes of legal reality which are fixed in the legislation by means of the indication only of the most general signs of the phenomenon or process".

M. F. Lukyanenko (Lukyanenko, 2010) writes that "precepts of law with estimated concepts, possessing subjectively variability, dependence on specific situations, "are as if completed" by the persons applying them in relation to some specific situation. This results from the fact that precepts of law with estimated concepts can realize situational values and shades, acquiring a certain contents only in a specific situation". From here the following feature of estimated concepts follows: the last are a striking example of manifestation of disposition in the law.

Exactly thanks to the fact that estimated concepts are indistinct by the logical nature they allow to capture an extensive circle of circumstances of reality which the legislator is, as a rule, not able to define precisely applicable to all cases of action of precept of law.

Meanwhile, the positive effect of uncertainty of precepts of law is noticed long ago. So, in 1949 E. Levi wrote: "The categories applied in legal process have to be not clear, ambiguous for providing injection of the new ideas to an opportunity in judicial proceedings. And it is really necessary even in case of an ambiguity, uncertainty of rules of law. The terminology applied by the legislator has to be capable to gain new values … In such a way laws will express the ideas of society even then when they are written in a general sense, and, therefore, will be applicable in the course of consideration of specific affairs" (Levi, 1949).

2. METHODS

The methodological base of a research is made by set of methods of scientific knowledge among which the leading place is taken by a dialectic method. In article also common scientific legal methods are used general (dialectics and metaphysics), general scientific (the analysis and synthesis, system and structural) (legal, comparative and legal, hermeneutical, etc.).

3. RESULTS

As Y. M. Braynin emphasizes, "inclusion in dispositions of criminal laws of estimated signs is in most cases inevitable and it is necessary". The similar idea was introduced by V. N. Kudryavtsev
(Kudryavtsev, 1963): "Existence of estimated concepts of the law is inevitable". However use of estimated concepts is a compulsory measure, as S. I. Vilnyansky notes, the estimated concepts "give to rules of law elastic character". "Fluidity, variability of concepts," - P. V. Kopnin (Kopnin, 1969) writes, - is reflection of variability and a versatility of a material world". Dynamics of development is peculiar both to the public relations, and the rules of law governing and ordering these relations.

So, M. I. marks out Bara (To bar, 1970): "The estimated concept as if completely does not finish law creation process. The legislator presents completion of this process to law-enforcement practice".

It is necessary to notice also the fact that the rules of law containing estimated categories in science of criminal law (by the way, are most in details investigated by the representative of this sphere of law and definition of an estimated concept was for the first time formulated). At the same time, estimated concepts exist also in civil law as a striking example of disposition and self-control in the law. Estimated concepts of private law exist as a part of initial norms - norms principles ("justice", "rationality", "conscientiousness", "importance"), and all-regulatory norms ("the reasonable term", "inseparable improvements", "apparent defects", "due care", "obvious benefit", etc.).

Rules of law with estimated concepts have certain advantages. So, they allow considering dynamics of change of the public relations, give flexibility to legal regulation and open ample opportunities for individual and legal regulation of the civil relations.

At the same time, estimated concepts have no rather clear content and do not give exhaustive signs of this or that phenomenon or a subject, and serve only as a form of typification of any signs or circumstances. In other words, the law as the regulator of the public relations needs stability of definitions, a certain legal framework, standard rigidity. "Fluidity" of legal concepts, their excessive flexibility and mobility definitely undermines authority of the law.

So, S. S. Alekseev (Alekseev, 1999) pays attention that the estimated concepts "are focused on that judicial authorities specifically, taking into account features of this or that situation, estimated the actual situation and concretized the general formula of the law". Such assessment is made by court on the basis of the judicial discretion which is present at interpretation of precepts of law with estimated concepts. Concretizing "the general formula of the law" and carrying out the specified assessment, the law enforcement official attaches legal significance to the facts of the case included by it in the volume of an estimated concept turns them into the legal facts attracting certain legal consequences (Opalev, 2008).

Exactly thanks to the fact that estimated concepts are indistinct by the logical nature they allow to capture an extensive circle of circumstances of reality which the legislator is, as a rule, not able to outline precisely (to define) applicable to all cases of action of precept of law. The accounting of these circumstances within individual substandard regulation of the public relations is often simply necessary for successful realization of the purposes of action of precepts of law.

Here we should remember P. I. Lyublinsky (Lublin, 2004) statement that "definitions should not pass into so-called rubber resolutions which can be stretched in any direction".

Meanwhile, unjustified and excessive inclusion of estimated concepts in regulations complicates interpretation and process of law enforcement and by that conceals danger of manifestation of subjectivity.

So, N. A. Lopashenko (Lopashenko, 2009) writes: "The legislator "scattered" estimated signs everywhere where it is only possible, and is frequent - where, in my opinion, it is impossible. The speech, of course, about the estimated signs influencing criminalization such, for example, as "significant damage" … Their various interpretation leads to the fact that a frame (border) of criminalization are mobile and are narrowed or, on the contrary, extend. Therefore application of such terms in the criminal law is inadmissible. It contradicts the principle of legality as borders criminal really are established not by the law, and the specific law enforcement official".

Having certain similar lines with gaps, estimated concepts differ from the last in the fact that are means of a conscious assumption from the legislator to work to the law enforcement official
taking into account features of conditions, the place and time. Also process of application of estimated concepts is other than completion of gaps in the law.

So, according to the p. 2 of Art. 1 of the Federal law "About Anti-corruption Examination of Regulations and Drafts of Regulations" of July 17, 2009 corruption factors the provisions of regulations (drafts of regulations) setting for the law enforcement official unreasonably wide limits of a discretion or a possibility of unreasonable application of exceptions of the general rules, and also the provisions containing uncertain, exigant and/or burdensome requirements to citizens and the organizations and by that the creating conditions for corruption manifestation admit to No. 172-FZ.

In the Technique of conducting the anti-corruption examination of regulations and drafts of regulations, prov. No. 96 the corruption factors called in the law are defined by the resolution of the Government of the Russian Federation of February 26, 2010 by the closed lists of specific factors.

Namely, the corruption factors setting unreasonably wide limits of a discretion or a possibility of unreasonable application of exceptions of the general rules for the law enforcement official are:

a) width of discretion - absence or uncertainty of terms, conditions or bases of decision-making, existence of the duplicating powers of public authorities or local governments (their officials);

b) definition of competence on a formula "have the law" - dispositive establishment of a possibility of commission by public authorities or local governments (their officials) of actions concerning citizens and the organizations;

c) selective change of volume of the rights - a possibility of unreasonable establishment of exceptions of the general order for citizens and the organizations for a discretion of public authorities or local governments (their officials);

d) excessive freedom of subordinate rule-making - the existence of blanket and referential norms leading to adoption of the bylaws interfering in competence of the public authority or local government which adopted the initial regulatory legal act;

e) adoption of the regulatory legal act outside competence - violation of competence of public authorities or local governments (their officials) at adoption of regulations;

f) filling of legislative gaps by means of bylaws for lack of legislative delegation of appropriate authority - establishment of obligatory rules of conduct in the bylaw in the conditions of lack of the law;

g) absence or incompleteness of administrative procedures - lack of an order of commission by public authorities or local governments (their officials) of certain actions or one of elements of such order;

h) refusal of competitive (auction) procedures - fixing of an administrative order of providing the law (benefit).

The corruption factors containing uncertain, exigent and/or burdensome requirements to citizens and the organizations are:

a) existence of the overestimated requirements to the person imposed for realization belonging to it is law, - establishment of uncertain, exigent and burdensome requirements to citizens and the organizations;

b) abuse of the law of the applicant of public authorities or local governments (their officials) - lack of an accurate regulation of the rights of citizens and the organizations;

c) law-linguistic uncertainty - the use of not settled, ambiguous terms and categories of estimated character.

4. CONCLUSIONS

Using estimated concepts, the legislator provides to the law enforcement official freedom in their interpretation by filling by a certain contents depending on specific circumstances. It is possible to tell that precepts of law with estimated concepts, possessing subjectively variations, dependence on specific situations, "are as if completed" by the persons applying them relatively to some specific situation.

Use of norms with estimated concepts is in some way similar to a situation of overcoming gaps in the law. But it is only at first sight. V. V. Lazarev paid attention to need of gaps limitation of the law from cases when the legislator authorizes the law
enforcement official on the solution of business on own discretion. Formulating norm with estimated signs, the legislator thereby wishes to subject to its influence a certain group of the public relations, but owing to variety of suitable cases cannot give them the exact description. Under such circumstances a certain circle of the public relations in principle is in the sphere of legal regulation; however there is a need of the choice of one of possible ways of her understanding. Precept of law is present, its borders are defined, and the task of the law enforcement official consists in independent refraction of the existing norm to specific vital circumstances (Lukyanenko, 2010).

T. V. Kashanina notes the interesting fact that estimated concepts are entered into the legislation not by terms, i.e. words and phrases which are characterized by commonality of the use, and by means of the words borrowed from household language where they have a set of values. Still A. S. Pigolkin (Normography, 2007) paid attention to this circumstance, specifying the following: "not the place in the legislative text to fashionable slangy words. Hardly pertinently, for example, use in Art. 174 of the Criminal code of such slangy expression, as "money-laundering".

Rather fully the question of interpretation of the rules of law containing estimated concepts was opened in dissertation work as T. V. Kashanina (Kashanin, 1974). Tatyana Vasilyevna distinguished the following characteristics from features of such interpretation:

1. estimated concepts owing to the specifics do not fall under action of a statistical tendency of interpretation.

2. interpretation of estimated concepts is carried out in the functional way.

3. one of features of interpretation of estimated concepts is their communication with assessment.

4. at interpretation of estimated concepts of process of use of the law the role of doctrinal interpretation is big.

5. for interpretation of estimated concepts jurisprudence has a certain value.

6. interpretation of estimated concepts can be made in two ways: through an illustration (phenomenon) and by means of the characteristic.

Interpretation of estimated concepts through an illustration represents a way of an explanation of estimated concepts by the instruction on the specific facts and the phenomena covered by this concept. Interpretation through an illustration assumes accumulation of some experience in use of norms with estimated concepts and pursues the aim to visually explain sense of estimated concepts. Interpretation by means of the characteristic is an explanation of estimated concepts by the instruction only on some essential signs of objects and the phenomena, in it generalized and important for the law. This way of interpretation is used at interpretation of those estimated concepts in which application already considerable experience allowing making the known generalizations, to open though not all, but their separate internal communications is accumulated. Interpretation of estimated concepts by means of the characteristic is insufficient in many cases. It, as a rule, has to be supplemented with interpretation through an illustration.

So, for example, the legislator the special Federal law of 8.12.2003 No. 162-FZ made a number of the additions concerning interpretation (interpretation) of the estimated signs which are contained in the Criminal code of the Russian Federation.

At the same time, as fairly writes T. A. Vasilyev (Vasilyeva, 2012): "If strictly to adhere to requirements of the legal equipment, then in notes only instructions of auxiliary character can be located, it does not make sense to place which in the main text of article. During the Soviet period the rule that notes are allowed to regulations only in exceptional cases when the corresponding instruction cannot be stated without prejudice to sense in article (point) was formulated.

In spite of the fact that now the tendency of reduction of number of notes in laws is traced, they, nevertheless, meet. For example, a significant amount of notes in the Criminal code of the Russian Federation (the Art. of Art. 117, 122, 126, 141.1, 151, 171.1, 174) … At the same time, such form of supply of standard material makes an impression that the note contains less significant provisions, than those that are enshrined in the main text of article".
Moreover, some authors (Rakhmanina, 2005) consider that, unlike acts of the current law-making, notes should not be provided in the codified acts at all.

Nevertheless, for optimum fixing of an estimated concept it is normal of the law it is necessary to pay attention, first of all to the existing practice of interpretation of this concept branch jurisprudence, and also other sciences (political science, history, philosophy, etc.) that will promote the correct and uniform understanding, so and application of this estimated concept.

A. F. Cherdantsev speaking about specifics of interpretation of estimated concepts notes that the maintenance of such concepts changes together with changes of a socio-political and economic situation. In other words, it is about dynamic interpretation which can cardinaly change the direction depending on a political environment or economic features of development of society. Moreover, dynamic approach in the limit option allows creation during interpretation of new precepts of law.

5. CONCLUSION

Thus, we come to a conclusion that use of estimated concepts and categories in the modern Russian legislation is inevitable and it is even necessary, however the rules of law containing estimated signs have both strong, and weaknesses. And it is caused in turn by the legal nature of estimated categories. Really, estimated categories have no rather clear and accurate content, and only generalize typical signs of the phenomena with that calculation that the law enforcement official details them independently in borders of specific legal relationship. Having certain lines of similarity to imaginary gaps, estimated concepts differ from them in the fact that estimated concepts are special means of the legal equipment by means of which the legislator consciously allocates the law enforcement official with an opportunity to work initiative, taking into account certain conditions (places, time, term, etc.).

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REFERENCES


