

Accessory Criminal Offences in the Criminal Legislation of the Republic of Kazakhstan

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Abstract: An study is considered the basic concepts of accessory criminal offences in the criminal legislation of the Republic of Kazakhstan. Researchers were conducted the comparative analysis of development of accessory criminal offences in the legislation of the Republic of Kazakhstan. The researchers were made the offers on further improvement of the existing criminal legislation of the Republic of Kazakhstan on the basis of the analysis of the current legislation, the scientific literature, devoted to problems of abetting in a crime.

Key words: Abetting in a crime, forms of abetting in a crime, criminal group, organized crime, legislation

INTRODUCTION

It is known that determination of accessory criminal offences in criminal law in fair opinion of a number of authors is a mechanism of strengthening of criminal and legal repression (Schneider, 1958) where it is possible to agree on the basis of the existing Criminal Code (CC) of Kazakhstan. If to address to educational and scientific publications on this problem, it is easy to notice that accessory criminal offences: allows to prove responsibility of persons who directly didn't commit a crime but definitely promoted its performance that is defines a circle of the acts which aren't determined by special part of CC but objectively constituting public danger and demanding criminal and legal reaction; allows to define rules of qualification of actions of accomplices; develops the criteria, allowing to individualize responsibility and punishment (Komissarov, 1999).

The foundation of the theory of complicity after the stalin period was put by the seventh international congress on criminal law which took place in Athens on September, 1957, devoted to questions of complicity (Kudryavtsev *et al.*, 1958).

The resolution was found the continuation in legislative and law-enforcement practice of the majority of the countries.

The next stage in development of the Soviet criminal legislation was admission by the Supreme Council of USSR on December 25, 1958 of "bases of the criminal

legislation of USSR and union republics". According to Article 17, "bases", complicity is admitted "deliberate joint participation of two or more persons in commission of crime". In addition, "bases" were entered a new figure among accomplices the organizer having given the corresponding definitions and also there is recognized as complicity only beforehand promised concealment. It was legislatively finally consolidated the principle of responsibility of accomplices taking into account of character and extent of their participation in commission of crime.

Acceptance of "bases", 1958 was predetermined an acceptance in each union republic including Kazakhstan, the criminal code. On July 22, 1959 the supreme council of KazSSR was adopted the law "about the adoption of the criminal code of the Kazakh Soviet Socialist Republic", claimed a new criminal code which came into force since January 1, 1960.

In further, CC was repeatedly changed and supplemented, proceeding from criminal policy of the Soviet state and also from the changing social and economic and political realities.

In CC of the Kazakh Soviet Socialist Republic there were presented several articles, providing criminal liability for the organization of criminal alignments and participation in them: Article 58 (the organizational activity directed to commission of especially dangerous state crimes and it is equal participation in the anti-Soviet organization), gangs (Article 63), criminal groups in CLF (correctional labor facility) (Article 66-1), mass riots

(Article 65), gamblings (Article 201), dens (Article 225-1) and all of them were entered much later than adoption of CC.

“Bases of the criminal legislation of the USSR and union republics, 1991 were specified concept of complicity as “deliberate joint participation of two or more persons in commission of a deliberate crime”. There were enacted by the law RK of July 16, 1997 Article 27 (concept of abetting in a crime), 28 (types of accomplices to a crime), 29 (responsibility of accomplices of crimes), 30 (an excess of the accomplice of a crime), 31 (forms of accomplices of crimes) which at the legislative level were fixed all questions, connected with complicity.

Determination of complicity as deliberate joint participation of two or more persons in commission of a deliberate crime was enacted into the criminal legislation of our republic by the decree of the president of Kazakhstan “about amendments and additions to certain legislative acts of RK” of March 17, 1995.

DISCUSSION

In the criminal code of RK, 1997 determination of complicity was legislatively fixed in Art. 27 of CC, according to which abetting in a crime is admitted a deliberate joint participation of two or more persons in commission of a deliberate crime. This provision was completely passed into the Article 27 “concept of complicity in a criminal offense” of the new criminal code of the Republic of Kazakhstan, accepted on July 3, 2014 and come into force on January 1, 2015. An exception was made the definition “a criminal violation” which according to Article 10 of criminal code of Kazakhstan, depending on degree of public danger is subdivided into crimes and criminal offenses. This provision is belonged to one of short stories of again adopted criminal legislation of the Republic of Kazakhstan.

In our opinion, this progress of the legislator in a legal regulation of accessory criminal offences is connected with the made attempt to regulate the acts, committed by organized criminal groups.

The concept of complicity as deliberate joint participation of two or more persons in commission of crime is added: “in commission of a deliberate crime” that was unambiguously given a position to understand an opinion of the legislator on this matter.

The criminal code of RK in Article 31 “criminal liability for the criminal offenses made by group” was built a complete system of group forms of a crime. It is united the group without previous concert, a group of persons with previous concert and criminal group. So, according to Article 31 of criminal code of Kazakhstan, the criminal offense is admitted as committed:

- A group of persons if in its commission there were participated two or more principals without previous concert
- A group of persons by previous concert, if there were participated the persons who beforehand agreed about joint commission of a criminal offense
- Criminal group if it is made by organized group, the criminal organization, criminal community, transnational organized group, the transnational criminal organization, transnational criminal community, terrorist group, extremist group, a gang or illegal militarized force

For corpus delicti their role is various. So, the first two types carry out function of an element of structure obligatory and also qualifying. The organization, the management or participation in criminal group is punished as an independent crime in the cases, specified in special part of CC.

Vital issue is differentiation by legislators of group by previous concert, organized group and criminal community and also correlation of criminological and criminal and legal concepts of criminal community. As a result of indistinct border we can't define the lower bounds of organized crime at allocation of it from group.

There is arisen the difficulties with qualification of acts, presence at the matter of a subjective factor result and the statistics is respectively distorted.

The unconditional advantage of the new criminal code of Kazakhstan is development of rules of qualification of members of criminal group as accomplices.

So, responsibility for the fact of creation and the direction of organized group, criminal organization (Article 262 of the criminal code of Kazakhstan), criminal community (Article 263 of the Criminal code of Kazakhstan), transnational organized group, the transnational criminal organization (Article 264 of the criminal code of Kazakhstan), transnational criminal community (Article 265 of the criminal code of Kazakhstan) and it is equal participation in them there is come into force in the cases, provided by the relevant articles of special part.

It should be noted that according to the new criminal legislation of RK (subparagraph 4; 5 of the Article 31 of the criminal code of Kazakhstan) the person who created criminal group or directing it is subject to criminal liability for the organization of criminal group and the direction of it, in the cases provided by the relevant articles of special part of the present code and also for all crimes, committed by criminal group if they were included by its intention.

Other participants of criminal group are subjects to criminal liability for participation in it in the cases,

provided by the relevant articles of special part of the present code and also for crimes where they participated in preparation or commission.

And commission of crime by a group of persons, a group of persons by previous concert, criminal group is involved more strict punishment on the basis and in the limits, provided by the criminal code of RK as it is the circumstance, aggravating criminal liability and punishment (the item 3) p.1, Article 54 of the criminal code of Kazakhstan.

In the special part of the criminal code of Kazakhstan, it is provided their commission by a group of persons, a group of persons by previous concert or criminal group as the qualifying sign of the concrete corpuses delicti.

The specified articles of special part of the criminal code of Kazakhstan where along with other signs, it is about complicity as the qualifying sign, there can be conditionally divided into several groups.

The first: an article where it is only about simple complicity, it is about group (in the commission of crime where there were participated two or more principals without previous concert).

The second group of articles where among the qualifying signs there is provided the commission of crimes by a group of persons by previous concert (compound complicity) that is the participating persons agreed beforehand about joint commission of crimes.

The third group is included articles where among the other qualifying signs, it is provided the commission of crimes by criminal group (in excess of compound complicity).

It is necessary to notice that under the criminal code of Kazakhstan of 1997, the organized (compound) forms of complicity there were four (organized group, criminal community (the criminal organization), transnational organized group, transnational criminal community (the transnational criminal organization) that under the criminal code of Kazakhstan of 2014, the organized (in excess of compound) form of complicity is one and it is a criminal group. Thus, the organized (compound) forms of complicity earlier known to the criminal legislation which was listed above were included as separate types into structure of the general, integrated form of complicity under the name "criminal group".

The provided analysis of articles where one of the qualifying signs is complicity is shown that the legislator gives preference to such form of abetting in a crime as a group of persons by previous concert and criminal group.

The legislator doesn't provide an accurate side between such forms of abetting in a crime as commission of crime in group by previous concert and criminal group.

In our opinion, this form of abetting in a crime as the qualifying sign needs considerable expansion as exactly here it has to be resolved issues of legal regulation of fight against organized crime.

Let's consider it in more detail. So, now in the existing criminal code of Kazakhstan in Article 31 there is given the description of all forms of abetting in a crime and in Articles 262; 263; 264; 265 of the criminal codes of the Republic of Kazakhstan, it is provided criminal liability for creation and the direction of the criminal organization, criminal community, transnational organized group, transnational criminal organization, transnational criminal community and it is equal participation in them.

Besides, in Article 54 of the general part of the criminal code of the Republic of Kazakhstan and also in a number of articles of special part, the aggravating circumstance, along with others is admitted the commission of crime by a group of persons by previous concert and criminal group.

So, in Article 31 of the criminal code of Kazakhstan the legislator as criterion of division of complicity in a criminal offense into forms uses an existence or an absence between accomplices of the preliminary agreement. He provides three forms of complicity: group of persons; group of persons by previous concert; criminal group.

If between the first and second forms of complicity there is a visible border but when comparing the second and third forms of complicity of it, there is impossible to tell in such way.

Besides, it is difficult to prove a unity sign as in the law there are no accurate criteria in what cases the group is united or less united. For example, if there could be a time sign of formation of group till 1 year, over 2 years, etc. It is very difficult given in to proof and other sign of organized group the purpose of creation of group commission of heavy or gravest crimes. If to assume existence of the united group but wasn't committed heavy and gravest crimes, it is also difficult to prove this intention. Especially, as the purposes of creation of an organized criminal group can be not criminal.

So, some researchers (Boytsov and Gontar, 2000) determine organized crime by its contents as a kind of the social activity of a certain number of members of society, directed on obtaining the income, various benefits in both the criminal and not criminal ways.

Without denying existence along with criminal ways, not criminal ways of activity, it is difficult to agree with comparison of organized crime as kinds of social activity.

In our opinion, organized crime can be only illegal activity on what V.G. Grib fairly notes that at the present stage, the development of the Russian state organized

crime is considered as a type of illegal activity which essence is made a process of the conversion of capital, acquired by criminal formations in the illegal way in legal and illegal spheres of public life.

Though, the process of legalization of the organized crime can be made adjustments in this perception of the specified type of crime in the long term.

Authors of the textbook “criminal law of the Republic of Kazakhstan (the general and special parts)” (Bekmaganbetov *et al.*, 2010), giving the characteristic to all forms of complicity, speaking about the third (commission of crime by an organized criminal group), note that feature of this form of complicity is that the interrelation between participants of such group has to have steady character.

In p. 36, Article 3 “an explanation of some concepts, having in the present code” of the criminal code of Kazakhstan in legislative definition of organized group there are allocated three main signs of it:

- Numerical structure of group not less than two persons (i.e., two or more)
- Stability of structure of this group
- Preliminary and purposeful consolidation (creation) of this group for commission of one or several criminal offenses

Unfortunately, despite aspiration of scientists to reach objectivity at qualification of criminal groups, signs of organized criminal groups have subjective character. The top quantitative limit of accomplices in the law is made no mention of that.

The lower quantitative limit 2 accomplices can't be challenged. A certain interest is submitted the solution of a question of the minimum number of accomplices in organized criminal structures.

This vagueness is allowed to manipulate law enforcement agencies at all stages of consideration of criminal case at qualification of activity of criminal groups. In our opinion, in the law the number of participants of criminal group has to be concretized.

So, it is impossible to consider the criminal group as organized which is consisted of 2-3 people as this quantity doesn't allow, even theoretically, realizing the criminal intents which are referred to committed acts and to the category of the most socially dangerous.

It's not a coincidence, according to opinion of some scientists; the criminal organization is compared as a kind of labor collective.

V.G. Grib is fairly indicated on the need of legislative fixing of the quantitative characteristic of forms of complicity who also is noted that this position has full

authority for legislative fixing as the criminal community, consisting of two people will hardly be able to correspond to such characteristics as structure, existence of compound organizational and hierarchical relations, systems of protective measures, conspiracy, presence of security guards, etc.

Further, the researcher pays attention that at qualification of acts as a part of criminal formation it is necessary to remember that the quantitative sign shouldn't be defined to its reference to the category of “criminal community” (“the criminal organization”) as participation of a large number of members is not opened a question of the possession of the above characteristics.

Realities of modern life, however are testified that the corresponding sign in relation to organized criminal structures is much higher.

So, practically there are no criminal structures numbering <3 people, groups in quantity from 4-10 people are prevailed and they must have structures of “mafia” type and the corrupted relations both apparatus of coercion and leaders and hierarchy, etc., therefore, this number of the revealed members of organized groups hardly corresponds to reality.

Legislators of a number of foreign countries directly establish in appropriate cases the raised quantitative sign. Considering these circumstances, it is necessary to resolve an issue that there is necessary the legislative fixing of a quantitative sign at qualification of an organized criminal group, communities. And from such approach there are won the legislator and law enforcement agencies.

Other sign of organized crime, in our opinion which is needed in a legal regulation is stability. Unfortunately, as well as the quantitative sign, stability and unity, because of the subjectivity, also complicate to define the qualification of the committed crime and need legal fixing.

In Russian language “stability” means not susceptibility to fluctuations, constancy, firmness, hardness (Ozhegov, 1986b). Authors of the textbook “criminal law of Kazakhstan (general part)” in the capacity of stability as the sign of the third form of complicity (commission of crime by an organized criminal group), understand the presence in group not of casual people and those, who intends to commit with others one or several crimes together; participants of this group trust each of them; the structure of group is stable; there is a leader where the participants of group are submitted. In practice, by reason of lack of legal regulation, there is allowed a mixture of concepts of “unity” and “stability”.

“Solidary” in Russian language means amicable, unanimous, organized (Ozhegov, 1986a). Judging by this interpretation, “solidarity” as the sign of complicity is shown a closer form of communication of people.

However, if to take into account more broadened interpretation of the terms “stability” and “solidarity”, they can be considered as synonyms. For example, it is difficult to object comparison, the more united a group the steadier and vice versa. In this case between signs “solidarity” and “stability” can be put an equal-sign.

In literature there is also other point of view on which the maintenance of “solidarity” is much wider than “stability”.

So, authors of the textbook “criminal law of Kazakhstan (general part)” consider that solidarity of group means not only stability of its structure, presence of the head (heads) to whom all other accomplices are submitted but also mutual support of each other, interchangeability and mutual readiness to help. Solidarity means high degree of organization, observance of the rules of conduct, established in the criminal organization (Rogov and Rakhmetova, 1998).

In our opinion, “stability” and “solidarity” can be considered as synonyms also they have the right to be, in our opinion, more preferable.

In the existing criminal code of Kazakhstan, the thesis that organized crime is a special form of abetting in a crime, it isn’t looked through in full.

This point of view is shared also by some Russian scientists, according to their opinion on the example of the criminal code of Russian Federation; the legislative equipment is unsuccessful.

An approach of researchers of the model criminal code for the CIS member states is represented more acceptable (Galaktionov, 1998).

In general, it is impossible to deny that the criminal code of Kazakhstan rather in details and consistently is consolidated the most essential aspects of accessory criminal offences, however, it doesn’t exclude possibility of further improvement of the current legislation. So, the law-enforcement practice testifies to serious problems of application of the criminal legislation of the Republic of Kazakhstan concerning representatives of organized crime.

CONCLUSION

Taking into account above-mentioned circumstances it is possible to state the following: the first is the legislation of the Republic of Kazakhstan not fully provides regulation of questions of qualification in relation to accessory criminal offences in general and organized crime as most socially dangerous form of complicity in particular.

The second is borders between such forms of abetting in a crime as group by previous concert and criminal group are legislatively not accurately formulated. As a result many articles of the criminal code of RK “do not work”, it is difficult to define borders of organized crime.

The third is in the criminal code of Kazakhstan, it would be necessary to consider the qualifying sign of complicity more differentially in relation to each structure of a criminal offense.

The fourth is there have to find reflection in the law such signs of organized crime, applicable to all forms of complicity as stability, solidarity, a quantitative sign and time of existence of criminal group.

Such approach will be allowed to resolve issues of qualification of the crimes, committed by groups of persons unmistakably.

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