

Commitment of a Crime by a Group of Persons by Prior Collusion

The article considers the current legislation of Ukraine concerning the criminal responsibility for the commitment of a crime by a group of persons by prior collusion. In the focus of attention are qualifying signs of the crime, as well as a circumstances aggravating the punishment for it. The author suggests definition of the notion of organized group as a union where several persons participated in its creation and who have previously established a stable association for the purpose of preparation and committing offenses. The article analyzes the main characteristics of the organized group. The recognition of a union a criminal organization implies management or coordination of criminal activity of other persons, comprises joint activity of the participants of the association or its structural parts in organizing the crime by other persons, management of its preparation and fulfillment.

Key words: organized outlawry, premeditated agreement, complicity, guide criminal activities.

Formulation of scientific problem and its meaning. Today a large number of crimes are perpetrated in complicity, which determines their heightened threat for society. Some categories of them tend to the increase in the number of crimes committed precisely by a group of persons on prior collusion. In the current legislation of Ukraine on criminal liability committing a crime by prior collusion is regarded as a qualifying sign of the crime, as well as a circumstance aggravating the punishment for it.

The basic material and justification of the results of the study. The concept of this form of committing a group crime is interpreted in paragraph 2 of the Article 28 of the Criminal Code of Ukraine, according to which the offense is admitted as committed by prior collusion of a group of persons if it was committed jointly by several people (two or more), who beforehand agreed to commit the crime together, i.e. agreed on joint committing of it [8, p.16].

In the Special Section of the Criminal Code of Ukraine committing a crime by a prior collusion is classified as a qualifying sign or especially aggravating circumstance of the crime. However, in practice there are cases of the commitment of other assaults on preliminary arrangement that are not included into the list. For example, infliction of grievous body injuries (art.121, CC); illegal felling of forests (art.246); resisting: the authorities, law enforcement officer, a member of a public organization for keeping public order and state borders, or a military officer (art.342, CC); assault on the life of a state or public figure (art.112, CC), or the lives of the representatives of a foreign state (art.443 CC) and so forth.

All the articles mentioned above consider the major characteristics of the qualifying signs or especially aggravating circumstances of the crime committed by a less socially dangerous group of criminals, e.i. without preliminary collusion. Commitment of a crime by a more socially dangerous group of this kind, namely a group of accomplices, who committed a crime by prior collusion, is not specified in the articles of the Code, while the investigative and judicial practice admits and proves the possibility of committing these kinds of crimes on preliminary arrangement by a group of criminals.

In practice there is an opinion, that aggravating circumstance of committing a crime by a group of persons includes both the crime committed by a group of persons by prior collusion and without it. To resolve the dispute on this issue we should refer to the analysis of legislative definitions of the concept «committing a crime by a group of persons», which in the legally relevant paragraph 1 of Article 28 of the Criminal Code of Ukraine is attributed by the item «without prior agreement» as mandatory, but not as an alternative one. Thus the qualification wording of such criminal acts as «committing a crime by a group of persons» can neither comprise the concepts of «committing a crime by a group of persons by prior collusion», «committing a crime by an organized group», nor even «represent» them in the Special Part of the Criminal Code of Ukraine. So it would be appropriate to clarify the term «group of persons» in the General Part of the Criminal Code of Ukraine. For instance, it is advisable to clarify the characteristics, which define committing a crime by a group of persons without prior collusion, by prior collusion, by an organized group, if the other is not specified in the article of the Special Section of this Code.

An organized group is a union where several persons (three or more) participated in its creation and who have previously established a stable association for the purpose of committing this and other offense (or

offenses). The main characteristics of an organized group are: presence of several people (three or more); their previous organization into the stable association for the preparation, development or fulfillment of crime, or attempt on it, or instigation to its fulfillment, or commitment of two or more offenses; the stability of the union; consolidation of crimes by a common plan with assigned roles, designed to achieve this plan; awareness of all members of the group about this plan. Organized group is more dangerous variety of a group by prior collusion. It differs from the group by prior collusion in the following items: stability (for the group with prior collusion this feature is not obligatory); orientation on committing two or more crimes (the group with prior collusion can be organized to commit only one crime); the number of participants – organized group consists of three or more participants, while the group by prior collusion – of two or more.

Application of the norms of the Special Section of the Criminal Code to the crimes committed by a group is based on the common and fundamental provisions, which are set out in the General Part. For example, according to Article 28 of the Criminal Code of Ukraine crime shall be admitted as committed by a group of persons exclusively at the absence of prior collusion between the accomplices.

A comparative analysis can shed the light on the possibility to fix legally the crimes committed by prior collusion and without it as a type of group crime in one separate article of the General Part of the Criminal Code of Ukraine.

From the contents of paragraphs 1 and 2 of Article 28 of the Criminal Code of Ukraine we can highlight the features that seemingly are characteristics of the group of persons by prior collusion as opposed to a simple group. These features are: joint offense but not obligatory participation in the crime; no legislator's specifications that the participants are perpetrators, as well as specifications concerning the presence of a preliminary agreement (collusion) to commit a crime, i.e. before the crime was committed. The commitment of a crime jointly means awareness of cohesion, unity of all participants in the crime, understanding that the crime is being perpetrated by them together (which gives them strength, confidence) and that each accomplice, understanding the joint responsibility in common crime, hopes for support and mutual assistance from the other partners [5, p. 94].

M. Y. Korzhanskyi states that the main characteristic of the content of the aggravating circumstances is collusion and he defines it as a prior agreement of two or more persons to commit a crime together, by joint efforts [5, p. 93].

It is the presence of prior collusion that transforms the content of the notion of such a group as compared to the simple group. This collusion aligns the roles of every separate accomplice – each of them becomes a perpetrator, irrespective of the role he performs in the joint commitment of a crime. V. O. Navrotskyi [11, p. 268] adds that a group member, acting in accordance with the collusion, at least, should be present at the scene of the crime and provide assistance to other members of the group.

In the science of criminal law the problem of the content of aggravating circumstances for the crime committed by prior collusion in the norms of the Criminal Code remains controversial and hotly debated. Contradiction in solution of this matter is due to the absence in paragraph 2 of Article 28 of the Criminal Code of Ukraine legislator's direct reference to the nature of the accomplices' roles.

Researchers in the field of criminal law continue interpret the content of aggravating circumstances for the crime committed by prior collusion only as co-perpetration but not complicity. For example, P. S. Matyshevskiy, investigating crimes against property draws the conclusion that the theft should be classified on the basis of its commitment by prior collusion only when these individuals were directly involved in crime execution [10, p. 130-131].

R. R. Haliakhbarov is one of those who support the interpretation of the content of aggravating circumstances of the crime committed by prior collusion within the notion of co-perpetration. According to him, the notion of group crime concerns only that type of crime where every participant intentionally, in agreement with others, together, fully or partially, participates in the fulfillment of one, common for all participants crime [3, p. 6]

The scientist noted that the group crime has the necessary amount of permanent, common manifestations of the objective and subjective attributes, characteristic for all the crimes of that type. Being a specific expression of the required attributes of complicity, they, alongside, have significant peculiarities. In other words, any group crime is characterized by a set of permanent features which must be identified in every particular case qualified as a crime committed by a group of persons. The absence of any of the permanent attributes always indicates that the crime shall not be admitted as committed by a group [3, p. 3].

In addition to permanent attributes some of crimes committed by a group are characterized by changeable characteristics (for instance, prior agreement or collusion). However, it is understood that the variables are the features usually combined with the permanent ones, without which there can be no group.

Among the permanent objective attributes of a group crime R. R. Haliakhbarov distinguishes the

following:

- the plurality of members (two or more);
- direct participation of every member of the group in the commitment of a crime which has the manifestations of the objective attributes of one and the same offense;
- carrying out attacks, assaults by joint efforts of accomplices [3, p. 3].

The first objective feature describes the role that members of the group crime can perform during its execution. R. R. Haliakhbarov emphasizes that unlike complicated type of complicity, in group crime all the members are perpetrators (co-performers, accomplices).

The second objective indicator considers the group crime in terms of the more significant peculiarities. In particular, the emphasis is laid on the mandatory direct participation of each accomplice in the offense which has the manifestations of the objective attributes of one and the same offense. Directness in this case means that each of the participants, in full or in part, through their efforts – at least partially – perform socially dangerous acts, which are included into the objective set of attributes of the crime.

Unlike the offense committed by a single perpetrator, in the group crime several people are directly involved into it, as they combine their efforts to commit common acts that «fit» the description of the objective attributes of a single, common for all accomplices offense. It follows that the group crime is always a crime committed by joint efforts of several participants with appropriate responsibilities that form a unified force, which sets in motion the mechanism of harm infliction to the protected by criminal law social relations.

In the terms of rating executive actions of accomplices may vary significantly. Some of them may commit socially dangerous acts that fully include all the elements of crime, others – the act comprising these features in part [3, p. 4]. Unlike criminal group in which performing acts may occur only within the legal framework and concrete attributes of a crime under the article of the Criminal Code, in a complex complicity these features and boundaries are considerably wider [3, p. 5]. They are defined both as the specific features of a particular crime and the characteristics defined in Article 27 of the Criminal Code of Ukraine. Thus, organization of the crime, its development, complicity and instigation to its fulfillment may occur before the crime has been committed by perpetrator, as well as aiding and abetting may be incorporated at the time of or after the crime committed. That is exactly why, wrote R. R. Haliakhbarov, without taking into account features of direct involvement of each individual into the commitment of actus reus of the crime itself, it is impossible to distinguish clearly between group crime and complicity in a crime in the narrow meaning of the word. In fact, there is always a danger of too broad interpretation of such legal phenomenon as a group crime, due to the inclusion to it offenses, which, in accordance with the law content, should be considered as a different form of complicity [3, p. 6].

If the collusion on the committing the crime occurred in the course of offense, during the fulfillment of the criminal acts, it can not be qualified as committed by prior collusion, because in this case there was no prior agreement. However, in some papers of academic literature on criminal law of Ukraine it is clearly indicated that the collusion can occur long before the fulfillment of the crime, right before the crime, but always before the attempt to commit it [7, p. 203], the other authors recognize the possibility of a preliminary collusion in the course of attempt to commit a crime [7, p. 191].

Judicial authorities continue to take similar decisions as to the interpretation of the meaning of the notions «aggravating circumstances or qualifying signs of the crime by prior collusion» and the other categories of group crime. However, some of them contain certain positions, sometimes even errors, which determined the expediency in more detailed consideration of them.

Contemporary science on criminal law in Ukraine also has the followers of this point of view regarding the content of aggravating circumstances for the crime by the prior collusion. For example, O. V. Ilina, commenting on this issue, noted that «in the case of complicity with the distribution of roles such feature can not be incriminated to accomplices, but can be applied only in case when there are several perpetrators of a crime» [4, p. 9].

In the theory of criminal law there is another position concerning understanding of the essence of aggravating circumstances of committing a crime by a group of persons by prior collusion. For instance, according to H. P. Zharovska, criminal group, which operates by prior collusion, can be recognized both in the form of co-perpetration, and in the form of complicity, with the distribution of roles [21, p. 9].

In support of this position D. P. Alioshyn suggested to recognize the crime committed by prior collusion, «if it was committed jointly by several people (two or more), who in advance, i.e. before the start of the crime, agreed on joint commitment of it by executing mutually agreed functions in the course of implementing a single criminal intent (plan), regardless of the role they thus performed» [2, p. 9].

This position is advocated in Russian science of criminal law too. For example, S. V. Afinochenov

criticizes the views of scholars who consider the notion of co-perpetration separately, beyond the term of complicity [1, p. 24]. A. P. Kozlov is also convinced that we should derive from existing fictions and recognize that a group of persons by prior collusion can carry out criminal intent both by co-perpetration and by distribution of roles [6, p. 11]. O. O. Kvasha finds this position persuasive and emphasizes that public danger of collective crimes is not that the criminals together serve the actus reus of the crime, but that crime is committed by joint efforts of the accomplices together, irrespective of the role played by each of them – their homogeneity or heterogeneity [1, p. 165].

In foreign criminal law this issue also has not found a definite solution. Thus, in the Criminal Code of Armenia (Part 2, Article 41) [13] and Belarus (Part 2, Article 41) the crime is considered committed by a group of persons by prior collusion if it involves only the perpetrators [18].

In the definition of complicity in the crime in this regard, legislators use the terminology «individuals who had agreed on joint commitment of the crime» – in the Criminal Code of the Republic of Kazakhstan (Part 2 of Article 31) [19], Georgia (Part 2 of Article 27) [14]. The concept of «a group of persons by prior collusion» is not defined at all in the Law on criminal liability of Denmark [15], Poland [17], China [16], Germany [20].

While analyzing this type of complicity in the crime we have come to the conclusion that it would be appropriate to recall the definition of a group of persons by prior collusion presented in the Draft of the Criminal Code of Ukraine of 18.05.2000, adopted on second reading: «The crime is considered committed on collusion if it is committed jointly by several perpetrators, who in advance, i.e. before the crime, agreed to co-perpetration of it» [12].

Conclusions and perspectives for further researchs. It is significant that defining the concept «a group of persons by prior collusion» in paragraph 2 of Article 28 of the current Criminal Code of Ukraine the legislators declined the direct reference to the fact that only the perpetrators of the crime can be considered the members of such group. Effective regulation of responsibility for group crime, as well as the other matters of Criminal Law, can be realized only on the basis of internally consistent and scientifically-based legislation.

The recognition of a union as criminal organization, from the standpoint of management or coordination of criminal activity of others, comprises joint activity of the participants of the association or its structural parts, which implies organizing the crime by other persons, management of its preparation and fulfillment (for the details on the concept of organization of crime, management of its preparation or fulfillment see Comments to Article 27).

The functioning of both the criminal organizations and other criminal groups implies developing proper conditions for the existence of these associations and for caring out criminal activity by them. It may include the financing of such activities, concealment of it, counterintelligence, intelligence, legal, medical and information support, providing personal guard for the organizers and leaders of criminal organizations or other criminal groups, legalization of the proceeds, obtained by the mentioned associations in a criminal way, ensuring their concealment from social control, protecting members of such associations from criminal prosecution and so forth.

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Гусак А. Вчинення злочину групою осіб за попередньою змовою. У статті розглядається чинне законодавство України про кримінальну відповідальність за вчинення злочину за попередньою змовою групи осіб. Аналізується як типова кваліфікуюча ознака складів злочинів, а також обставина, яка обтяжує покарання. У статтях Особливої частини Кримінального кодексу не передбачено як ознаку основного складу чи кваліфікуючу ознаку вчинення злочину групою осіб за попередньою змовою співучасників. На практиці має місце думка, що кваліфікуюча ознака «вчинення злочину групою осіб» охоплює як вчинення злочину групою осіб за попередньою змовою, так і без змови. У статті сформульоване поняття організованої групи як стійкого об'єднання декількох осіб, які попередньо зорганізувалися для підготовки або вчинення злочинів. Ознаками організованої групи є: наявність декількох осіб; попередня їх зорганізованість у спільне об'єднання для готування або вчинення двох чи більше злочинів; стійкість такого об'єднання; об'єднаність злочинів єдиним планом з розподілом функцій учасників групи, спрямованих на досягнення цього плану; обізнаність всіх учасників такої групи з цим планом.

Ключові слова: організована злочинність, вчинення злочину за попередньою змовою, суспільно-небезпечний вид групи, вчинення злочину групою осіб, керівництво злочинною діяльністю.

Гусак А. Совершение преступления группой лиц по предварительному сговору. В статье рассматривается действующее законодательство Украины об уголовной ответственности за совершение преступления по предварительному сговору группой лиц. Совершение преступления группой лиц по предварительному сговору анализируется как типичный квалифицирующий признак составов преступлений, а также как обстоятельство, отягчающее наказание. В статьях Особенной части Уголовного кодекса совершение преступления группой лиц по предварительному сговору соучастников не предусмотрено как признак основного состава или квалифицирующий признак состава преступления. На практике имеет место мнение, что квалифицирующий признак «совершение преступления группой лиц» охватывает как совершение преступления группой лиц по предварительному сговору, так и без сговора. В статье сформулировано понятие организованной группы как устойчивого объединения нескольких лиц, которые предварительно организовались для подготовки или совершения преступлений. Признаками организованной группы являются: наличие нескольких лиц; предварительная организованность в совместное объединение для приготовления или совершения двух или более преступлений; устойчивость такого объединения; объединенность преступлений единым планом с распределением функций участников группы, направленных на достижение этого плана; деятельность всех участников такой группы согласно этому плану.

Ключевые слова: организованная преступность, совершение преступления по предварительному сговору, общественно-опасный вид группы, совершение преступления группой лиц, руководство преступной деятельностью.