II ● LAW

IRSTI 10.77.01

ON THE CONCEPT AND CLASSIFICATION OF ORGANIZED FORMS OF COMPLICITY IN CRIME

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Annotation. This paper considers one of the problems of the General part of Criminal law, the issues of classification of forms of complicity and the degree of correspondence of the current legislative formulation to the theoretical and practical requirements of Criminal law.

The purpose of this article is to study the issues of classification of forms of complicity, the analysis of the legislation of the Republic of Kazakhstan on their compliance with the theoretical and practical requirements of the science of criminal law, as well as the proposal of the author's scientific definition of organized forms of complicity.

The scientific and practical significance of the work in the fact that in the theory of criminal law and law enforcement practice of our state and post-Soviet countries in general, one of the unresolved and debatable problems today is the distinction and identification of the most distinctive features of organized forms of complicity to the crime.

The research methods for studying this problem are the historical, comparative legal, logical and structural-functional methods of scientific cognition.

The main results and analysis, the findings of the research. The authors, drawing attention to the provisions of articles 31, 264 and 265 of the Criminal Code of the Republic of Kazakhstan, which establish the criminal responsibility for the creation and management of a transnational organized group, a transnational criminal organization, as well as the participation in them and the creation and management of a transnational criminal community and involvement in it, recognize the norms of articles 264 and 265 of the Criminal Code of the RK as superfluous. The reason for this assessment is the United Nations Convention against Transnational Organized Crime of 13 December 2000, which does not deal with the transnational nature of organized crime as an independent form of complicity. This document calls for international cooperation in combating organized criminal manifestations of an international character.

According to the authors, a transnational organized group, a transnational criminal organization and a transnational criminal community are recognized as independent forms of complicity if these terms represent "a way to realize a criminal plan in the form of joint criminal offense", which means the distinction between the forms of complicity in the science of criminal law.

The practical significance of the results of the research of the problem under consideration lies in the fact that the materials of a scientific article can be used for further research in this area, used in the educational process, in legislative activities that regulate issues related to the institution of complicity.

Key words: criminal law, form of complicity, a lower class, criminal community, criminal group

Аннотация. В статье рассмотрена одна из проблем Общей части уголовного права – вопросы классификации форм соучастия и изучена степень соответствия нынешней законодательной формулировки теоретическим и практическим требованиям уголовного права.

Целью данной статьи является изучение вопросов классификации форм соучастия, анализ законодательства Республики Казахстан по вопросу их соответствия к теоретическим и практическим требованиям науки уголовного права, а также предложение авторского научного определения организованным формам соучастия.

Научная и практическая значимость работы заключается в том, что в теории уголовного права и право-

применительной практике нашего государства и постсоветских стран в целом, одной из нерешенных и дискуссионных проблем на сегодняшний день считается разграничение и выявление наиболее отличительных черт организованных форм соучастия преступлении.

Методами исследования при изучении данной проблемы являются исторический, сравнительно-правовой, логический и структурно-функциональный методы научного познания.

Основные результаты и анализ, выводы исследования. Авторы, обращая внимание на положения статей 31, 264 и 265 Уголовного кодекса Республики Казахстан, устанавливающих уголовную ответственность за создание и руководство транснациональной организованной группой, транснациональной преступной организацией, а равно участие в них и создание и руководство транснациональным преступным сообществом и участие в нем, признают нормы статей 264 и 265 УК РК излишними. Причиной такой оценки служит Конвенция ООН против транснациональной организованной преступности от 13 декабря 2000 года, которая не рассматривает транснациональный характер организованной преступности как самостоятельную форму соучастия. Данный документ призывает к международному сотрудничеству в борьбе с организованными преступными проявлениями международного характера.

По представлению авторов транснациональная организованная группа, транснациональная преступная организация и транснациональное преступное сообщество самостоятельными формами соучастия признаются в том случае, если эти понятия представляют «способ реализации преступного замысла в виде совместного совершения уголовного правонарушения», что означает разграничивающий критерий форм соучастия в науке уголовного права.

Практическое значение результатов исследования рассматриваемой проблемы заключается в том, что материалы научной статьи могут быть использованы для дальнейших научных исследований в данной области, использоваться в учебном процессе, в законотворческой деятельности, регулирующей вопросы, связанные с институтом соучастия.

Ключевые слова: уголовный закон, форма соучастия, группа лиц, преступная организация, преступная группа.

Аннотация. Мақалада қылмыстық құқықтың Жалпы бөлімі мәселелерінің бірі, қылмысқа қатысушылықтың нысандарын топтастыру мәселесі қарастырылған және қазіргі заңның қылмыстық құқықтың теориялық және практикалық талаптарға сәйкестік дәрежесі зерттелген.

Бұл мақаланың мақсаты қылмыстық құқық бұзушылыққа қатысу нысандарын топтастыру мәселесін зерттеу, олардың қылмыстық құқық ғылымының теориялық және практикалық талаптарға сәйкестігі мәселесі бойынша Қазақстан Республикасының заңын талдау, сонымен қатар қатысушылықтың ұйымдасқан нысандары бойынша авторлық ғылыми анықтаманы ұсыну болып табылады.

Жұмыстың ғылыми және практикалық маңыздылығы, ол қылмыстық құқық теориясында және біздің мемлекеттің, бүтіндей алғанда посткеңестік елдердің құқық қолдану практикасында бүгінгі күндері шешімін таппаған даулы мәселенің бірі, қылмысқа қатысушылықтың ұйымдасқан нысандарын ажыратушы белгілерін келтіру және анықтау болып саналатындығынан көрінеді.

Бұл мәселені зерттеудің әдістері ғылыми танымның тарихи, салыстырмалы-құқықтық, логикалық және құрылымдық-фунционалдық әдістері болып табылады.

Зерттеудің негізгі нәтижелері және талдауы, қорытындылары. Авторлар трансұлттық ұйымдасқан топты, тарнсұлттық қылмыстық ұйымды құрағаны және жетекшілік жасағаны, сонымен бірге оларға қатысқаны және трансұлттық қылмыстық қауымдастықты құрғаны және жетекшілік жасағаны, сонымен бірге оған қатысқаны үшін қылмыстық жауаптылық белгілейтін Қазақстан Республикасы Қылмыстық кодексінің 31, 264 және 265 баптарының ережелеріне назар аудара отырып, ҚР ҚК 264 және 265 баптарының ержелерін артық деп санайды. Мұндай бағалаудың себебі ұйымдасқан қылмыстылықтың трансұлттық сипатын қатысушылықтың жеке нысаны ретінде қарастырмайтын, 2000 жылғы 13 желтоқсандағы трансұлттық ұйымдасқан қылмыстылыққа қарсы БҰҰ Конвенциясы болып саналады. Бұл құжат халықаралық сипаттағы ұйымдасқан қылмыстардың көріністерімен күресте халықаралық ынтымақтастыққа шақырады. Авторлардың түсінігі бойынша трансұлттық ұйымдасқан топ, трансұлттық қылмыстық ұйым және трансұлттық қылмыстық қауымдастық қылмыстық құқық ғылымында қатысушылықтың нысандарын ажыратушы критерийді білдіретін «қылмыстық құқықбұзушылықты бірлесіп жасау түрінде қылмыстық ниетті іске асыру тәсілі» болғанда ғана қатысушылықтың жекелеген нысандарын білдіруі керек.

Қарастырылған мәселе бойынша нәтижелердің практикалық маңыздылығы, ғылыми мақаланың материалдары осы саладағы ғылыми зерттеулерде қолданылуы мүмкіндігімен, оқу процесінде, қатысушылық интситутымен байланысты мәселелерді реттейтін заң шығармашылық қызметтерде қолданылатындығымен анықталады.

Түйін сөздер: уголовный закон, қатысушылық нысандары, адамдар тобы, қылмыстық ұйым, қылмыстық топ.

Introduction

The problem of classifying the forms of participation in relation to the Common Part of Criminal Law is one of the debatable ones. This conclusion follows from the analysis of not only the different approaches of researchers to this issue, but also legislation. Thus, the Criminal Code of the Republic of Kazakhstan dated July 3, 2014, rejecting the concept of "the form of complicity in a crime", in Article 31 instead uses the concept of "Criminal responsibility for criminal offenses committed by a group". The criminal law, in parts 1 and 2 of the same article, distinguishing a criminal offense committed by a group of persons on the basis of the presence and absence of a preliminary conspiracy, gives the third generalized concept of a "criminal group". Hence, it can be noted that the criminal law, calling this criminal law institution "complicity in a criminal offense" of all its manifestations or forms, defines how the criminal behavior of various groups. Thus, the legislator does not take into account the specificity of this criminal law institution, which means that complicity was originally meant to commit a crime with the distribution of roles. The distribution of roles means the participation of the accomplice, organizer, instigator of the crime along with the performer.

Organized forms of complicity require increased attention in conditions where even the legislator sometimes demonstrates an incomplete understanding of the legal nature of the phenomenon and the resulting classification of such forms, which means the subject of this research.

Under the influence of globalization processes, the law enforcement function of the state begins to undergo certain changes, including acquiring an international character. This phenomenon is associated with the acquisition of many types of crimes of a transnational nature, which has become characteristic of such an institution as complicity in a crime.

Based on the above, the purpose of this research is to answer the question: is this classification accurate and perfect, provided for in Article 31 of the Criminal Code of the Republic of Kazakhstan, does it meet the criteria developed by the theory of criminal law?

One of the traditional principal functions of a State in a sphere of national policy is the law-enforcement function which envisages the protection of human rights and freedoms of citizens, of all forms of property as well as the rule of order. Under the influence of globalization processes the law-enforcement function of the state has undergone certain changes acquiring international character.

This phenomenon is connected with the fact that many forms of crimes are of transnational character which has also become inherent to such a notion as complicity in crime. Organized forms of co-participation (complicity) reguire much higher attention under the conditions when even a legislator sometimes demonstates misunderstanding of the legal nature of the phenomenon and classification of such forms arising from it.

Methodology

For forming the right understanding of organized forms of co-participation in crime and their scientifically grounded classification, it is necessary to carry out comparative analysis of organized forms of co-participation envisaged in the Criminal Code of the Republic of Kazakhstan (further RK) and dealt with in the works of scientists, as well as foreign legislative practice. By using the results of such comparative analyses it will be possible to formulate the exact proposals related to the notion and classification of organized forms of complicity.

Discussions

The Convention of the UN against transnational organized criminality of 13 December 2000 and organized forms of complicity.

Initially, we would like to note that it is difficult to consider the issue of classifying forms of participation, in particular, organized forms of it in relation to foreign legislative practice. The reason for this is the lack of a special rule or legal institution for the forms or types of complicity in the General part of the criminal law of many countries. Criminal laws of the USA, France, Germany, Spain, Poland, Switzerland in the General Part do not specify the forms or types of complicity. However, in the Special Part of the Criminal Code of these countries there is criminal liability for certain types of complicity in criminal offenses. For example, the Criminal Code of Germany specifies the responsibility for a group of persons, a criminal community, a gang (German criminal code). In US law, there is a responsibility for collusion of six degrees, an illegal gathering (U.S. Code Title 18. Crimes and criminal procedure U.S. Code). According to the Criminal Code of France, a criminal gang, conspiracy, gathering, battle group, union of criminals (Code pénal Version consolidée au 25 novembre 2018) is considered criminal. The Spanish Criminal Code provides for responsibility for the armed gang, formation, group (Spanish Penal Code), Criminal Code of Poland, organized

group, community (Criminal Code of Poland), Swiss Criminal Code gang, criminal organization (Criminal Code of Switzerland). Also, the Italian Criminal Law does not single out in the General Part of the Criminal Code a separate provision for the form of complicity in art. 416 of the Special Part of the Criminal Code provides for liability for the criminal organization of the mafia type (The Penal Code of Italy).

The Criminal Code of the People's Republic of China in the General Part mentions a criminal group and a criminal community (Art. 26), and in the Special Part identifies an armed insurgency and armed rebellion (Art. 104), a terrorist organization (Art. 120), an organization (Art. 125) , group (art. 228) (Criminal Law of the People's Republic of China).

Any state enacting laws strives not simly to regulate public relations, due to which the society is formed and functions, but also to produce rules and norms of high quality.

The quality of legal norms is defined by such circumstances as the observance of theoretical requirements to the content of the law, the application of legal norms in the activity of law-enforcement bodies relating to the right qualification of the crime committed, as well as the observance of the legislative techniques. From the scientific point of view of the legislative techniques some doubtful provisions of criminal legal norms can be observed in the content of the institute of complicity. So, the Criminal Code of the Republic of Kazakhstan of 1997 (with subsequent amendments), has dealt with the transnational organized criminal group and the transnational criminal communities (Art 31) as an independent form of complicity in crime. The reason of appearing such forms of complicity in the Criminal Code is clear. For effective combating the organized criminality within the frame of standards recognized by international organizations special Conventions have been adopted. One of them is the Convention of the UN against transnational organized crimes of 13 December 2000, adopted in Palermo (Convention of the UN against transnational organized crimes of 13 December 2000). This convention was ratified by the Republic of Kazakhstan on 4 June 2008 by adopting the Law of the RK №40-IV "On the Ratification of the UN Convention against Transnational Organized Crimes». The Convention consists of 41 Articles and contains certain provisions which are necessary for international cooperation in combating transnational organized crimes. The Convention, dealing with the principal notions used in its content, in Article, 2 gives the following definition of an organized criminal group:

«Organized criminal group means a structurally formed group which consists of two or more persons existing during a certain period of time and functioning jointly in committing one or several serious crimes or crimes recognized as of that in conformity will the current Convention, in order to get, directly or indirectly, financial or other material profits».

The current Convention does not consider the notion «transnational organized group» as an independent form of complicity, but the word combination «transnational organized crime» is given in the title of the Convention. And it is expedient, as the norms of international law, including the present Convention, are applicable to neutral zones, i.e. to the territories of neutral waters or to the international air space, as well as to the offenses concerning which several states have grounds to apply their own jurisdiction. That's why the notion «transnational organized crime» used in the title of the Convention means the activity of organized criminal groups of international character, i.e. we observe the direct indication to transnational character of organized crime.

In compliance with this the criminal responsibility of a master-minder and participants of the organized criminal group or criminal community, which have committed crime on the territory of a foreign state or on other grounds claiming to apply the jurisdictions of more than one state, is determined by an international treaty. The analogous study is recognized by other scientists. In particular, Komissarov V.S. and Ensebaeva M.B. dealing with the issues of combating organized crimes by perfecting Criminal legislation, write as follows: "In this context it is understood that the main characteristic feature of transnational organized criminality is the specific activity, which has alongside with the organized, transnational nature» (Komissarov, 2013: 118). However, to our regret, these scholars have not considered the notion "transnational organized criminality» in relation to the forms of complicity. That's why it is not quite clear whether they recognize transnational organized criminal activity as an independent form of complicity. Foreign scientists as Pierre Hauck and Sven Peterke referring to numerous national and international documents including the Convention of the UN against Transnational Organized Criminality, consider the notion «transnational organized criminality» as a legal notion (Pierre Hauck, 2013: 407-436). One can agree with this point of view with a certain reservation, because the usage of this or that term in national law or in international relations turn this term into a legal notion. But it should be kept in mind that Criminal law and other branches of law

close to it must use those notions and terms which really exist in the world and designate the names of the subjects or characterize humans behavior. It is exactly in this point that Criminal law differs from criminology. In criminology, unlike Criminal law, only those notions and terms are used which designate the aggregation of similar, phenomena. For example, if the notions "organized criminal group», «criminal organization», «criminal community» are recognized as criminal-legal notions and are used in private cases, but in criminology they are designated with the only term "organized criminality». It is exactly in this meaning the notion "transnational organized criminality» is presented as the notion referring to criminology, as by this notion we always mean an organized group, organized community whose activities have foreign elements.

It should be noted that transnational organized criminality and organized criminality in general are the phenomena of present days, as there is no reliable information from ancient sources on crimes of organized character.

In ancient times complicity in crimes in an organized form took place during the seizure of power or during the attempts made on the lives of leaders of states.

Over the subsequent centuries, since the establishment of banning slavery and slave trade by European states, the world has already known about organized criminality of transnational character as slave trading.

That's why we can assert that organized forms of complicity in crime have started and spread since the XIX century, being a characteristic feature of criminality of some nations and regions.

According to the assertions of some scientists, organized forms of complicity with started in certain regions of the world their specific features, and later spread over other states. Thus, Stefano Maffei and Isabella Merzagora Betsos in the article under the title "Crime and Criminal Policy in Italy» state that Italian Mafia organizations evolved as regional ones and much later they spread all over Italy and even abroad. In their opinion, besides the worldwide known Sicilian mafia stemming from the XIX century, there are some other organizations as "Kamorra» (in Kampania), «ndrageta (in Kalabria), «saka corona unita» (in Apulia). In the paper under discussion these scientists note that at present organizations of a mafia type, besides traditional crimes as extortions in department stores and local enterprises, are engaged in other profitable activities such as drug, cigarette and people trafficking and international smuggling of arts items (Stefano Maffei, 2011: 470).

Focusing on traditional organized crimes of this or that nation, we can dwell upon the Chinese type of organized crime. T. Wing Lo and Sharon Ingrid Kwok Sharon state in their article that the Chinese criminal world is evolving in two directions:

structural and territorial triads and criminal groups set up by entrepreneurs (Wing Lo, 2017: 589). Triad is a Chinese mafia originally created on the grounds of religion and patriotism, later transforming into a criminal syndicate and spreading over other countries.

From the point of view of the above mentioned authors, at present Triads are establishing their economic territories and are actively making impact on the entrepreneurial activities.

The analogous opinion is expressed in the paper of Paolo Kampana. He analyses the two points of view on the movement of Mafia groups: organized criminal groups, including mafia, which move and extend their business becoming more and more localized. According to the second point of view, such criminal groups can easily migrate.

Based on the analysis of these points of view, the author comes to conclusion that organized criminal groups have become a kind of flexible organization which can easily migrate, redislocate its business and use every opportunity all over the world (Paolo Kampana, 2011: 213-228).

Analyzing the data from foreign sources and taking into consideration the peculiarities of organized crime in Kazakhstan, it can be concluded that most of organized criminal groups relate their activity with the economy.

It is natural that the leaders of such groups focus their attention on the principal flow of the capital into the economy and use every opportunity in this direction.

Such kind of conclusion can be made despite the existence of some criminal organizations whose activity is connected with people trafficking or drug trafficking, as well as terrorist or extremist organizations whose criminal activities are based on national, religious or political convictions.

It should be noted that acquiring transnational character of organized crime must not be recognized as the circumstances aggravating criminal responsibility. In our opinion, the transnational character of organized crime is a natural phenomenon for many states. One of the reasons of this is the fact that state boundaries are open for tourism and entrepreneurship. Organized criminal groups are not slow to take advantage of such a situation. In other words, such forms of crimes as people or drug trafficking pose a real threat to society, no matter

whether they have been committed within one state or on the territories of several states. In the criminal legal doctrine the gravity of criminal acts and the extent of responsibility are determined by the incidence of crime, i.e. the object of encroachment, means, techniques, circumstances, time, place, motives and purposes of committing criminal acts.

Thus, by determining legally this or that symptom as a circumstance aggravating criminal responsibility, a law-maker must take into consideration more frequently committed crimes or their peculiar symptoms. For example, Sevigny Eric and Allen Andrea assert that 7 percent of drug users carried guns while committing crimes, and for this they were incarcerated. They also state that there are a number of factors stipulating drug market participants to obtain guns (Sevigny Eric, 2015: 435).

Organized Forms of Complicity in Crime in the Criminal Code of the Republic of Kazakhstan (RK).

The Criminal Code of the RK of 2014 in its Articles 264 and 265 has designated criminal responsibility for «setting up and guidance of transnational organized groups, transnational criminal organization and participation in them» and «setting» up and leadership of transnational criminal community and participation in it as well."

The scientific substantiation of these forms of complicity is not so considerable, thats why there is no need to differentiate the symptoms of organized groups and transnational organized groups envisaged in Chapter 3, article 31 of the Criminal Code of the RK, as well as criminal community and transnational criminal community as indicated in the same article.

The content of Chapter 3, article 31 of the Criminal Code of the RK runs as follows: "A crime is recognized having been committed by a criminal group, if this crime has been committed by an organized group, criminal organization, criminal community, transnational criminal organization, transnational criminal community, terrorist group, extrmist group, gangs, or illegal military formations».

Galiakbarov R.R. suggested to consider as "an organized group» any «criminal group» generalized according to the forms of complicity and having, as minimum, the symptoms of stability (Galiakbarov, 1980: 30-32). At present the analogous standing is observed not only in the Kazakhstan legislative practice, but in the writings of some Russian scientists as well.

In particular, Arhipova M.V. and Redkina E.A. dealing with this issue express the following: "Correspondingly, the notion "Criminal group» denotes three organized forms of complicity. If these persons have agreed upon in advance to commit crime and are seeking to find accomplices, then they are considered to be a group of persons on preliminary agreement. If such kind of group is stable, then it is an organized group; if it is stable and is aimed at committing grave or much gravest crimes, then it is a criminal community. The above mentioned assertions give the grounds to consider a criminal group in a generic sense related to the forms of complicity (Arhipova, 2008: 17).

Unlike this scientists, Kazakhstani legislative practice includes into the notion "criminal group» not only organized forms of complicity but also other types of complicity as gangs, military formations, terrorist groups, which are directly considered the forms of complicity possessing the symptoms of stability.

Referring to the correlation of notions "organized group, criminal organization, criminal community, transnational organized group, transnational organized organization, transnational criminal community, envisaged in Part 3, Article 31, as well as in Articles 262-265 of the Criminal Code of the RK, we can observe the following: "If in conformity with Paragraph 36, Article 3 of the Criminal Code of the RK, an organized group is regarded as a stable group of two or more persons united with in advance with the purpose of committing one or several criminal offences, then, according to paragraph 35 of the same Article, a transnational organized group is characterized as an organized group pursuing the aim of committing one or several criminal offenses on the territories of two or more states or one state while masterminding the perpetration of criminal acts from the territory of another state involving the participants of another state.

The Criminal Code of the RK defines the notion «criminal community»as an association of two or more criminal organizations having agreed upon to commit jointly one or more criminal offences as well as creating conditions for committing one or several criminal offenses by any of these criminal organizations on their own [Paragraph 23 Article 3 of the Criminal Code of the RK]. Paragraph 33 of the same Article envisages the following definition for the transnational criminal community: transnational criminal community is an association of two or more transnational criminal organizations.

Analyzing the classification of the forms of complicity, some discrepancies or even wrong perceptions of the forms of complicity by the law-makers can be observed. The Criminal Code of 1997 of the RK considered the criminal organization as

an alternative name for the criminal community. The Criminal Code of the RK of 2014 considers the criminal organization and transnational criminal organization as independent types or activities of criminal groups.

For clarifying the correlation of an organized group, criminal community and criminal organization the definition of a criminal organization is given. In conformity with Paragraph 25 of Article 3 of the Criminal Code of the RK a criminal organization is an organized group where participants are placed organizationally, functionally and territorially in separate groups (structural subdivisions). As far as transnational criminal organization is meant, the following definition is given in paragraph 34, Article 3 of the Criminal Code of the RK: transnational criminal organization is a criminal organization pursuing the aim of committing one of several criminal offences on the territories of two or more states or one state while masterminding the commitment of some criminal act from the territory of another state involving participants of another state.

Focusing on the characteristics of a transnational organized group, transnational criminal organization and transnational criminal community, it can be observed that these forms of complicity can be depicted in three variants. First: committing, crime on the territories of two or more states irrespective of participants citizenship;

Second: masterminding of committing crime from the territory of another state; third: committing some criminal acts on the territory of another state by citizens of another state. It should be noted that in accordance with such characteristics it is not desirable to consider a transnational organized group, transnational criminal organization and transnational criminal community as independent forms of complicity, the territory where crime is to be committed and citizenship of persons who are guilty do not stipulate the ways of implementing criminal intentions with the participation of two or more persons. These notions, if the ways of implementing criminal intentions jointly were available, would present an independent form of complicity.

Besides, the citizenship of offenders and the territory where crime is committied, must not make impact on the degree of public danger.

Part I of Article 262 of the Criminal Code of the Republic of Kazakhstan regulating responsibility for setting up the organized group or criminal organization envisages the deprivation of liberty to the term of 7-12 years. But Part 1 of Article 264 of the Criminal Code for the same fact of setting up and masterminding transnational organized group, transnational criminal organization brings the verdict of punishment to the term of 10-15 years.

It is hard to agree to such differentiation of criminal responsibility, as, firstly, the citizenship of the offender and the territory where the criminal offence is committed (the place of committing crime is the territory in Kazakhstan) in conformity with general rules of Criminal law are not recognized as the circumstances aggravating criminal responsiblity. Secondly, Article 262 of the Criminal Code of the RK providing for responsibility of leaders of an organized group and criminal organization in one part of the Article, does not differentiate their responsibility. The question way be posed: if these types of criminal groups are not differentiated according to the degree of public danger, then what is their peculiar feature?

In our opinion, paragraphs 36 and 25 of Article 3 of the Criminal Code of the RK are too vague in differentiating an organized group and criminal organization. If to refer to the characteristics of an organized group, it may be noticed that it occurs to be a stable group of persons united beforehand with the purpose of committing one or several offences, while a criminal organization may be characterized as the activity of an organized group where the participants are placed in organizational, functional and structural subdivisions which may be applied in an organized group as well.

Paying attention to the characteristics of these notions, it way observed that a legislator considers a criminal organization as something between an organized group and a criminal community, between which, in fact, there are no specific differences.

If to take into consideration the classification made by the scientists having researched the problems of complicity, it may be concluded that none of them distinguished an independent form of complicity in a kind of organized group or criminal community. But some of them used the notion «criminal organization» instead of a criminal community. Thirdly, Articles 262, 263, 264 and 265 of the Criminal Code of the RK relate to the general norms of the Special Part of the Criminal Code. It means that these Articles while qualifying crimes may be applied in cases when there are no special qualification elements for the creation and guidance of an organized group, criminal organization, transnational criminal organization, criminal community and transnational criminal community as well as for the participation in the activities of such criminal groups. Fourthly, over the last years, crimes caquire transnational character.

The Criminal Code of the RK contains a rather sufficient number of criminal offences which possess characteristic transnational coloring and for combating them international cooperation is required. These criminal offences are qualified as crimes of international character. They are as follows: people trafficking, trafficking of drugs and psychotropic substances, smuggling of confiscated things and items limited in circulation, economic smuggling, producing and sale of counterfeit money and securities, acts of terrorism, etc.

In most cases the crimes are committed not by individuals but by an organized group or criminal community. That's why even in the absence of Articles 264 and 265 in the Criminal Code, the leaders and other members of a transnational organized group and transnational criminal community for committing the above mentioned crimes, would not be spared and left outside of responsibility and punishment. These acts fully correspond to the contents of Articles 262 and 263 stipulating responsibility for setting up organized groups and criminal communities for the participation in the activities of such criminal groups. It should be noted that in general in the law-making process one should avoid excesses while drafting legal norms.

Distinctive Features of Organized Forms of Complicity.

In the theory of Criminal Law and of law-enforcement practices one of the unsolved and debatable problems of today is differentiation and revealing of the most distinctive features of organized forms of crime complicity. If one group of scientists recognize "criminal organization» as the most aggravated form of complicity (Grishaev P.I., Kriger Y.A.). (Grishaev, 1959: 56-63); Piontkovski A.A. (Piontkovski, 1970: 466); Telnov P.F. (Telnov, 1974: 132), the others use the notion «criminal community» Trainin A.N. (Trainin, 1941: 79), Burchak F.Y. (Burchak, 1986: 126-128), Kurinov B.A. (Kurinov, 1984: 151). The question is whether these two notions are independent forms of complicity or they are just synonyms?

But there exists the third direction, according to which the notions "criminal organization» and «criminal community» are not included into the forms of complicity but they are designated independently (Kovalev, 1962: 227-237). In Part 4, Art 31 of the Criminal Code of the RK of 1997 these two, notions were given the common definition, considering them as synonyms. The criminal community was considered the form of complicity (the notion «criminal organization" was placed next to it in brackets).

If to analyze the positions of the current law and the points of view of scientists, it seems to be hard to differentiate the criminal organization from the criminal group and criminal community. It is hard to do it not because of the criteria by which one form is differentiated from another, but because of symptoms characterizing the criminal organization and criminal community. For example, Grishaev P.I., Kriger Y.A., including unity as one of the symptoms of the criminal organization, consider that it is possible to set up a criminal organization for committing crime (Grishaev, 1959: 11). Kovalev M.I. suggests almost the same definition, asserting that "The criminal organization is a group consisting of two or more persons set up for committing one or a number of crimes being engaged in criminal activities» (Kovalev, 1962: 231).

Piontkovski A.A. characterizing the criminal organization as the most dangerous and complicated form of complicity, stated the following: «Such organizations have their own tasks. They may be anti-Soviet organizations, gang organizations, etc. Even the fact itself that such kind of organization has been set up, is a real crime. In other forms, the creation of a criminal organization means the stage of preparation» (Piontkovski, 1970: 446). Besides those crimes mentioned in the Articles of the Special Part, the Criminal Code of the RK does not exclude the possibility of existing an organization on other crimes. The suggested definitions of Piontkovski A.A. and of the other above mentioned authors are identical where they point to the possibility of existing a criminal organization for committing one crime. It should be perceived with understanding because Criminal Law of that time contained such types of crimes where there was the word "organization», for example, anti-Soviet organization. Besides, there was special literature dealing with such types of criminal organizations for committing the acts which undermine the activity of penal institutions, smuggling, ets (Beljaev, 1968: 606-607).

Among the scientists who researched the problems of complicity in crimes is Telnov P.F. He also characterized a criminal organization as a kind of independent form of complicity. In his opinion independent "a criminal organization is a stable association of two or more persons united for committing criminal acts jointly» (Telnov, 1974: 132). This definition does not show the difference between a criminal organization and an organized group.

He considers the organization and stability of the group as the obligatory symptoms of an organized group. Just the fact that the existence of a criminal

organization is mentioned in the Articles of the Criminal Code of the RK as a special norm can be regarded as the difference between the two notions in this interpretation.

The analogous point of view is expressed by Eleskin M.V. who asserts that "A law-maker, in fact, has mixed the two criminal structures: a criminal organization (whose activity is aimed at committing certain crimes) and a criminal community (whose activity, first and foremost, is aimed at strengthening the joint actions against the state combating crimes); creation of the most favourable conditions for promoting criminal activities, etc» (Eleskin, 1998: 17).The above mentioned standings of the authors may lead to the wrong solution of the issue because while classifying the forms of complicity related to its organized forms, it should be taken into consideration not the types of crimes envisaged in the Special Part of the Criminal Code of the RK but the joint criminal activity of two or more persons having certain peculiarities on objective and subjective symptoms.

Not recognizing a criminal organization as an independent form of complicity, we think that the wording of Article 31 of the Criminal Code of the RK is wrong which considers these two notions «a criminal organization» and "a criminal community» as synonymous. The reason of such kind of approach lies in the fact, firstly, because of their being interchangeable. If in the early researches "a criminal organization was recognized as the gravest and the most complicated form of complicity, in the latest writings the notion "criminal community» was used.

Consequently, refrering to the researches carried out earlier, it seems to be impossible to reveal the correlation between the notions «a criminal organization» and "a criminal community».

Secondly, while classifying the organized forms of complicity, the application of judicial procedural materials as well as taking into account the types of criminal offences envisaged by the Special Part of Criminal law characterized with the symptoms of stability and structurality are considered to be more effective. Criminal law of 1959, as it has been mentioned above, used the notion «organization», in particular, referring to such elements of crime as, for example, «setting up of an anti-Soviet organization", which showed that such kind of form of complicity existed.

In the Criminal Code of the RK of 1997 and 2014 we can come across the notion "organization» whill describing the actions of accomplices, for example, the organization of illegal military formation (Art 236, now Art 267), organization and upkeeping of dens for using drugs (narcotics) and psycotropic substances (Art 264, now Art 302). It should be taken into consideration that Criminal law uses other notions as well, related to complicity in these crimes except qualified elements of crime providing for responsibility for the crime committed by an organized group or criminal community where the exact forms of complicity in crime may not be named, for example, in such crimes as piracy, armed rebels, etc. We should treat such a position with understanding, because the law-maker does not consider as the main task of his activity to determine to what form of this type of complicity belongs, but the investigation of crime describing the objective symptoms of the elements of criminal offences. Answering the question to what form this type of complicity is to belong is the task of the next stage, i.e. paying attention to the presence or absence of the symptoms of stability and structurality in crime, we recognize the form of complicity envisaged in Art 31 of the Criminal Code of the RK article 31 of the Criminal Code of the RK being the norm of the General Part of the Criminal Code is the general normative provision for the norms of the Special Part. It should be noted here, that the main practical requirement of Article 31 is the extent of all criminal offences committed in complicity, irrespective of the fact whether this act is regarded as a form of complicity in Criminal law.

In other words, any criminal offence committed in complicity must correspond to one of the forms of complicity. If some criminal offence committed in complicity, due to its peculiar characteristics does not comply with any forms of complicity envisaged in Art 31 of the Criminal Code of the RK, then this norm is considered imperfect.

Besides, if should be noted that one and the same criminal offence committed in complicity must not comply with two forms of complicity simultaneously, because each form of complicity represents and is designated for separate criminal offences committed in complicity.

We, in this part of the analysis, shortly speaking, we want to state our decision regarding complicity, where the perpetrators, without creating an organized group, implement the criminal intent by distributing roles and without assigning roles, i.e. in the form of co-performance. In accordance with the theory of the qualification of criminal offenses, it cannot be qualified as a crime committed by a group of persons in such a case, when in it one of the accomplices is limited to performing the role of organizer or instigator, and the rest are all performers. In this

case, the participation of at least one person in the form of an organizer or accomplice changes the form of complicity in the direction of complex complicity. The meaning of complex complicity is that the crime was committed, and it was attended by persons who perform other roles besides the performer. In general, the question of the classification of forms of complicity should always be borne in mind that the initial value or reason for the emergence in the criminal law of such a thing as "complicity in a crime" is the fact that a crime was committed, and someone involved in this crime as a persuader accomplice or organizer, and they should be punished.

One of the reasons why the notion "a criminal organization» is given preference compared with the notion "a criminal community» is its extent and volume. Under the present conditions, when organized criminality has acquired the transnational or interstate character, we think, it is desirable to use the term «criminal community». The term "criminal organization» due to it content and meaning can not cover such a wide range of forms of organized criminality.

That's why it can be asserted that in a criminal community it is not mandatory that the leadership of all the groups must be carried out by one person. It is possible that the leaders of several organized criminal groups may unite. The pure sense of the word "community» is the unification of several communes united for the attainment of common ends.

We should also pay attention to the proposal of Jurov A., who assert that the term «community» has a wide meaning and is close to the notions of social character rather than to the notion «organization». He suggests to change the term «community» into the term «criminal organization» (Jurov, 1990: 259). But we do not support this idea, because, if we add the word "criminal» to the notion, it changes its social and political meaning. Here not only the notion "community» but also «organization» both have social significance and meaning. There exist such word combinations as public organizations, state organizations, international organizations, etc.

The analysis given above may lead to the conclusion that the group which does not belong to any communities engaged in criminal activity irrespective of the types of crimes committed (whether they are identical or not) is considered an organized group or a criminal organization.

The possibility of transforming of an organized group into a criminal community. Considering the mentioned aspect of complicity in criminal offence, we should dwell upon the possibility of transforming of an organized group into a criminal community in the process of committing crimes relating to the category of grave or gravest. There is not such kind of trend in the researches carried out earlier, but in the criminological encyclopedia and in the Criminal Code of the Russian Federation we can find such a trend (Alekseev, 2000: 568-569). That's why it is reasonable to ask what symptom is, first and foremost, characteristic of a criminal community: the purpose of committing grave or gravest crimes or structurality and stability. The answer may logically be derived from the following judgments. Lets assume that the association of organized group have committed a series of crimes, but these crimes on the degrees of their public danger do not belong to the grave ones. Can we assert that it is not a criminal community? We think we cannot.

In such cases the systematic engagement and the organized character of criminal activities amplify the responsibility and the degree of public danger inflicted by their criminal acts.

In general, the purpose of committing grave crimes is not a typical symptom of the criminal community and does not reveal the nature of such form of complicity. This symptom is a typical factor for various manifestations of crimes, including criminal offences committed by non-permanent forms of complicity as well as by other individuals.

In our opinion, the characteristic features of the criminal community is the unity and structurality or unification of several organized criminal groups. It should be admitted that the availability or the lack of structurality of groups is the criterion discriminating a criminal community from an organized group, but a characterizing symptom of an organized group are the permanency and stability of the group.

Defining of the notion "Criminal community». Describing the guestions relating to the organized forms of complicity the scientists who researched the problems of complicity in crime, suggested different definitions of the criminal community.

These definitions in many cases corresponded to the definitions of organized groups or criminal organizations, proposed by other scientists. For example, Kovalev M. defined a criminal organization as the group consisting of two or more persons, set up in advance for committing one or several crimes (Kovalev, 1962: 231). Grishaev P.I. and Kriger Y.A. put forward the similar definition of an organized group. Liychmus U. who considered a criminal community as an independent form of complicity, suggested the following definition: "a criminal community is a permanent association of two or more persons

united for the joint criminal activity» (Liychmus, 1985: 34). Further the commented: «Participants of the criminal community can commit many socially dangerous acts, but the criminal community may also be organized for committing the only criminal act, for example, terrorist attack» (Grishaev, 1959: 27).

The above mentioned definitions show that in the 1960 s -80 s there was no common opinion on the criminal organization, the criminal community and the organized group. Analyzing the researches of the recent times, including the researches of Kazakhstani scientists, we can underline that now there is the unanimity of standings and approaches to the earlier debatable issues on certain forms of complicity. The Kazakhstani scientists, who researched the issues relating to the organized forms of complicity, have recognized banditism as one of the forms of the organized groups, though such kind of provision was not given in the previous Criminal Code of the RK [Sudakova R.N.] (Sudakova, 2002: 392-393), Verbovaya O.V. (Verbovaya, 2000: 16). If to focus on paragraph 36, Art 3 of the Criminal Code of the RK where the notion "organized group» is defined, it becomes clear that banditism, being organized, stable and socially dangerous, is the variety of an organized group.

Normative resolution №2 of the Supreme Court of the RK of June 21, 2001 "On several issues on the Application of the Legislation on Responsibility for Banditism and other crimes committed in complicity» has recognized gangs as a variety of an organized criminal group (paragraph 6 of the same resolution). In general, we also stick to such a decision.

Summing up various points of view on the issues of organized forms of complicity, we think that the notion "criminal community» has not been given the precise and scientifically grounded definition yet in the current Criminal Code.

Proceeding from the definitions given above, we put forward the following editing of paragraph 23, Art 3 of the Criminal Code of the Republic of Kazakhstan: A crime is considered having been committed by a structurally united association of several criminal groups which have been brought together for the joint criminal activities.

Recommendations

Critically relevant to the current criminal law, it is advisable to bring your own solution to this problem. Article 31 of the Criminal Code of the Republic of Kazakhstan should reflect all the circumstances of the joint criminal activity of two or more persons. All the circumstances of a joint criminal activity of two or more persons should be understood as forms of complicity, which in their sense represent ways of satisfying the criminal intent in the form of complicity in a criminal offense. They may be:

- the commission of a crime by a group of persons (or simple complicity);
- committing a crime with the distribution of roles (or complex complicity);
- organized group;
- criminal community.

From this classification of the forms of complicity it is clear that the presence or absence of prior collusion between the accomplices is not taken into account, since the commission of a crime by a group of persons and the commission of a crime with the distribution of roles can be committed without prior collusion and with prior agreement. The reason for refusing to use preliminary agreement on the classification of forms, in our opinion, is the impossibility of determining the degree and nature of the public danger of a crime, as well as the rules for qualifying criminal offenses through these signs. For example, the murder was committed with preliminary agreement or without preliminary agreement, from which the degree of public danger of the crime does not change and, accordingly, its qualification does not change.

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