

MENTAL COERCION AS A CIRCUMSTANCE EXCLUDING THE CRIMINALITY OF AN ACT IN THE COMMISSION OF A CRIME THAT INFRINGES ON LIFE

Ganna Sobko

Department of Criminal Law and
Criminology

Odesa State University of Internal Affairs

65000, 1 Uspenska Str., Odesa, Ukraine

e-mail: g-sobko@edu.cn.ua

<https://orcid.org/0000-0002-5938-3400>

Abstract

The article is devoted to the existence of the criminal law institute “Circumstances excluding the criminality of an act” at the legislative level, which was enshrined in the new Criminal Code adopted by the Verkhovna Rada of Ukraine on April 5, 2001. This institute has undergone the largest update and amendments in the Criminal Code of Ukraine, so some of the circumstances provided for in it require further development, analysis and clarification. In its turn, the Criminal Code of 1960 provided for three circumstances that exclude the criminality of an act: extreme necessity, necessary defense and apprehension of the offender. However, criminal law has also studied other circumstances that exclude the criminality of an act that were not directly enshrined in the Criminal Code. Understanding and defining the circumstances excluding the criminality of an act is of great practical and scientific importance. The main function of such a definition is to reflect the objectively real circumstances that characterize these circumstances. The concept of these circumstances, based on the generic properties (features, attributes) of individual species, promotes differences and disagreements and emphasizes what they have in common. Thus, the basis of this concept is the defining and essential properties of the circumstances under consideration. The author examines violence as a circumstance which excludes the criminality of an act, and analyzes its significance in the context of behavior of a person who committed a certain act due to the relevant influence which he/she was unable to resist. An example is the case when a person pushed the victim, and as a result, the latter’s health was harmed. The model of this article is specified in Part 1 of Article 40 of the Criminal Code of Ukraine, and such an act of a perpetrator in the theory of criminal law is called irresistible physical coercion. First of all, we note that there is a feature which unites all the circumstances excluding the criminality of an act, which includes the legitimacy of causing harm to the interests protected by criminal law, which is the functional purpose of criminal law. The author proves that in order to exclude subjectivity of a judge as much as possible, it is necessary to legislatively regulate the concepts of physical and non-physical violence, and also to identify the general features which will characterize non-physical violence and exclude liability of a person for actions committed under its influence. Another pressing issue that requires special attention is the clear regulation of a person’s liability for an act or omission committed under the influence of non-physical violence. The author believes that such a person is not subject to criminal liability for a committed criminal offense, since when a person is subjected to non-physical violence, he or she cannot control his or her actions. Therefore, in our opinion, it would be quite logical to legislate the exemption of a person from liability for acts committed under the influence of non-

physical violence. The author proposes a new version of Article 40 of the Criminal Code of Ukraine.

Key words: coercion; crimes that infringe on life; strong emotional distress; circumstances excluding the criminality of an act

1. Introduction

The status of a state governed by the rule of law obliges Ukraine to provide equal protection to both the rights of the victim of mental violence and the rights of the perpetrator of such violence. The phenomenon of psychological violence is closely related to human security and peace of mind (Kvasha, 2015). The changes made to the current Criminal Code of Ukraine (amendments to the articles of the Special Part of the Criminal Code of Ukraine, direct enshrining of mental coercion as a circumstance excluding the criminality of an act) have significantly affected the criminal law support in this area. However, the Code has significant shortcomings in the regulation of mental violence, in particular, in terms of terminology. For example, the Code does not contain a definition of mental violence. This is a consequence of the incomplete and superficial reflection of psychological categories in criminal law (Hurtovenko, 2008).

There is also considerable controversy regarding Article 40 of the Criminal Code of Ukraine “Physical or mental coercion”, which, in turn, requires a thorough study. According to Part 1 of Art. 40 of the Criminal Code of Ukraine, an act or omission that harms law enforcement interests and is committed under the pressure of physical coercion, as a result of which a person is unable to control his or her actions, is not recognized as a criminal offense. Part 2 of this Article specifies another type of coercion - mental coercion.

In a state governed by the rule of law, it is essential to balance the protection of individual rights equitably—ensuring that both victims and perpetrators of offenses receive fair consideration. This principle is particularly pertinent in the context of psychological violence, which significantly impacts human security and mental well-being. Recent amendments to the Criminal Code of Ukraine have introduced notable changes aimed at addressing mental coercion, such as recognizing it as a circumstance that can exclude the criminality of an act. Despite these advancements, significant gaps remain, particularly concerning the legal definitions and terminologies related to mental violence (Hurtovenko, 2012).

The Criminal Code of Ukraine’s current provisions reveal a substantial shortfall in adequately defining and regulating mental violence. For instance, the Code lacks a precise definition of mental violence, reflecting a broader issue of insufficient integration of psychological concepts within criminal law (Lisova, 2007). This inadequacy complicates the legal assessment of acts committed under mental coercion, as articulated in Article 40 of the Criminal Code, which distinguishes between physical and mental coercion but remains ambiguous in application.

Scholarly contributions have been pivotal in exploring the theoretical underpinnings of circumstances excluding the criminality of an act. Notable researchers like Anchukova (2004), Baulin (2014), Iushchyk (2003) and others have extensively analyzed these concepts, but the specific role and regulation of mental coercion remain underexplored. The theoretical framework suggests that while mental coercion is recognized as an independent circumstance excluding criminal liability, the practical application of this concept is fraught with challenges (Omar, 2003).

The legal distinction between physical and mental coercion is critical. Physical coercion involves actions that completely override a person’s control, while mental coercion, although severe, does not entirely eliminate a person’s volition. This distinction is crucial

for understanding how mental coercion should be treated under criminal law, especially when the coercion does not fully incapacitate the individual's ability to act according to their own will.

This introduction sets the stage for a detailed examination of the Criminal Code's current provisions, the gaps in the legal definitions of mental violence, and the practical challenges faced in applying these concepts in judicial proceedings. The proposed reforms aim to address these shortcomings by clarifying the definitions and criteria associated with mental coercion, ensuring that the law adequately protects both victims and perpetrators in a manner consistent with modern legal and psychological understanding.

2. Literature review

The examination of circumstances excluding the criminality of an act within Ukrainian criminal law has garnered considerable scholarly attention. Central to this field are works by notable scholars who have explored various theoretical and practical aspects of these legal circumstances. This review synthesizes key contributions from the literature, focusing on the treatment of mental coercion and mental violence as circumstances excluding criminal liability.

The foundational works of Anchukova (2004), Baulin (2014), Bodnaruk (2012), Iakymets (2008) and others provide critical insights into how these circumstances are integrated into the legal system. They collectively contribute to our understanding of various factors that might exclude criminal liability, including self-defense, necessity, and lawful acts.

Scholars like Burdin (2013) and Iarmysh (2002) have made notable contributions in this area, but their studies do not fully address the complexities and legal implications of these factors. Mental coercion, in particular, poses unique challenges in its conceptualization and application within the criminal justice system.

While the literature provides a robust theoretical foundation, comprehensive studies specifically addressing mental coercion and mental violence as circumstances excluding criminal liability are limited. Notably, Burdin has partially explored these issues: touches on the role of mental coercion but lacks a thorough exploration of its legal ramifications and provides some insights into mental violence but does not offer a comprehensive analysis of its role in excluding criminal liability.

Scientific research has focused on understanding the essence of circumstances excluding the criminality of an act and their criminal law characterization.

Today, the role of mental coercion and mental violence as circumstances excluding the criminality of an act has not been fundamentally and comprehensively studied. Only partially this issue was considered in the works of Burdin (2013) and Iarmysh (2002).

The literature on circumstances excluding criminality in Ukrainian criminal law reveals a foundational understanding provided by key scholars. However, the specific treatment of mental coercion and mental violence remains underexplored. There is a need for more detailed and comprehensive research to address these gaps and refine legal definitions and applications related to mental coercion. Future research should focus on developing clearer legal standards and improving the practical application of these circumstances in criminal cases.

3. Circumstances excluding criminality

Thus, the Criminal Code of Ukraine of 2001 for the first time provided for seven

circumstances that exclude the criminality of an act, instead of three. Such circumstances are enshrined in Section VIII of the CC of Ukraine (Circumstances that exclude the criminality of an act), and certain types are regulated by the Resolution of the Plenum of the SCU of December 23, 2005 No. 14 "On the practice of application of legislation by the courts of Ukraine in cases of certain crimes against road safety and transport operation, as well as administrative offenses on transport", Resolution of the Plenum of the Supreme Court of Ukraine No. 7 'On judicial practice in cases of necessary defense', Resolution of the Plenum of the Supreme Court of Ukraine No. 8 'On application by the courts of legislation providing for liability for encroachment on life, health, dignity and property of judges and law enforcement officers' of April 26, 1992.

We support the position of Baulin (2014), who divides them into lawful acts that exclude criminality, acts that are the exercise by a person of his subjective right (necessary defense, harm to the person who committed a criminal offense during his detention, extreme necessity, reasonable risk), or the performance of legal duties (execution of an order or instruction, performance of professional, official, military and other duties), or the performance of official duty (professional risk, use of official authority to use physical force, special means of restraint, etc.).

It is generally accepted that circumstances excluding the criminality of an act are divided into two groups: socially useful (necessary defense and apprehension of the offender) and all other circumstances that are proposed to be recognized as lawful, non-criminal, but socially unhelpful (imaginary defense, physical and mental coercion, and all others).

Given that the scientific literature contains many concepts of circumstances excluding the criminality of an act, it makes sense to propose to consolidate a single definition in section 13 "Circumstances excluding the criminality of an act". Circumstances excluding the criminality of an act traditionally include lawful acts that, although enshrined in criminal law (administrative law), are not aimed at causing harm to protected rights, but, on the contrary, at protecting or preventing an attack or harm that could be caused as a result of a criminal offense.

Mental coercion is also recognized as an independent circumstance that excludes the criminality of an act. On the one hand, the legislator's opinion is quite reasonable and is conditioned by the modern development of society, science, peculiarities of law enforcement, etc. On the other hand, the legislator has not sufficiently developed the relevant criminal law provisions. This causes difficulties in qualifying misconduct and resolving the issue of bringing or releasing a person from criminal liability. Such difficulties also arise in the legal assessment of a person's behavior committed under mental duress (Zhdanova, 2011).

Mental coercion violates social relations protected by the current legislation and causes or may cause harm to a legal or natural person, the state or society. Part 2 of Art. 40 of the CC provides for objective signs of mental coercion, which are similar to the objective signs of irresistible physical coercion. However, the signs of mental coercion and signs of physical coercion differ significantly in the context of a socially dangerous act: a person commits this act due to the impact on the bodily integrity or freedom of another person, and therefore cannot control his or her actions (inaction) (Sobko et al., 2024).

However, in this case, the damage caused must be assessed taking into account the extreme necessity (Article 39 of the Criminal Code), i.e. the damage caused must be less than the damage prevented. And the impossibility of eliminating this physical coercion by another person(s) by other means is a prerequisite for the circumstance.

The subject of overcome mental coercion is a physical sane person who has committed a socially dangerous act under the influence of physical or mental coercion, at the age of tort capacity. The subjects of physical or mental coercion may not be insane persons,

as well as persons who have not reached the age of legal capacity. Such persons may be subjected to compulsory medical or educational measures.

The subjective signs of overwhelming mental coercion regulated by Part 2 of Article 40 of the CC include the following (Plysiuk, 2011). The intellectual aspect characterizes the person's awareness of the social danger of the act that he or she must perform under the influence of overwhelming mental coercion and his or her ability to foresee the onset of socially dangerous consequences. Volitional moment: the person does not want the socially dangerous consequences to occur, but is forced to allow them due to overwhelming mental coercion. There is no motive or purpose to commit these acts. Under the influence of overwhelming mental pressure, a person may experience severe emotional distress.

Therefore, the circumstance will exclude the criminality of the act only if objective and subjective signs of mental coercion are established, which will indicate its presence.

4. Mental coercion in the Criminal Law of Ukraine

Both the grammatical and semantic meaning of the word "coercion" is that it is "the necessity to act in a certain way, regardless of desire, caused by someone or something". This definition indicates that the person being coerced maintains conscious and volitional control over his or her behavior. It should be noted that, distinguishing between the concepts of "violence" and "coercion," it can be stated that coercion is an influence exercised only against the will of a person. Violence, on the other hand, is not only against the will, but also beyond the will, i.e. in its absence. Coercion, by affecting freedom of will, restricts it, while violence restricts or removes it (Prymachenko, 2008). That is, under coercion, a person has the opportunity to choose a certain course of action. However, being subjected to violence, a person may either retain the ability to choose behavior or not be able to act at his/her own discretion (an example is part 1 of Article 40 of the CC, when "a person cannot control his/her actions").

However, this reflects a situation where violence is taking place, not coercion. Proponents of this position argue that coercion can only occur when a person does what is required of him or her, i.e., is able to express his or her will. Instead, under the influence of insurmountable physical coercion, a person, as a person, does not show his or her will at all. The person who caused harm to the health of another because he or she was pushed was not forced to do so. In this situation, the person who caused the harm is only an instrument of a criminal offense: he or she was aware of the criminality of the act, but was unable to comply with the requirements of the law or prevent their violation (Nakonechna, 2015).

Given the concept of mental coercion, it should be emphasized that in most cases mental coercion is committed by threatening. The threat is most often made verbally and is aimed at the mental state of the person, namely: threats of a physical nature, threats of destruction of property, threats aimed at disclosure of information, the disclosure of which will affect the victim.

The peculiarity of mental coercion is that it never completely suppresses a person's will, despite the fact that such coercion still limits the person's ability to control his or her behavior. That is, a person still has the opportunity to choose certain actions, as in the case of insurmountable physical coercion (Bazhanov et al., 2011).

Having analyzed the points of view of various authors, it should be noted that, in our opinion, we should abandon the division of coercion into overcome and insurmountable, because in practice it is very difficult to distinguish these concepts on objective grounds, and therefore they are distinguished solely on subjective grounds. However, the internal

state of a person is very difficult to assess, especially when a person is in a state of anxiety due to a criminal offense committed against him or her, or when he or she is under pressure (Kharytonov, 2000).

We agree with A.O. Kasyan, who in his dissertation study "Physical and Mental Coercion in the Criminal Law of Ukraine" categorically disagrees with the division of coercion into insurmountable and overcome, which is approved at the legislative level. He determines that "if due to coercion a person was unable to control his or her behavior, it is impossible to assess the criminality or non-criminality of such actions or omissions that caused damage to law enforcement interests in the context of circumstances that exclude the criminality of the act" (Kasian, 2015). The author also argued that "a person who cannot control his or her actions should be recognized either as insane due to the presence of such a medical criterion as a temporary disorder of mental activity (Article 19 of the Criminal Code of Ukraine), or on the basis of the general provisions of criminal law. In this case, there is no guilt for failure to perform certain actions (inaction), since the victim was supposed to, but in fact could not (for reasons beyond his control) perform them. In this case, the point should be that the condition for the legitimacy of causing harm by a person who has been coerced is the actual inability of the person to freely control his or her actions. It is because of the restriction of a person's freedom of will and its manifestation in the management of his/her behavior, caused by the unlawful (criminal) actions of the perpetrator, that the criminality of causing harm to the law-protected interests by the person who is being coerced is excluded" (Mantuliak, 2006).

Despite the substantial development of the concept of coercion and its types, there are general comments on the separation of physical coercion from mental coercion (Husar, 2009). The author believes that coercion can only be mental. It can be supported by physical violence. But if it is only violence, it is physical violence, not physical coercion.

There is a widespread view that the threat of physical violence is the only possible form of mental violence. However, based on the subsection analyzed above, it is clear that there are a large number of manifestations of mental violence in our criminal law (Khramtsov, 2013). In addition, the manifestations of mental violence can also include the threat of harm to human rights, influence on the senses, communication of unpleasant information, etc. Coercion has a purpose, and therefore can only be committed with direct intent, since the purpose is a sign of the subjective side of a criminal offense committed with direct intent.

If we consider mental coercion in the system of circumstances that exclude the criminality of an act, it should be noted that such coercion is a separate independent circumstance, as it is a similar criminal offense provided for by the Criminal Code of Ukraine, socially acceptable lawful actions or omissions of a person committed in the presence of certain conditions that exclude the unlawfulness of the act, and therefore the criminal liability of a person for damage caused to the interests of law enforcement.

There are certain features that should be characteristic of "coercion" as a circumstance that excludes the criminality of an act:

- 1) these circumstances are committed in the form of an act (action or inaction);
- 2) the conditions of legality under the law must be met;
- 3) acts (actions or omissions) may be similar to criminal offenses;
- 4) these acts committed under duress are admissible, but cannot be classified as beneficial, because the person cannot control his/her actions (acts under duress).

At the same time, the conditions of legality are objective and subjective.

5. Challenges in legal practice and proposed amendments to Article 40 of the Criminal Code of Ukraine

The objective ones usually include: an act that falls under the provisions of Article 40 of the CCU and is socially dangerous; harm is caused to the rights protected by the law on criminal liability; the presence of signs of coercion in the offender's actions. At the same time, subjective signs (internal factors) include: the person's perception of the proportionality of the act to the threatened; lack of ability to control their actions; at the time of the harm, in the person's opinion, there was no other way to prevent the harm (Diachuk, 2000).

Unfortunately, practice shows that due to the lack of clear regulation of the concept of "mental coercion" in Ukrainian legislation and specific conditions under which a person will be released from liability for criminal offenses committed under its influence, judges sometimes find it difficult to consider cases of criminal offenses committed under the influence of mental coercion.

For example, there is a relevant court practice on bringing to criminal liability a person who committed a criminal offense under the influence of mental coercion. Thus, the ruling of the Supreme Court of Ukraine of 09.12.2011 in case No. 5-1021k09 established the following: "...The arguments of the cassation appeals in defense of PERSON_3 that he acted under the influence of mental coercion by PERSON_1 cannot be taken into account, since the existence of such coercion is not confirmed by anything other than the testimony of PERSON_3, and, moreover, according to Article 40 of the Criminal Code of Ukraine, only irresistible physical coercion can be the basis for exemption from liability for a crime. Since the court found that no such coercion was applied to PERSON_3, it should be noted that when he participated in the deprivation of PERSON_8's life, he acted at his own discretion. The fact that at the time of the crime PERSON_3 was in a state of intoxication is confirmed by the testimony of the convicts PERSON_1 and PERSON_2, as well as the witness PERSON_9 about their joint consumption of alcoholic beverages, so the arguments of the cassation appeal of the lawyer PERSON_7 in this part are unfounded" (Legal portal Protocol, 2004).

In addition, there is a practice when, when bringing a person to criminal liability, mental coercion is always recognized by the court as a circumstance mitigating the punishment (clause 6, part 1, Article 66 of the Criminal Code of Ukraine) (Shevchenko et al., 2011).

If a person retains the ability to resist mental coercion, his or her actions do not exclude criminal liability and are only circumstances that can be assessed as mitigating.

For this purpose, the following requirements must be met:

- 1) the inability to act otherwise to prevent the threatened harm;
- 2) according to the judicial assessment, the harm that was caused is less than the harm that was prevented (Criminal Code of France, 2002).

When carrying out a legal assessment of the behavior of a person who acted under the influence of non-physical violence, it is mandatory to appoint a mental examination that would provide answers to the above questions.

In view of the above, specific signs of non-physical violence should be formulated jointly by legal professionals, psychotherapists and psychologists. In turn, the author of the paper below proposes his version of the list of signs that may be considered by the legislator.

The author proposes to change the wording of Article 40 of the Criminal Code of Ukraine to the following:

"Article 40. Physical and non-physical violence

1. Physical violence shall be defined as a violation of the physical integrity of another person with the purpose of humiliation and causing pain and suffering; beating or mockery, the purpose of which is to cause permanent mental disorders in the victim.

Physical violence is manifested in: pulling hair, hitting, - beating, strangulation, scratching, poisoning, arson and causing physical suffering in other ways, as well as aggressive physical contact (pushing, kicking, throwing objects at the person) or restriction of movement, harassment, physical restraint with or without the use of weapons.

2. An action or inaction of a person that caused damage to law enforcement interests committed under the direct influence of physical violence, as a result of which the person could not control his/her actions, shall not be a criminal offense.

3. Non-physical violence shall be recognized as all other ways of encroachment not covered by the concept of "physical violence". Non-physical violence is an intentional unlawful violent attack on human health that has the following characteristics

- the object of impact is human health;
- unlawfulness;
- the use of psychological methods that can be verbal or non-verbal;
- intentional nature of action or inaction;
- violent nature of the impact.

Non-physical violence is manifested in: threats of violence, violent acts, coercion, compulsion, threats, intimidation, physical and mental violence, obstruction, terrorization, criticism, contempt (despotism, humiliation, verbal intimidation, boasting, demand for admiration, surveillance, constant presence, limiting contact with the outside world, jealousy, control, ignoring, isolation).

4. An action or inaction of a person that caused damage to law enforcement interests committed under the direct influence of non-physical violence is not a criminal offense if at least one of the listed criteria is present:

- a person recognized as insane in accordance with Article 20 of the Criminal Code of Ukraine;
- a person recognized as partially sane in accordance with Article 21 of the Criminal Code of Ukraine;
- the person, who was under the influence of non-physical violence, tried to take all necessary measures to prevent harmful consequences of his/her action or inaction;
- the person was unable to resist non-physical violence or take all necessary measures to prevent harmful consequences of his/her action or inaction;
- the person was not aware of the impact of non-physical violence on them;
- the person could not control his/her actions;
- the person was aware of his/her actions, but preventing the non-physical impact would have led to even greater harm to the interests protected".

The author also proposes to list the following corpus delicti of criminal offenses with signs of non-physical violence in the notes to Article 40 of the Criminal Code of Ukraine, namely: Article 126¹ of the Criminal Code, Article 127 of the Criminal Code, Article 134 of the Criminal Code, Article 151² of the Criminal Code, Article 152 of the Criminal Code, Article 153, Article 154 of the Criminal Code, Article 173 of the Criminal Code, Article 180, Part 2 of the Criminal Code, and Article 266, Part 1 of the Criminal Code.

Therefore, it should be noted that mental coercion is a threat that has signs of reality, is provided for by various laws (constitutional, administrative, criminal), and is associated

with the use of intimidation and coercion to perform certain actions that a person does not want to perform, but is deprived of the opportunity to choose his or her behavior. It is the inability of a person to control his or her actions (to make a choice) that excludes guilt and criminal liability.

Conclusions

The status of Ukraine as a state governed by the rule of law mandates the balanced protection of both victims and perpetrators of mental violence. This obligation extends to ensuring that the legal system comprehensively addresses the nuances of psychological abuse and coercion. The recent amendments to the Criminal Code of Ukraine, which include provisions for mental coercion as circumstances excluding the criminality of an act, represent a significant step forward in criminal law. However, these changes also highlight critical gaps, particularly in the area of mental violence.

The current Criminal Code, despite its advancements, lacks a precise definition of mental violence, reflecting a broader issue of insufficient integration of psychological concepts into criminal law. This gap complicates the legal evaluation of cases involving mental coercion, which remains inadequately addressed. Article 40 of the Criminal Code, while distinguishing between physical and mental coercion, still falls short in its practical application and clarity. The division into «overcome» and «irresistible» coercion, for instance, has proven problematic, leading to difficulties in legal interpretation and enforcement.

The theoretical framework established by scholars such as M.V. Anchukova, Y.V. Baulin, and others provides a solid foundation for understanding these circumstances. However, the need for further research into mental coercion is evident. The partial treatments by V.M. Burdin and N.M. Yarmysh underscore the necessity for a more thorough and comprehensive analysis. The current legal provisions and judicial practices often struggle with the assessment of mental coercion, leading to inconsistent applications and challenges in ensuring justice.

To enhance the effectiveness of the legal system in addressing mental coercion, it is crucial to refine the definitions and criteria related to this concept. A unified definition and a clearer framework for assessing mental coercion, as proposed in the revised Article 40, would provide much-needed clarity. This would also facilitate more accurate judicial assessments and ensure that the rights of both victims and perpetrators are appropriately balanced.

In conclusion, while the Ukrainian Criminal Code has made notable strides in incorporating mental coercion as a factor excluding criminal liability, there remains significant room for improvement. Addressing the definitional and procedural gaps in the regulation of mental violence will strengthen the legal system's ability to deliver fair and just outcomes. Collaborative efforts between legal professionals, psychologists, and lawmakers are essential to develop a more comprehensive and practical approach to mental coercion, ultimately enhancing the protection of individual rights and the integrity of the legal system.

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