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УДК 343 (094.4): 343.343.5 (479.24+477)

EVASION FROM MILITARY SERVICE BY DAMAGING PERSONAL HEALTH OR OTHERWISE: GAPS AND CONTRADICTIONS

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The work is devoted to the problems of rules of criminal law, establishing liability for evading military service by damaging their health or otherwise. The study author concludes that in dispositions and sanctions Art. 335 of the Criminal Code, there are certain gaps and contradictions. Hence, in the article the criminal norms and acts as well as

legislatives of the Russian Federation and Ukraine, the U.S.R. criminal code are studied and comparisons were implemented among the aforesaid criminal laws.

In the conclusion part of the article, the author proposed his opinion and arguments in order to eliminate gaps and contradictions existing in dispositions and sanctions of Article 335 of the Criminal Code of the Republic of Azerbaijan

Key words: military service, evading military service, harming their own health, simulation of the disease, forgery.

УКЛОНЕНИЕ ОТ ВОЕННОЙ СЛУЖБЫ ПУТЕМ НАНЕСЕНИЯ ВРЕДА СОБСТВЕННОМУ ЗДОРОВЬЮ ИЛИ ИНЫМ СПОСОБОМ: ПРОБЕЛЫ И ПРОТИВОРЕЧИЯ

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Работа посвящена проблемам нормы уголовного закона, устанавливающей ответственность за уклонение от военной службы путем нанесения вреда собственному здоровью или иным способом. В результате проведенного исследования автор приходит к выводу, что в диспозициях и санкциях статьи 335 Уголовного кодекса Азербайджанской Республики имеются определенные пробелы и противоречия. В целях их устранения предлагается внести соответствующие изменения и дополнения в указанную статью и утвердить ее в новой редакции.

Ключевые слова: военная служба, уклонение от военной службы, нанесение вреда собственному здоровью, симуляция болезни, подлог документов.

УХИЛЕННЯ ВІД ВІЙСЬКОВОЇ СЛУЖБИ ШЛЯХОМ НАНЕСЕННЯ ШКОДИ ВЛАСНОМУ ЗДОРОВ'Ю АБО ІНШИМ СПОСОБОМ: ПРОГАЛИНИ ТА ПРОТИРІЧЧЯ

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Стаття присвячена проблемам, пов'язаним зі статтею 335 Кримінального кодексу Азербайджанської Республіки, яка передбачає відповідальність військовослужбовців за ухилення від військової служби шляхом нанесення шкоди власному здоров'ю або іншим способом. Законодавча норма, що передбачає відповідальність військовослужбовців за ухилення від військової служби шляхом нанесення шкоди власному здоров'ю або іншим способом, має велике практичне значення. Автор аналізує статтю 335 Кримінального кодексу Азербайджанської Республіки на підставі чинного кримінального та військового законодавства, вказує на конкретні недоліки та протиріччя, наявні в диспозиції статті, та обґрунтовує необхідність їх усунення. З метою їх усунення пропонується внести конкретні зміни та доповнення до вказаної статті та затвердити її в новій редакції. У статті автор аналізує УК Азербайджанської Республіки, України та Російської Федерації щодо проблеми ухилення від військової служби шляхом нанесення шкоди власному здоров'ю або іншим способом.

Ключові слова: військова служба, ухилення від військової служби, нанесення шкоди власному здоров'ю, симуляція хвороби, підробка документів.

According part I of Article 76 of the Constitution of the Republic of Azerbaijan, defense of the country is a duty of every citizen. The aforesaid constitutional requirement is implemented by the citizens in the military service in the Armed Forces of the Republic of Azerbaijan, in other troops and military formations of the Azerbaijan Republic in the manner and within the limits set by the norms of the appropriate legislation and military regulations [4].

Citizens recruited for military service in accordance with the Law of Azerbaijan Republic "On Military Duty and Military Service" are required to perform military service in certain military commanders of military units, not to leave the military unit and duty station without the permission of the commander (chief), and at any time to be ready to perform the military duty [2]. Not accidentally, that any form of evasion of duties on military service is regarded as evasion to fulfill the constitutional duty of citizens to defend the motherland.

Evasion of military service causes in a serious public danger as it weakens combat readiness of the formations, the units and the ship. Public danger of evasion of military service also makes a negative impact on other military personnel and especially moral instability, hereby undisciplined soldiers.

More complex military duty in modern conditions has own features. Rapid, accurate and timely implementation of a combat mission even with a small military team or individual soldiers is of great importance. That is why all kinds of evading from military service represent a significant public danger to the public. Since they complicate educational work of commanders and superiors with subordinates, have a negative impact on the weak-willed and undisciplined individual soldiers and the state of discipline among the personnel in general, and indeed, in the end result weakening the embattled military units and formations. In some cases, evasion from military service causes in other crimes (e.g., theft, hooliganism, violation of the rules of guard service, etc.), or co-accompanies with them. Implementation of a decisive struggle with these

offenses is one of the necessary conditions to ensure high combat capability and combat readiness of military units and formations [1, p. 111-112].

Articles 333, 334 and 335 (unauthorized abandonment of a military unit or place of service, desertion, evading military service by damaging personal health or otherwise) of the thirty-fifth chapter of the Criminal Code of the Azerbaijan Republic put forward liability for various types of military service evasions. When systematization of crimes against military service on the direct object, the offenses make up a group called "the crime of evading military service".

In accordance with article 335.1 of the Criminal Code of the Azerbaijan Republic, evasion of the soldier as objection to military service, by causing in any harm to health or simulation for illness, forging documents or other fraud, as well as for conscientious objection to military service is punished to restriction on military service for up to one year or maintenance to disciplinary military unit for a period of up to two years.

Evasion of a serviceman from military service by causing harm to someone's or the simulation of the disease, forgery of documents or other fraud and refusal to perform military service is fundamentally different from the unauthorized abandonment of a military unit or place of service and desertion (articles 333 and 334 of the Criminal Code) as per the nature of the offense and the offense of public danger. At first glance, the perpetrator of the deviation shall be exempt from military service lawfully, based on the decision (orders, instructions) of the official concerned. And in fact, these grounds are falsified, artificially created, obtained by fraud or other illegal means [1, p. 118].

Causing harm to health can be made by ordeal-governmental damage various organs or tissues of the body, worsening or enhancing existing disease. This can be accomplished in various ways, by the use of firearms or knives, cutting or sharps, vehicles, equipment and other mechanisms medication, and other toxic substances. Such damage can be caused directly by the guilty, or at the request of another person. However, the perpetrator of the crime, in all cases is taken into account as the person who is trying to escape from performance of military duties in this way.

Simulation on sickness is false picture of illness or some of its symptoms. By simulating the perpetrator creates belief that he suffers from a disease that prevents the performance of his military duties. The simulation takes place in the case where the military is deliberately trying to create a view of the exacerbation or worsening of existing diseases and thereby to secure the release of the performance of military duties.

The artificial nature of the damage caused to set various evidence, including court-medical expertise that is required to be appointed in cases of causing harm to the health to determine the nature and origin of the damage. In some cases about these require to conduct forensic- psychiatric examination, which must determine whether the simulation is not one of the symptoms of the disease available to the perpetrator (pathological simulation). Upon confirmation of the criminal responsibility for the simulation is excluded [1, p. 118].

In cases of causing harm to the health, they must also obtain the opinion of the military-medical commission of the validity of the guilty person to perform military service.

Forgery of documents expressed that the military fakes the document to the commanders (chiefs) forged by himself or by another person at his request, a document containing false information (such as age, family composition, education, etc.) and on that basis receives time or permanent exemption from military service.

Actions of serviceman, himself to produce a false document and use it, or use a false document, produced at the request of another person, additional qualification under article 320 of the Criminal Code (forgery, manufacture or sale of official documents, state awards, seals, stamps, forms or use of counterfeit documents) don't comply with the composition of the article 335.1. Criminal Code of the Republic of Azerbaijan.

Another deception - a message to the commander (chief) of false information about the facts, events or circumstances that serve as the basis for the release of a soldier from the military service (for example, false information on the availability of higher education for the purpose of early transfer to the reserve, in the direction of a medical examination instead themselves of another person). Like other cases of fraud are considered bribery in order to evade military service. If this is the case of bribery, the liability is incurred for multiple offenses.

Conscientious objection to military service obligation is expressed in oral, written or other form of reluctance to perform the duties of a soldier of military service and is accompanied by a de facto termination of the

execution of these duties. Disclaim of a soldier's objection to military service is possible in the form of an explicit, the actual termination of these obligations without incurring application unwillingness to serve. However, the failure to execute specific instructions of a subordinate commander (chief) can not be regarded as a refusal to perform military duties. In such cases, the responsibility may come under article 328 of the Criminal Code of the Republic of Azerbaijan (failure to order).

Evasion from military service under article 335 of the Criminal Code of the Azerbaijan Republic shall be considered as completed from the moment of the actual termination of some or all of their military duties.

The objective aspect of the crime in question is expressed in the fact that the guilty person through artificial harm the health, disease simulation, use of false documents or other fraud creates a basis for exemption from military service permanently or temporarily. It is also expressed in the form of conscientious objection to military service in oral, written or other form.

On the subjective side of the crime under article 335 of the Criminal Code of the Republic of Azerbaijan committed only by direct intention. The offender is aware that by artificially causing harm to the health, simulates illness, forges documents or other fraud is refusal to perform military service duties evading from military service permanently or temporarily and wants it. If the injury is harm to the health, simulates illness, forges documents or other fraud committed without intent to evade military service objection, such action does not constitute a crime under article 335 of the Criminal Code of the Azerbaijan Republic.

The perpetrator may be privates and sergeants serving on an appeal, as well as those of officers, warrant officers and soldiers re-enlisted for military service, called up for calibration, training and special charges.

Article 335.2. Criminal Code of the Azerbaijan Republic provides for criminal liability for committing the same acts in time of war or a combat situation. And as provided in footnote Art. 328 of the Criminal Code of the Azerbaijan Republic under the "wartime" means a stay of the Azerbaijan Republic in a state of war with a foreign country. The term "combat situation" refers to the direct confrontation of the enemy or the actual conduct of military operations by military unit or military division.

The nature and degree of public danger of the act provided for in Article 335.1. Criminal Code of the Azerbaijan Republic, are crimes not constituting big public danger, and acts punishable under Article 335.2. Criminal Code of the Republic of Azerbaijan less serious.

In our opinion, it is appropriate to draw attention to the gaps and contradictions existing in the disposition of the article commented. Exploring thesis on "Criminal legal issues of offences committed against military service", Aliyev came to the conclusion that "the phrase" evading from military service", which is available in the disposition of the article, gives reason to believe that we are talking about evading from military service by causing the health any harm or by simulation of illness, forgery of documents or other fraud at all. But it remains an open question: what is the responsibility that a soldier carries, avoiding those same methods objection to military service temporarily? It is also unclear that the meaning of the phrase of the final disposition "as well as failure to perform the duties of military service". If such a phrase is directly related to the phrase "evading from military service by causing the health, any injury or illness by simulation, forgery of documents or other fraud", it is concluded that the word "failure" is used in the text inappropriate and does not reflect the essence of offenses since avoidance and denial are the actions of a different nature. If there is no such a connection, it is possible to conclude that the phrase "as well as conscientious objection to military service duty" carries a different meaning and it forms a separate category of crime" [10, p. 31-36].

In our opinion, the author's conclusions are indisputable. Indeed, the disposition of art. 335.1. Criminal Code of the Republic of Azerbaijan is quite difficult and controversial. It is unclear why the legislature has not clearly defined the ultimate goal of a soldier who has committed one of the acts (or more) specified in the disposition of the article: to avoid military service permanently or temporarily. If the subject in the disposition about temporary deviation from the duties of military service, then it is not clear how to solve the question of liability soldier who committed the act with the objective of evading from military service. Conversely, if the subject in the e disposition about constant evasion from military service, why the soldier should not be responsible for the illegal actions related to evasion of military service temporarily, but a very long time (days or months), in this case, when a military serviceman is carries criminal responsibility for leaving the military unit or place of service for more than three days.

It is inappropriate but that is fact, in the disposition of Article 335.1. Criminal Code of the Azerbaijan Republic provided different in nature and degree of public danger of such acts as "evading from military service by causing the health any harm or by simulation of illness, forgery of documents or other fraud" and

“conscientious objection to military service”. Practically, the legislator equate these acts that there is a wrong in the stem. As a rule, evasion from military service by causing harm the health or by simulation of illness, forgery of documents or other fraud, committed secretly and not disclosed in all cases. Therefore, these actions don't cause in a special resonance among the personnel of military units. However, conscientious objection to military service is done openly.

Therefore, such a fact will certainly become known to the entire staff and depending on the cause of failure is perceived differently by individuals (indifference, condemnation, encouragement, etc.), and can sometimes cause undesired reactions. A soldier's objection to military service is a dangerous war crimes, encroaching on the established order of military service and subordination, generating disorganization and confusion in the military units that violate the statutory procedure for solid adversely affecting the readiness and capability of military units. Therefore, conscientious objection to military service is a big public danger than evading from military service by causing the health. It should be noted that the criminal responsibility of servicemen for evading military service by maiming or otherwise, including for conscientious objection to military service was established by article 13 of the Law of the USSR on criminal liability for war crimes on December 25, 1958 and, accordingly, the criminal codes of the Union Republics (Art. 249 of the Criminal Code of the RSFSR, art. 243 of the Criminal Code of the Ukrainian USSR, Art. 244 of the Criminal Code of the Azerbaijan USSR, etc.) 1960 and punishable by imprisonment for a term of three to seven years, any harm or by simulation of illness, forgery of documents or other fraud. [3; 5; 7; 9].

In part 1 of Article 409 of the Criminal Code 2001 provides for liability of failure soldier objection to military service by self-mutilation, or by simulation of illness, forgery of documents or other fraud and is punishable by detention in a disciplinary battalion for up to two years, or imprisonment for the same term. In Part 2 of the article provides for liability for conscientious objection to military service, and shall be punished by imprisonment for a term of two to five years [8].

In Part 1 of Article 339 of the current Criminal Code of the Russian Federation provides for liability for failure serviceman from military service by simulating illness or self any injury (self-mutilation), or forgery of documents or other fraud and punished by restriction on military service for a period of up to one year, or imprisonment up to six months, or by custody in a disciplinary military unit for the term up to one year. In part 2 of the Code provides for liability for the same act committed for the full exemption from military service, and is punishable by imprisonment for up to seven years. As can be seen from the example mentioned in the disposition of art. 339 of the Criminal Code of the Russian Federation held a clear distinction between evasion of serviceman from military duties temporarily and does not provide for liability for conscientious objection to military service. [6, p. 849].

It should be noted that the problem of article 335 of the Criminal Code does not exhaust the existing gaps and contradictions in the disposition, there are problems associated with the sanctions of the article. We think that, compared with the unauthorized abandonment of a military unit or place of service (Art. 333 of the Criminal Code), evasion from military service by damaging the health or otherwise poses a great danger to the public. Since unauthorized abandonment of a military unit or place of service is done in many cases lightly, under the influence of external stimuli, the nature of domestic factors or due to exceptional circumstances. In many cases, a soldier, left his military unit or place of service, after a while critically assessing the behavior returns to his unit or place of service. Once, a soldier who commits evading military service by damaging the health or otherwise acting consciously by a pre-arranged plan, creates the appearance of a legitimate reason for exemption from military service by causing the health any harm or by simulation of illness, forgery of documents or that fraud is seeking exemption from military service. In some cases, a soldier who has achieved liberation from military service illegally acquires the right to enjoy the privileges provided for certain categories of ex-military servicemen. The likelihood of criminal prosecution of a person for evading military service by damaging the health or otherwise significantly lower than the soldier who committed unauthorized abandonment of a military unit or place of service. It is not strange, for evading military service by damaging their health or otherwise the law considers less serious punishment.

As already noted, the criminal legislation of the Russian Federation provides for two types of evasion. In part 1 of the article 339 of the Criminal Code of the Russian Federation provides for liability for a temporary deviation of a soldier from the military service. The person who committed the acts, shall be punished by restriction on military service for the term up to one year, or imprisonment for up to six months, or by custody in a disciplinary military unit for the term up to one year. In part 2 of the article provides for liability for the same act committed for the full exemption from military service. A serviceman who committed the acts, shall be punished by imprisonment for a term up to seven years [6, p. 849]. In other words, the

legislature of the Russian Federation, more correctly, deliberately and purposefully went to the issue of criminal responsibility for evasion of military duties of military service by simulating illness or other means.

Referring to the results of the study, A. Aliyev offered to make the appropriate changes and additions to the article 335 of the Criminal Code of the Republic of Azerbaijan and give it as a new version. However, this issue still remains unresolved [10, p. 31–36].

Based on the above mentioned, and in order to eliminate gaps and contradictions existing in dispositions and sanctions of Article 335 of the Criminal Code of the Republic of Azerbaijan, we consider it appropriate to make changes and additions to the said article and give the following rewording:

"Article 335. Evasion from military service by damaging the health or otherwise

335.1. Temporary evasion of a serviceman from military service by simulating illness or self any harm or forgery of documents or other fraud.

It is punishable by detention in a disciplinary military unit for the term up to one year, or imprisonment for the same duration.

335.2 The same act committed for the full exemption from military service – shall be punished to imprisonment for a term of three to eight years.

335.3. Committing an offense under Article 335.1.of the Code, in wartime or combat conditions - punishment is imprisonment for up to five years.

335.4. Committing an offense under Article 335.2. the Code, in wartime or in a combat situation he or she is punishable to imprisonment for a term of five to ten years.

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