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Theoretical and Legal Basis to Conception of Organized Crime in Modern Conditions

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Abstract: Article considers questions of the definitions which are completely reflecting content by the form of crime, all-recognized by scientists and practitioners, opening an essence of organized crime. Now exhaustive signs of organized crime, where in legal relations there are many gaps, complicating law-enforcement process concerning members of organized criminal groups, especially its top and many other things aren't worked out. In our opinion, "stability" and "unity" can be considered as synonyms which have the right to existence and have to be regulated along with other signs of organized criminal group in the existing penal legislation of the Republic of Kazakhstan. All these circumstances require searching of the new approaches in research work at studying of organized crime, which would give the chance to receive a true picture of organized crime.

Keywords: A definition to organized crime; forms of criminal complicity; elements (types) of criminal group; criminological signs of the group; concepts of "unity" and "stability".

1. INTRODUCTION

The present stage of economic, political and social development of Kazakhstan is accompanied by a number of the factors, interfering forward and systematic state development, one of which is organized crime.

The President of state N.A. Nazarbayev said for the first time about scales of organized crime in Kazakhstan in the speech at a meeting on fight against crime and corruption on April 19, 2000. So the President of the country, giving critical evaluation to a criminal country situation for that period, noted that everywhere there is a revival of criminal traditions and customs, professionalizing and specialization of underworld. Many citizens have the main source of the income - a criminal business. In Kazakhstan there were "crowned thieves", who distribute spheres of influence between criminal groups. There are prospered narcobusiness, alcohol smuggling, trade in stolen cars, prostitution became the ordinary phenomena. And there are engaged in all this not separate groups, but well organized criminal societies with "supporting gang of criminals" in law enforcement agencies [1].

Organized crime is so large-scale, multifunctional and diversified that as a result represents a certain amorphous and intangible formation where it is difficultly not only to confront, but even it is difficult to research.

On this occasion, the American scientist Jay Albeneze wrote that organized crime is always contained a certain secret that made exaggerate its importance. This image was in many respects created thanks to belief that behind of some crimes there are some mysterious organizations which in every possible way were cultivated by popular editions and Hollywood. Today it is difficult to understand where the reality comes to an end and literature begins. Many do not have a clear idea of what is a mafia in fact, what it does and what takes place in the world of organized crime. For nearly hundred years the nature of organized crime and its sources remained unknown that excluded a possibility of effective fight against it [2].

According to the Russian scientist Yu.A. Voronin, organized crime – is one of the burning issues of the present, but a peculiar paradox is the fact that till this moment it is not developed accurate concept of what it represents [3].

Other scientist I.V. Godunov fairly writes in the preface of his work: “Organized crime – what is it? The sign of a century or plague of the present?!” In modern conditions this topical issue faces not only whole world community and each individual state; in a varying degree, it concerns each person, each member of modern civilized society [4].

According to A.I. Dolgova, organized crime – is a highest manifestation of criminal orderliness. It is about very difficult phenomenon, which is due to its complexity, is treated in the scientific, educational literature and regulatory legal acts as multiple-valued [5].

The Kazakhstan scientists consider that the modern criminology, both in our country and abroad, isn't developed the definition so far, which is completely reflecting content of this type of crime all-recognized by scientists and practitioners, opening an essence of organized crime; exhaustive signs of organized crime, where in legal relations there are many gaps, complicating law-enforcement process concerning members of organized criminal groups, especially its top and many other things aren't worked out [6].

All these circumstances require searching of the new approaches in research work at studying of organized crime, which would give the chance to receive a true picture of organized crime or at least to approach to its solution.

In 1983 for the first time scientists of the former USSR, namely group of authors of research associates of All-Union research institution Ministry of Internal Affairs of the USSR (A. Volobuyev, E. Galkin, V. Pakhomov), offered the structure of the organized crime in the form of a pyramid [7].

2. DISCUSSION

Let's consider the main approaches to understanding of organized crime.

One group of authors, despite the happened changes in all spheres of life after the collapse of the USSR, continues to claim that there is no organized crime that it – is the myth, which was thought up by journalists and was picked up by some criminologists [8].

Other authors, referring to documents of the international conference of the UN on problems of the organized crime, which took place in Suzdal (October, 1991), determine organized crime as functioning of steady, managing communities of the criminals, who are engaged in crimes as business and creating system of protection against social control by means of corruption [9-10].

The third group of authors at determination of organized crime, in a basis of a definition, gives process of the circulation of the criminal capital and calls organized crime as social and economic process of the circulation of the criminal capital in the criminal sphere with involvement of a general population, with use of corruption and all that promotes its building-up and enrichment [11].

The fourth group of authors, doesn't give a definition to organized crime, and prefers to list its signs, refer to them: steady community; separation of functions between participants; hierarchy; specialization of a field of activity; generation of profit; ensuring own safety; harsh discipline; legalization of the money got in the criminal way; international relations; presence of national or class signs; use of science and technology achievement [12].

The fifth group of authors, giving definition to organized crime, recognizes that it is first of all a crime type [13].

In our opinion it is the most preferable position, as far as in it, a definition of organized crime is given rather complete and logically.

According to the famous criminologist A.I. Dolgova, the society of market economy, domination of the capital – it is not “a paradise” in the criminological relation at all. Many foreign criminologists, studying this society “on the inside”, convincingly show that it has strong criminal potential and high criminality [14].

Now organized crime already has an international character and it is transformed to transnational criminal structures.

According to expert opinions the international organized crime has about 300 billion dollars of investments to the real estate, in various firms and the entities, and also on the bank accounts. These monies are received mainly from traffic in drugs, weapon, and racket. Moreover, its annual income about 120 billion dollars [15].

Interesting data are provided by the Russian scientific criminologists on the damage, caused by organized criminal groups in the sphere of privatization. So, according to estimative data loss to the economic capacity of Russia from privatization was colossal: “... losses were in two and a half times higher than the losses of the USSR in the Great Patriotic War and they were equaled 9540 trillion rubles according to the prices of 1995. On today's rate it is 2 trillion dollars, or 58 trillion rubles [16].

Certainly, organized crime in Kazakhstan has no such big scales, such as in Russia, and furthermore in foreign countries, but the tendencies characteristic for it can take place and at us.

Not casually our society was begun to get used to contract murders, plunder in especially large sizes and to other loud crimes that is a favorable condition for organized crime.

So, before speaking about organized crime as the phenomenon, it is necessary to decide on its basic concepts and the methodology of a research conceptually.

For complete idea of organized crime it is necessary to consider it in an extended and confined sense of the word.

If to consider organized crime in the broadest sense, then it is represented along with other types (crime of minors; relapsing crime; crime of the military personnel, etc.) such as independent type of crime. And as it is a type of crime, then organized crime must be included a set of the specific crimes, differing in the features and criminal and legal characteristics.

It is known that various criteria (for example, crime object; fault form; character and degree of public danger of the committed crime, etc.), taking into account that there is defined the structure of a special part of

the Criminal Code of Kazakhstan, can be the basis for qualification of criminal offenses (crimes or criminal offenses).

In our case, organized crime is cumulative of the offenses, committed by organized criminal groups or criminal societies (the criminal organizations).

Unfortunately, scientific criminologists pass directly to consideration of signs of organized crime at the determination of essence of organized crime: and the cumulative offenses, constituting an independent type of crime and which are referred to as organized crime, remains out of a field of vision.

The reason of absence of a clear boundary of organized crime as object of a research is insufficient legal support of questions of criminal and legal responsibility and high latency of this type of crime.

For the first time it is given the explanation of such concepts as criminal group, a criminal society, the criminal organization, a transnational criminal society, the transnational criminal organization, transnational organized group, organized group in article 3 of the Criminal Code of the Republic of Kazakhstan, which was adopted on 3 July 2014 and entered into force January 1, 2015 [17].

In the article 31 of the Criminal Code of Kazakhstan it is given the description of criminal liability for the criminal offenses made by group [18, page 18].

Criminal liability of various forms of criminal complicity is provided in the articles 262, 263, 264, 265, 266 of the Criminal Code of Kazakhstan [19].

In addition in point 2) of article 54 of a general part of the Criminal Code of Kazakhstan, and also a number of articles of the special part along with others as aggravating circumstance it is recognized committing a criminal offense as a part of a group of persons, a group of persons by previous concert, criminal group [20].

It should be noted that one of novel of the new Criminal Code of Kazakhstan is the fact that in the Criminal code of RK of 2014 there were changed by developers a definition of the organized (complex) forms of criminal complicity, that is there was a change of the form of their definition, and the substantial party was undergone insignificant adjustments and practically was remained as prior version.

If in the Criminal Code of Kazakhstan of 1997 there were four organized (complex) forms of criminal complicity (organized group, a criminal society (the criminal organization), transnational organized group, a transnational criminal society (the transnational criminal organization), then according to the Criminal Code of Kazakhstan of 2014 an organized (complex) form of criminal complicity there is only one and it is a criminal group.

At the same time the organized (complex) forms of criminal complicity earlier known to the penal legislation, which are listed above, were included as separate types into structure of a general, single form of criminal complicity under the name "criminal group". It should be noted that some of types of criminal group (earlier independent forms of criminal complicity) underwent certain changes (for example, a concept of a criminal society and the criminal organization).

As independent types of criminal group there are allocated the gang, terrorist group, extremist group, an illegal paramilitary force (earlier, these concepts were covered by such forms of criminal complicity as organized group and a criminal society (the criminal organization)).

According to the part 3 of Art. 31 of the Criminal Code of Kazakhstan the crime is recognized as committed by criminal group if it is committed by organized group, the criminal organization, a criminal society, transnational organized group, the transnational criminal organization, a transnational criminal society, terrorist group, extremist group, gang or an illegal paramilitary force [21].

Concepts of all elements (types) of criminal group are considered in Art. 3 of the Criminal code of RK of 2014.

However, as practice shows, the offered means of criminal and legal fight against organized crime by the legislator are obviously not enough.

Therefore, it is absolutely fair the note of some scientists that it is possible to theorize for a long time about criminological signs of the group, acting by previous concert, organized group, a criminal society (the criminal organization), transnational organized group, the transnational criminal organization, a transnational criminal society, terrorist group, extremist group, gang or an illegal paramilitary force.

However, the legislator is obliged to give accurate definitions of these phenomena, so far as he connects with them occurrence of criminal legal consequences of various weight, but not to give definition of signs of these phenomena at the discretion of law-enforcement justice.

The firm principle of responsibility for fault, i.e. when the guilty person clearly realizes all objective circumstances of deeds is enshrined in the criminal law. Content of the concepts “organized group”, “criminal organization”, “criminal society” is especially subjective [22].

Imperfection of the penal legislation complicates the procedure of proof of the fact of organized creation group or a criminal society.

For example, Verbovaya D.V., during carrying out comparison between gang and a criminal society, specifies that the fact of the organization of gang or participation in it gives in to proof in much bigger degree, than the fact of the organization of a criminal society as the structure of gangsterism is characterized, in addition to a number of coincident estimative signs, also such defining sign of the objective party as armament [23].

Luneev V. specified on the difficulties of proof of the acts, committed by organized criminal groups so that the acts, committed by organized criminal groups, are taken into this account, he also notes, that these acts (organized crime) were accounted only when criminal case is solved and there are sufficient evidences about crime execution by organized criminals, though the same acts were committed by the considered criminals. But it, undoubtedly, isn't established, and they don't fall in this consideration [24].

According to item 11 of the Normative resolution of the Supreme Court of the Republic of Kazakhstan of June 21, 2001 “About some questions of application by courts of the legislation on responsibility for gangsterism and other crimes, committed in criminal complicity” about stability of organized criminal group there can be confirmed, in particular, such signs as stability of its structure, close interrelation between its members, coordination of their actions, a permanency of forms and methods of criminal activities, duration of its existence.

Management of organized group can be realized of both one, and several persons.

According to the item 13) of the above-stated Normative resolution of the Supreme Court of the Republic of Kazakhstan of June 21, 2001 the organized criminal group can exist also without head. It is necessary to refer to those cases when participants of small organized criminal group or gang, without separating the leader from the environment, resolve issues of criminal activities together and act, as a rule, as joint participants of the crimes, committed by them.

A crime is considered as completed from the moment of the actual management of the specified criminal groups. The actions directed to creation of organized group or the criminal organization but didn't come to the end with their creation for the reasons which aren't depending on the guilty person, must be qualified as attempt at creation of organized group or the criminal organization.

For complete idea of organized crime, it is necessary to consider organized crime also in other aspect – as activities, that are in the narrow sense of the word.

If between the first and second forms of criminal complicity, that is the group of persons without previous concert and a group of persons with previous concert, is available visible border, then at comparing with the third form of criminal complicity, criminal group which united the organized group, the criminal organization, a criminal society, transnational organized group, the transnational criminal organization, a transnational criminal society, terrorist group, extremist group, gang or an illegal paramilitary force, there can not be said as well.

In addition, 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, there could be a time sign of group creation – till 1 year, over 2 years, etc. It is difficult to proof and other sign of organized group – it is the purpose of creation of group – commission of grave or gravest crimes. If to assume availability of united group, but not committed of grave or gravest crimes, so it is difficult to prove also this intention.

Especially as the purposes of creation of organized criminal group can be non-criminal as well.

So, some authors [25] define organized crime by its content as a variety of the social activities of a certain number of society members, directed to acquisition of income, various benefits both criminal and non-criminal methods.

Without denying existence along with criminal and non-criminal ways of activity, it is difficult to agree with comparison of organized crime as variety of social activity

In our opinion, organized crime can be only unlawful activity, where Grib V.G. fairly specifies that at the present stage of development of the Russian state organized crime it is considered as a type of unlawful activity, essence of which makes a process of the capital circulation, purchased by criminal forming in the illegal way, and also in legal and illegal spheres of the public life [26].

Authors of the textbook the Criminal law of Kazakhstan (a general part) absolutely fairly specify that in the new Criminal Code of Kazakhstan the legislator doesn't use a concept "form of criminal complicity", but exactly this concept has meaning for elucidation of content of criminal liability basics for the criminal complicity [27].

Though in the theory of the criminal law and in practice in case of division of criminal complicity in a crime into forms on nature of performance by accomplices of the objective party of the committed crime there are allocated two forms of complicity in a criminal offense:

1. simple criminal complicity (it is called criminal complicity without separation of roles or joint participants) and
2. complex criminal complicity (criminal complicity with separation of roles or criminal complicity in close sense of this word) [28].

Unfortunately, despite the aspiration of scientists to reach objectivity in case of qualification of criminal groups, the signs of organized criminal groups have subjective character.

The first – quantitative signs. On our belief in the law there must be concretized the number of participants of organized group. So, it is impossible to consider criminal group consisting of 2-3 people as organized, as far as this quality doesn't allow, even theoretically, to realize criminal purposes, which refer to the committed acts to the category of the most socially dangerous.

Exactly this vagueness allows to manipulate of law-enforcement bodies at all stages of consideration of criminal case in case of qualification of activities of criminal groups.

For example, drawing an analogy to a construction gang, than the construction object is more difficult, the more must be the structure of labor collective, and also the requirements to professional training of builders must be higher, there already must be a specialization, etc.

It is no coincidence, according to some scientists, that the criminal organization is compared as a type of labor collective [29].

Therefore the comprehensive analysis of practice, taking into account opinions of the specialists, providing fight against organized crime, will allow for the scientists to make offers in the current legislation on the considered problem.

Grib V.G. fairly indicates on the need of legislative fixing of the quantitative characteristic of forms of criminal complicity, and this position has full authority for legislative fixing, as the criminal society consisting of two people will hardly be able to correspond to such characteristics as structure, availability difficult organizational and hierarchical relations, system of protective measures, conspiracy, presence of security guards, etc. [30].

3. CONCLUSION

We consider that legislative fixing of a quantitative sign will facilitate considerably the solution of the available problems in this sphere.

In our opinion, the second sign of organized crime, needing a legal regulation, – is stability. Unfortunately, as well as the first sign - quantitative, stability and unity because of the subjectivity also complicates qualification of the committed crime and needs a legal fixing.

In Russian “stability” means non-susceptibility to fluctuations, a permanency, firmness, hardness” [31].

Authors of the textbook “Criminal law of Kazakhstan” (a general part) as stability, as a sign of such form of criminal complicity as commission of a crime by organized criminal group, understand a presence in the group not of casual people, and those who intends to commit together with others one or several crimes, participants of this group trust each other, the structure of group is stable, there is a leader to whom participants of group are submitted [32].

Because of legal abeyant in practice there is often allowed confusion of concepts of “unity” and “stability”.

“United” in Russian means also amicable, unanimous, organized [33].

And judging by this interpretation, “unity” as a criminal complicity sign, considers closer form of communication of people.

However, if to take into account more extensive interpretation of the terms “stability” and “unity”, it is possible to consider them as synonyms. For example, it is difficult to object comparison, than more united group, the more it is steadier and vice-versa. In this case it is possible to carry out between signs “unity” and “stability” an equal-sign.

In literature there is also other point of view according to which content of “unity” is much broader than “stability”.

So, authors of the textbook “Criminal law of Kazakhstan” (a general part) consider that unity of group means not only stability of its structure, presence of the head (heads) to whom all other accomplices submit

mutual support of each other, interchangeability, and mutual assistance. Unity means high degree of organization, observance of the rules of conduct established in the criminal organization [34].

According to other scientists L.D. Gaukhman and S.V. Maximov, signs actually only of unity are: the “mutual protection” which is expressed in joint commission by participants of group of a crime earlier, serving by participants before of sentence in the same place of imprisonment, mutual awareness of participants on the materials, compromising each other; use for maintenance of discipline in group of violence, threats, rigidity, etc.; the conspiracy, consisting in use of code names and signals, a criminal slang, codes, passwords; the general till (“common fund”) representing the money and other values, extracted as a result of criminal and other illegal activities, etc. which are at the disposal of group; availability of special technical means, i.e. various listening and anti-listening devices, the security alarm system of transport, etc. which equipped organized groups [35].

In our opinion, “stability” and “unity” can be considered as synonyms also has the right to existence and must be regulated, along with other signs of organized criminal group, stated above in the existing penal legislation to the Republic of Kazakhstan, namely in the article 3 of the Criminal Code of Kazakhstan, where there is given an explanation of some concepts, containing in the Criminal code of RK.

Such offer will allow to enhance the existing penal legislation of the Republic of Kazakhstan, and to activate considerably law-enforcement activities and to increase its efficiency concerning the crimes committed by criminal groups (organized group, criminal organization, a criminal society, transnational organized group, the transnational criminal organization, a transnational criminal society, terrorist group, extremist group, gang, an illegal paramilitary force).

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