G.R. Kret

Candidate of Law,
Associate Professor of the Department
of Humanitarian and Socio-economic
Disciplines of the Ivano-Frankivsk
Faculty of the National University
«Odesa Law Academy»

LEGISLATIVE DETERMINING OF REABILITATING GROUNDS FOR CLOSING THE CRIMINAL CASE: PROBLEMS OF THEORY AND PRACTICE OF APPLICATION

The necessity of construction of the democratic, social, legal state, in which a man, his life, health, honour and dignity, inviolability and safety, are acknowledged to be the greatest social value, is proclaimed in the Constitution of Ukraine. Rights and freedoms of man and their guarantees determine maintenance and orientation of activity of the state which is responsible for the man for the actions of the organs and public persons (articles 1, 3). Going out from this fundamental principle of civil society and legal state, the Constitution of Ukraine foresees creations of reliable guarantees of defence of rights and freedoms of man, and also their renewals in the cases of illegal limitation in the sphere of the criminal legal proceeding. Meanwhile, the current the criminal-procedural legislation of Ukraine does not answer the mentioned constitutional position, the evidence of which are numerous facts of groundless criminal pursuit of citizens. From here is an urgent requirement if developing theoretical positions of the principle of responsibility of a person before the state in a criminal process, the most ponderable constituent of which is a clear legislative decision of reabilitating grounds for closing the criminal case.

In a current the criminal-procedural legislation rehabilitating grounds select such for closing the criminal case: for lack of event of crime (p. of 1 p. 1 article 6 of CPC of Ukraine); after absence of crime in the act (p. of 2 p. 1 article 6 of CPC of Ukraine); at a failure to prove of participation of defendant in the commission of crime (p. of 2 article 213 of CPC of Ukraine). It is worth noticing that these grounds are certain a similar rank in the project of CPC of Ukraine from April, 9, 2012. Thus, in an article 284 it is foreseen that criminal realization is closed, in time if: 1) absence of event of criminal offence is set; 2) absence is set in the act of composition of criminal offence; 3) sufficient evidences are not set for leading to guiltiness of a person in a court and possibilities are outspent to get them [1]. At the same time, today in scientific literature, discussions are conducted concerning formulation and maintenance of reabiliting grounds, that, taking into account absence of changes in relation to their exposition in the project of CPC of Ukraine (as compared to operating CPC of Ukraine) is the purpose of our research.

Absence of event of crime as the foundation for closing the criminal case in practice doesn't often happen. However, both in practice and in scientific literature, there are discussions conducted in relation to that, what exactly cases it follows to close the case in for lack of event of crime? Thus, P.M. Davidov and D.Y. Mirsky consider the absence of the event of crime as absence in general of the event which

an inquiry was prosecuted in relation to [2, p. 12]. However, as correctly mark N.V. Zhogin and F.N. Fatkullin, it results in narrowing of circle of events in relation to which can be applied foundation is given [3, p. 306]. An event of crime is the separate phenomenon which took place in a certain place and time and has foreseen the penal law of sign [4, p. 72]. In relation to an event, as a philosophical category – it summarizing a concept, which engulfs all events, including the event of crime. Thus, an event and event of crime are correlated as general and separate.

Most authors [3, p. 306-307; 5, p. 11-12] adhere to the idea, that case is closed the for lack of event of crime in such cases: 1) an event which a criminal case is started in connection with, did not take a place in general; 2) an event took a place, but is not the event of crime, because was the result of action of victim of person. In this connection it follows to underline that M.M. Gapanovich by mistake examines as absence of crime in the act cases of suicide, accidents which happened as a result of careless actions of a victim, and also death, from a natural calamity [6, p. 25-26]. In these situations there were not acts of any extraneous persons which would be examined as a crime, that is why under these circumstances it follows to close the criminal cases for lack of event of crime; 3) an event took a place, but is not the event of crime, because it was not the result of man's action. For example, establishing the fact of damage of property or the fact of the fire which were the consequences of thundersdorm, results in closing the criminal case after p. of 1 p. 1 article 6 of CPC of Ukraine; 4) if it is not set exactly, whether the event of crime took a place. In particular, G.I. Changuli specified: «if it is not proved, that a crime took a place indeed, the case is to be closed for the lack of the event of crime» [7, p. 58-59].

As to the last case, some authors consider that if it is not set, whether the event of crime took place, the criminal case must be closed after a failure to prove participation of defendant in the committing a crime [3, p. 335-336]. Thus, A.Y. Dubinskiy marked that unestablishing the event of the crime (in the cases of bribery, raping), swims out from a failure to prove the fact of committing a crime by a concrete person. A criminal case is to be closed after reasons of failure to prove participation of a defendant in the committing a crime, because all motion of investigation results in a conclusion that the committing on crime is not set by a concrete person, but not the event of crime in general. Closing the case in a situation after reasons of absence of event of crime would be wrong also and that is why, that it would put, possibly, conscientious declarant in position of person which did untruthful denunciation [5, p. 15].

Such position of research worker causes doubts, as a failure to prove the participation of defendant in the committing of crime can be used as foundation for closing the criminal case only at well-proved of fact of commission of crime. In addition, position that closing the criminal case in default of event of crime can put a conscientious declarant in position of person which did untruthful denunciation, also is grounded not enough: because of that law consequences of closing the criminal case after grounds foreseen p. of 1 p. 1 article 6 of CPC of Ukraine and p. 2 article 213 of CPC of Ukraine, identical – a person is fully rehabilitated, a declarant in any of these cases can be expecting a child person which did untruthful denunciation.

W.Y. Chekanov considers that closing the criminal case in the case of unestablishing of the event of crime is in general impermissible, as it will not decide the question of crime detection. Investigation of such business must be shut-down in

connection with unestablishment of person which committed a crime [8, p. 80-82]. However, the position of the author seems erroneous as in such case it is impossible to talk about unestablishment of person which committed a crime, as it is not set fact of commission of crime. Therefore it can decide the question of crime detection only in that case, when for certain the feasance of such act is set by a certain person.

Against closing the criminal case for lack of event of crime in the cases when the presence of such event is not set, is V.D. Arsen'ev, specifying that investigation must proceed until this event will not be exactly set or its absence is exactly set [5, p. 14]. However, here it costs to consent with opinion of Ya.O. Motovilovker, which considered that if the event of crime is not set and all of possibilities are here outspent for the assembly of additional proofs, unique correct in the stage of previous investigation will be a decision about closing the criminal case, but on the stage of judicial trial – passing the verdict of not guilty [9, p. 89-90]

There is an idea in judicial literature, that for lack of event of crime it follows to close the cases in which non-participation of person is set to the commission of crime [6, p. 227]. Such position also it is not enough grounded as it is impossible to draw a conclusion about absence of event of crime in general, coming from that the event of crime absents in the actions of this person, as a criminal act however little place (could take a place), though as a result of actions of other person.

Thus, for lack of event of crime it follows to close the criminal case in the cases when: the event of crime did not take place in general; exactly it is not set or the event of crime took a place; an event took a place, however is the event of crime as was the result of action of victim of person, or was not the result of action of man.

The second foundation which gives a right on the rehabilitation of person is foreseen p. of 2 p. 1 article 6 of CPC of Ukraine is absence of crime in the act. In science of criminal process, cases in which it follows to close the case for lack of corpus delict, classify on different. Yes, F.N. Fatkullin considers that the verdict of not guilty darts out a court after absence of crime in the act in those cases, when in charged to the defendant actions протиправність, public danger and guilt absents [10, p. 397]. I. Libus and G. Reznik the cases of absence of corpus delict divide into two groups depending on a social benefit and social conviction. The first group is cases of feasance publicly of dangerous acts in the state of absolute necessity and necessary defensive, second – all of other [11, p. 9-10]. Widespread enough in science of criminal process is dividing of such cases into three groups: 1) when absents even one of elements of corpus delict; 2) when circumstances, specially foreseen a penal law, are set (for example, a defensive is needed and others like that); 3) when non-participation of person turns out to the commission of crime [4, p. 77]. Last, as one of cases of absence of corpus delict, the row of authors examines yet [2, p. 63; 12, p. 197-198]. However much such position is unacceptable from the followings considering: if a person not participating to the commission of crime, criminal case is closed as to this person, he is rehabilitated, as for a perfect antilaw act, it is present and contains a corpus delict, business only in that the subject of crime is other, a person establishment of which and is the purpose of subsequent investigation is not set so far.

Examining the situations of absence in the actions of face of corpus delict, it follows to go out from the analysis of such concepts, as a crime and corpus delict. CC of Ukraine determines the list of acts which are not acknowledged crimes straight. To

them taken:

1) action or inactivity, which although legalistically and contains the signs of any act, foreseen CC of Ukraine, but through unimportant does not make a public danger (p. 2 article 11 of CC of Ukraine); an act is perfect under circumstances which eliminate his criminality (article of article 36, 38-43 of CC of Ukraine); other types of acts are foreseen CC of Ukraine, in particular p. 2 article 385 of CC of Ukraine and p. 2 article 396 of CC of Ukraine.

In literature it is marked, that criminal cases about unimportant acts are subject closing on the basis of p. 2 article 11 of CC of Ukraine [13, p. 52]. However, closing the criminal case from reason of unimportant shows by itself the special case of application of p. of 2 p. 1 article 6 of CPC of Ukraine, after which realization is eliminated on business because of absence of crime in the act. As correctly marked A.Ya. Dubinskiy, often practical workers mix up unimportant of act with unimportant crimes [5, p. 28]. Suitably enough marks N.F. Kuznetsova, that an unimportant act is not publicly dangerous for public relations, and that is why is not a crime. The concept of unimportant crime is used in a value though less dangerous, and however publicly dangerous and unlawful act [14, p. 17]. A criminal legislation does not give the list of criteria which determine an act unimportant, that is why a conclusion about unimportant of act in every case must be based on the analysis of actual data which characterize a criminal act. Important at the decision of unimportant of act is establishment of maintenance of intention, as unimportant such act harmfulness of which not only objectively can be acknowledged only, it is but also on maintenance been intention insignificant.

Another case of application of absence of corpus delict as foundation for closing the criminal case is touched directly by the concept of «corpus delict», when absents even one of his elements. In the theory of criminal right under a corpus delict understand the aggregate of signs which characterize the proper publicly dangerous act as crime. To them take: object, objective side, subject and subjective side.

In soviet legal literature an idea is shown about the necessity of association of grounds, foreseen p. of p. 1 and 2 p. 1 article 6 of CPC of Ukraine, in one – it «was not quite a crime» [5, p. 53-54]. Later such position was supported by S.M. Blagodir [15, p. 41]. For an argumentation an author specified on the results of the research conducted by him, which testified to the unclear differentiating of the noted grounds the organs of pre-trial investigation, and made an example of practice.

At the same time it follows to mean that «absence of event of crime» that «absence of corpus delict», though near on maintenance grounds, however have different civil legal consequences, on what pays attention L.M. Karneeva [16, p. 53]. Thus, in accordance with a current legislation, if the event of crime is not set, in accepting a civil claim renounces, when an event took a place, but in actions that, it was caused, a corpus delict absents, there are grounds for accepting a claim in order of the civil legal proceeding (p. 2 and 3 article 328 of CPC of Ukraine). Thus, a legislator takes into account different legal essence of these grounds and consequences of their application. Therefore, the resulted position is unacceptable.

In the process of investigation businesses can be set event of crime, and all of his signs, but participating in his feasance of concrete person is not well-proven. Then, in accordance with p. of 2 article 213 of CPC of Ukraine case in relation to this person is closed after a failure to prove participation of defendant in the commission

of crime. In criminal-procedural science round this foundation discussions are conducted, in particular in relation to the limits of its application and legal maintenance.

Row of authors widely enough, in our view, interpret the concept of failure to prove participation of person in the commission of crime. N.V. Zhogin and F.N. Fatkullin consider that foundation is indicated must be used in all of cases, in which impossible is continuation of the legal proceeding, halt or closing of him from other grounds. This foundation unites all of cases of doubts, contradictions, insufficiency of proofs, when it is impossible to do a final conclusion about presence in the actions of concrete face of signs of corpus delict [3, p. 335-337].

In this case it follows to consent from G.I. Changuli, what basic maintenance and essence of this foundation sees in an estimation before the produced prosecution and confession of him erroneous. According to his the opinion, after a failure to prove participation of defendant in the commission of crime, case can be closed only in relation to separate defendants (or groups of defendants), and realization in business on the whole it follows or to prolong, or stop a criminal to the exposure [7, p. 58-60].

In relation to legal maintenance, as early as the last century of interpretation of this foundation caused a discussion in judicial literature, before and today. The row of research workers repeatedly paid a regard to that application of this foundation causes a doubt in relation to the actual unguiltiness of person [17, p. 73-75; 18, p. 85-86]. Thus, M.V. Savitskiy specified that a term is not «well-proven» it is possible to explain on different, in a that number however «well-proven fully». It is possible to draw a conclusion from here, that to a certain extent participating of defendant in the commission of crime is well-proven, but investigation probably was not able fully to lead to his guiltiness, and that is why forced was to close the case [19, p. 48-49]. Closing the criminal case after a failure to prove participation of person in the commission of crime causes certain ideas concerning that a person could commit a crime, sufficient evidences of it are however collected [5, p. 22].

Analysing gnosiological nature of this foundation, the row of authors marks that a failure to prove of participation of defendant is in the commission of crime, represents an objective judicial situation which was folded in criminal case [4, p. 87; 20, p. 9]. As marks M.E. Shumilo, at disposal of court there are both accusatory proofs and those which do not confirm a conclusion about the feasance of crime a concrete person. That the subject of finishing telling is unable to do a synonymous conclusion about guilt of person in the commission of crime, in time to get them additionally there is not possibility. Therefore in this case it follows to talk about a failure to prove of participation of person in the commission of crime. Consequently, it must the real evidential situation answer and formulation of grounds for closing the criminal case [4, p. 87]. However, such formulation of foundation for closing the criminal case in the conditions of reformation of the system of criminal justice is impermissible. Presence of term a «failure» to prove in formulation generates self-contradiction between legal maintenance and linguistic expression of the probed foundation. If absent is given in business, that refute proofs of defendant about his non-participation to the commission of crime, or proofs which confirm involvement of person to the commission of this crime absent, taking into account the requirement of principle of presumption of unguiltiness a judge must do a categorical conclusion

about non-participation of person to the commission of crime. In this case we support an idea fully, that guilt is unproven after the legal meaningfulness and law consequences equated with the well-proven unguiltiness [21, p. 104-106]

In addition, p. 7 article 334 of CPC of Ukraine provides for, that plugging in the sentence of formulations which put under a doubt innocence justified is shut out. The row of decisions which would represent essence of this foundation more precisely was offered in literature: «unguiltiness of defendant», «unestablishment of guilt of defendant», «if it is not set that this person committed a crime», «unestablishment of illegal act to the feasance of which a defendant is laid» [5, p. 54; 17, p. 73-75; 22, p. 101; 23, p. 53]

At the same time, V.G. Stepanov and V.V. Shimanovskiy, analysing these suggestions, marked that authors at formulation of foundation not enough took into account those situations which can arise up in practice, and whatever new formulations were offered in resolut part, an investigator in descriptive part must analyse all of proofs which are in the case, and rotin their insufficiency for a conclusion about the commission of crime by a concrete person [24, p. 14]. Therefore in this case we support position of scientists [25, p. 42] in relation to the legislative decision of foundation for closing the criminal case is «non-participation of person to the commission of crime».

It is worth outlining the cases of application of certain foundation. Here it follows to accede to position of G.I. Changuli, which marked that closing the criminal case it admits from this foundation, if for certain the event of crime is set, a person which case is closed in relation was attracted as a defendant and collectedly not enough proofs which specify on the feasance of this crime a defendant, possibilities of receipt of additional proofs absent or non-participation of defendant is indisputably well-proven to the commission of crime [7, p. 58-60]

Thus, after non-participation of person to the commission of crime, criminal case is closed: 1) when it is set that a crime was perfect, a concrete person is suspected or laid to the commission of this crime, however much subsequent investigation or consideration of business show in a court, that grounds for leading to of feasance of crime this person not sufficiently, but possibilities for the receipt of additional proofs about the commission of crime outspent this person. Reasons which hinder the receipt of additional proofs can be different. The analysis of judicial practice shows that more frequent all such is that before the collected proofs lose the evidential value as a result of waiver of witnesses before these shows or change by them these shows; 2) when it is set for certain, that a crime took a place, however perfect he is other unstated person. In this case case in relation to a defendant is closed (a court decrees the verdict of nonguilty), and in relation to the fact of commission of crime, investigation proceeds in cases, all are used measures are needed for establishment of criminal; 3) when it is set for certain, that a crime took place, however perfect he is other person which is set. In this case case in relation to a defendant is closed (a court decrees the verdict of nonguilty), and in relation to the fact of commission of crime, in quality a defendant other person is attracted.

To summarizing it us, we'll mark that the general and determining for all of the cases outlined in the article closing of criminal cases is complete and unreserved confession of person innocence of the committing a crime. It is therefore important, that the essence of this judicial decision was clear not only to investigation and to

other subjects of criminal-procedural activity but also to public and any ordinary citizen.

Literature:

1. Проект Кримінального процесуального кодексу України внесений на розгляд Президентом України 13 січня 2012 року № 9700 (станом на 9 квітня 2012 року). – [Електронний ресурс]. – Режим доступу: http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_2?id=&pf3516=9700&skl=7.

2. Давыдов П.М. Прекращение уголовных дел в советском уголовном процессе / П.М. Давыдов, Д.Я. Мирский. – М.: Госюриздат, 1963. – 100 с.

3. Жогин Н.В. Предварительное следствие в советском уголовном процессе / Н.В. Жогин, Ф.Н. Фаткуллин. – М.: Юридическая литература, 1965. – 367 с.

4. Шумило М.Є. Реабілітація в кримінальному процесі України / М.Є. Шумило. – Х.: РВФ «АРСІС, ЛТД», 2001. – 318 с.

5. Дубинский А.Я. Основания к прекращению уголовного дела в стадии предварительного расследования / А.Я. Дубинский. – К.: НИиРИО КВШ МВД СССР, 1973. – 124 с.

6. Гапанович Н.Н. Отказ в возбуждении уголовного дела / Н.Н. Гапанович. – Минск: Вышейшая школа, 1967. – 124 с.

7. Чангули Г.И. Недоказанность участия обвиняемого в совершении преступления как процессуальное основание к прекращению уголовного дела в стадии предварительного следствия / Г.И. Чангули // Социалистическая законность. – 1965. – № 3. – С. 58–60.

8. Чеканов В.Я. Гарантии прав и интересов личности в уголовном процессе / В.Я. Чеканов // Развитие прав граждан СССР и усиление их охраны на совремрнном этапе коммунистического строительства. – Саратов, 1962. – С. 80–82.

9. Мотовиловкер О.Я. Основания прекращения уголовного дела по реабилитирующим лицо мотивам / О.Я. Мотовиловкер // Советское государство и право. – 1972. – № 9. – С. 87–94.

10. Фаткуллин Ф.Н. Обвинение и судебный приговор / Ф.Н. Фаткуллин. – Казань: Издательство Казанского университета, 1965. – 531 с.

11. Либус И. Основания оправдания в уголовном процессе / И. Либус, Г. Резник // Советская юстиция. – 1974. – №12. – С. 9–11.

12. Миньковский Г.М. Окончание предварительного расследования и право обвиняемого на защиту / Г.М. Миньковский. – М.: Госюриздат, 1957. – 211 с.

13. Науково-практичний коментар Кримінального кодексу України. – 4-те видання, перероблене та доповнене / [за ред. М.І. Мельника, М.І. Хавронюка]. – К.: Юридична думка, 2007. – 1183 с.

14. Кузнецова Н.Ф. Освобождение от уголовной ответственности с передачей дела в товарищеский суд / Н.Ф. Кузнецова. – Москва: Юридическая литература, 1964. – 95 с.

15. Благодир С.М. Закриття кримінальної справи в досудовому слідстві: навчальний посібник / С.М. Благодир. – Тернопіль, 2001. – 112 с.

16. Карнеева Л. М. Прекращение уголовного дела за отсутствием состава и события преступления / Л.М. Карнеева // Социалистическая законность. – 1970. – № 5. – С. 53–54.

17. Михеенко М.М. Доказывание в советском уголовном судопроизводстве / М.М. Михеєнко. – Киев, 1984. – 132 с.

18. Шимановський В.В. Недоказанность участия лица в совершении преступления / В.В. Шимановський // Правоведение. – 1986. – № 1. – С. 85–86.

19. Савицкий В.М. По поводу уголовно-процессуальных гарантий прав невиновного на реабилитацию / В.М. Савицкий // Советское государство и право. – 1965.– № 9. – С. 47–50.

20. Капліна О.В. Проблеми реабілітації у кримінальному процесі України: автореферат дис. к.ю.н.: спец. 12.00.09. / О.В. Капліна. – Харків, 1998. – 17 с.

21. Строгович М.С. Право обвиняемого на защиту и презумпция невиновности / М.С. Строгович. – М.: Наука, 1984. – 143 с.

22. Ларин А.М. Презумпция невиновности / А.М. Ларин. – Москва, 1981. – 151 с.

23. Лукашевич В.З. Прекращение уголовного дела в стадии предварительного расследования по реабилитирующим основаниям / В.З. Лукашевич // Правоведение. – 1968. – № 4. – С. 50–58.

24. Степанов В.Г. Прекращение уголовного дела в стадии предварительного расследования: Учеб. Пособие / В.Г. Степанов, В.В. Шимановский. – Л.: Б.и., 1979. – 59 с.

25. Скибицкий В.В. Освобождение от уголовной ответственности и отбывания наказания / В.В. Скибицкий. – К.: Наукова думка, 1987. – 181 с.