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A group of persons, a group of persons by previous concert: criteria for distinguishing and problems of qualification

This article deals with the problematic issues of qualification of criminal offenses committed by a group of persons, a group of persons by previous concert. Legislative and doctrinal definitions of a group of persons, a group of persons by previous concert as well as the criteria of separating these forms of participation are analyzed; the conclusion about the inadmissibility of division of the concepts of group criminal offense and complicity is proved. The author, contrary to popularly gustative and doctrinal approaches, allows for the participation in the group of persons not only an accomplice, but also an accessory. New approaches to the research of this issue are expressed in theoretical postulates formulated by the author, as well as in the system of proposals to improve legislation.

Key words: forms of complicity; a group of persons, a group of persons by previous concert; joint complicity; simple and complex complicity; a group criminal offense.

The term «a group of persons» is crucial in the art. 31 of the Criminal Code. The explanatory dictionary of S.I. Ozhegov defines a group as a group of people united by common interests, profession, activity [1; 151]. During the period of application of the Criminal Code of the Kazakh SSR in 1959 there was no single interpretation of the term. Therefore, certain authors started to separate the group criminal offense and complicity. Thus, in particular, I.P. Malakhov wrote: «The criminal complicity is not identical to the group criminal attacks, no matter what form it may exercise. These are different phenomena with different content and independent criminal legal importance. Theoretical insights on the issues of group performance of crime from the point of complicity, as well as questions of complicity in the criminal offense from the point of the group performance of crime are wrong » [2; 125].

Despite the fact that the criminal legislator resolved these issues in 1997, the position of scientists who divide the group criminal offense and the complicity has not been changed. Thus, according to the opinion of A.A. Ter-Akopov the current Criminal Code divides two types of joint complicity: a group criminal offense and a criminal offense, committed with accomplices. His conclusion is based on the Art. 35 of the Criminal Code of Russian Federation defining collective criminal offenses, where the activity of members of the group known as the complicity in the criminal offense. This according to the author's viewpoint means that they jointly exercise the objective element of a crime [3; 213]. It is difficult to share this authors' position, because in this case, how to be with the p. 2 of the Art. 31 of the Criminal Code of the Republic of Kazakhstan which also speaks about the complicity in a criminal offense, where the objective element can be performed by not all members of the group? In addition, what then is meant by the participation in a criminal offense in the Art. 27 of the Criminal Code of the Republic of Kazakhstan, where concept of complicity is defined. The author replacing the concept of complicity with the concept of joint committing of the criminal offense and proposing two of these kinds of joint committing criminal acts (joint participation and complicity), did not explain what to understand as complicity in the crime. From our point of view, criminal offenses committed by a group of persons, should be considered only within the framework of complicity.

There is the viewpoint in the literature, according to which the legislative formulations are inaccurate, «the same act committed by a group of persons», «a group of persons by previous concert» or «organized group» [4; 258]. We suggest that a criminal offense is committed yet by a group of persons, group of persons by previous concert, an organized group, a criminal community, etc., since it is based on the law (Art. 31 of the Criminal Code of the Republic of Kazakhstan). Undoubtedly, that each accomplice is individually responsible and therefore not accidently that in the p. 3 of p. 1 of the Art. 54 of the Criminal Code of the Republic of Kazakhstan (circumstances, aggravating criminal responsibility and punishment) is said about liability for criminal offense, for example, as a part of a group of persons, a group of persons by previous concert, criminal group.

Certain Russian scientists in different periods have criticized current title of the Article 35 of the Criminal Code of Russian Federation «Committing crime by a group of persons, a group of persons by previous

concert, an organized group or criminal community (criminal organization)», considering it is quite cumbersome. They suggested calling it differently, for example, «Forms of complicity» because it establishes the classification of complicity in the forms [5; 283]. Thus, it seems to us incorrect and the approach of the Kazakhstan legislator, who renamed the Art. 31 of the Criminal Code of the Republic of Kazakhstan. The cumbersome title of the latter, in our opinion, not entirely corresponds to its content. It is obvious that legislator came to this decision because of the fact that the p. 3 and 4 of this Article regulates the issues of liability for organizing and participating in a criminal group.

From the sense of p. 1 of the Art. 31 of the Criminal Code of the Republic of Kazakhstan follows that all members of the group persons are crime committers who do not have a previous concert to commit a criminal offense. The latter circumstance does not preclude the consistency in the behavior and actions of participants in the process of committing a criminal offense. In other words, the consistency in this form of complicity does not directly precede the beginning of committing of the criminal offense, but it coincides with the time and therefore cannot be seen as previous concert. For example, when the murder is committing and one crime committer asks the other, who joined the crime, when it had already begun to hold the victim physically, and that the latter performs. The same thing happens in a situation when the accomplice joined to the committing of criminal offense which had already started and on its own initiative and in the absence of a request to him by another accomplice assists. In this case, we can speak about tacit consent. That is why the responsibility for the criminal offense committed by a group of persons of one of the forms would only come in the case when accomplices act in a coordinated way and this consistency was expressed in the conscious joining of efforts of group members.

In practice, there are other examples where the accomplices in the process of committing a criminal offense by group of persons without previous concert, carry out a conspiracy to commit another criminal act. In this case, raises the question: whether it is necessary to admit the second criminal offense committed by previous concert? There is no single approach in the literature on this subject.

A characteristic feature of the considered form of complicity alongside with the foregoing is the fact that the actions of accomplices without previous plan, in accordance with the situation. Hence, the level of cohesion within the group is very small.

According to the opinion of A.P. Kozlov, this group can exist in the form joint participation and complicity with the assignment of roles. His conclusion is based on specific examples of practice. For example, he gives an example in which the person saw that his friend attempts to commit rape, comes and helps him holding victim's hands. Here the participant who joined later is considered an accomplice because he performs the objective element of the crime. However, in a situation where a person sees that his friend is trying to kill or cause grievous bodily harm, comes and helps him, holding the victim's hands without any previous concert with the performer, there is no a partial execution of the objective element of the crime by joined participant, his help to the executor is defined as aiding [5; 234, 235]. This issue, in our opinion, is quite complicated and it is difficult to find a definite answer on it.

It is noteworthy that an objective theory of complicity refers to the principal perpetrators of a crime only those who carried out the main act of the crime, for example, dealt a mortal blow by killing, but all other participants are considered accomplices. A. Feuerbach also applies the latter to the accomplices [6, 53–55]. As the main perpetrator he considered only those who have been the main (sufficient) cause of crime, i.e. the person who committed a crime in full. With regard to other participants of the crime committing he referred them to accomplices, because they have only assisted in achieving the criminal result, being thus the secondary (additional) reason. For example, accomplices of the murder are persons who held the victim or who caused it non-fatal strokes.

In p. 10 of Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated May 11, 2007 № 1 «On the qualification of certain crimes against life and health of a human» is explained: «The murder should be recognized as committed by a group of persons, if it is committed by the joint actions of two or more executors of the crime acting without previous concert. If persons had agreed beforehand about the joint committing of crime, and then each of them was involved in its execution, the murder should be recognized as committed by a group of persons by previous concert, regardless whether all of them were executors of crime or form of complicity of any of them in crime committing was different (organizers, instigators, accomplices)» [7]. This position is dominant today [8].

Contrary to this, A.P. Kozlov gives an example, which shows that an accomplice may be present in a group of persons without previous concert. So, for example, the offender got into the apartment to appropriate the belongings of the owner, but then he was having doubts about whether he was able to realize some

acts and how fast. To remove any question from he calls his friend to the pawnshop directly from the apartment and friend says what things should be and what should not be taken; under the influence of these pieces of advice the offender put certain things out of the bag and put other in it. It is obvious that the immediate crime committing has already begun, and the behavior of accomplice connected after the beginning of operations to seize property [5; 211]. Thus, a criminal offense committed by a group of persons is possible not only in the form joint participation. Or another similar example of forensic investigative practices, which demonstrates in his work, S.M. Apenov: «Sh-lov and the M-syn were convicted of willful murder under the following circumstances. On the night of January 1, these people celebrating the New Year, drank vodka in the apartment. Around two in the morning, A-ev came to them, who lived in the same area. Sh-lov, using a slight excuse offered A-ev to go outside and satrted to beat him there. Mutual fighting has started. M-syn, coming outside in the street saw, that Sh-lov cannot cope with A-ev, pulled a knife from his pocket and handed it to the Sh-lov, who killed A-ev with this knife » [9]. Therefore, we consider that it is difficult to agree with V. Bykov, who assumes that the feature of defining of the roles roles in criminal offenses is not inherent to the group of persons and is a sign of a group of persons by previous concert [10; 19]. Of course, that in this case we eliminate the existence in that group the instigator, because to persuade another person to commit a criminal offense is possible only before its beginning.

In p. 2 and 3 of the Art. 31 of the Criminal Code of the Republic of Kazakhstan is provided another form of complicity — complicity by previous concert and its variations.

Characteristically, that in the group of persons by previous concert, as opposed to complicity without previous concert between the agreement on the joint criminal activity and the actual criminal activity itself (the execution of the objective element of a criminal offense), there is a gap in time. The concert of accomplices carries out before to the beginning of the execution of the objective element of a criminal offense. Therefore, the opinion of V. Bykov that «general concert on crime committing reaches long before the actual execution» [10; 19], seems us wrong.

In the legal literature there are opinions according to which it is necessary to expand the responsibility of complicity due to concert [11; 21]; to admit the complicity as collusion, as well as deliberate participation of two or more persons in committing a deliberate crime [12; 157]. It is impossible to agree with these views in any way, as concert is unfinished criminal offense, in particular, preparation for the criminal offense.

In criminal law, the actual beginning of the execution of the act is recognized as the beginning of interference with the criminal offense. That is why all the actions, associated with the formation of the group, i.e., committed before the attack, are considered from the viewpoint of the preliminary agreement. In this regard, it is obligatory to establish the moment when the concert took place. This is reflected in the analysis of the causes of changes in the cassation court of first instance verdicts and decisions of the appellate collegium of the Almaty regional court of 2013 and the 1st quarter of 2014: «Resolution of the cassation collegium of the Regional Court dated March 27, 2013 , the Specialized Inter-district Criminal Court changed the verdict of the Criminal Court dated July 24, 2012, the appeal and the decision dated September 3, 2012, regarding Luhman A.M. and his actions were reclassified from p. «zh», «z», p.2, of the Art. 96 and p.5 of the Art. 28 of the Criminal Code of the Republic of Kazakhstan on the p. «a», «g», p.2, of the Art. 179 of the Criminal Code. Having examined the case files, the cassation collegium considered that the findings of the Court about the presence in the actions of Luhman and convicted in the case Dzhamalov the previous concert on committing murder, combined with robbery, do not correspond to the actual circumstances of the case and are only predictions. From the statements of convicted persons follows that they have agreed to commit an attack on citizens from mercenary motives. Further actions of Dzhamalov, expressed in causing the death to the victim Kegenbaev during the robbery, which was not covered with the intent of Luhman, therefore, in the actions of Dzhamalov is seen the excess of the perpetrator and the actions of Luhman should not be held as criminally responsible. In this regard, the actions of Luhman were reclassified on the p. «a», «g», p.2, of the Art. 179 of the Criminal Code, according to which he was assigned to 8 years of imprisonment» [13].

A.A. Arutyunov says: «The agreement between the accomplices (elements) is a fundamental condition for participation (system). Accomplices may therefore be only those who have agreed among themselves to commit a crime » [14; 12, 13]. With this opinion the scientist's hard to disagree. It should be noted that as a result of the concert, each accomplice performs his actions in the frames of preparing or committing a criminal offense, aware the participation of others and agreeing with them on joint actions. In addition, through the agreement, each accomplice is aware of not only his own role in committing a criminal offense, but also the nature of the activities of other accomplices. Thus, the collegium of the Supreme Court recognized the reasonable conclusion of the court of first instance convicted of the guilt of P. and S. F. in killing, committed

by a group of persons by previous concert, and the arguments of convicted in the murder by only P. without the complicity of S. — untenable. In particular, the Court of first instance found guilty P. and S. in committing of murder of F. by previous concert by the group of persons and theft of property belonging to the victim F., totaling 157 100 tenge, committed by a group of persons by previous concert on the night from May 4 to May 5, 2007. In the appeal: convicted P., disagreeing with the verdict of the court, claimed that there was no previous concert between him and S. on murder and he alone committed the murder of F. because of jealousy to Ya.; convicted S., considers verdict unreasonable because he did not commit the murder, he wasn't in the previous concert with P., he only carried out the things from apartment. The statements, given in the complaints of convicted for the murder of the victim F. by one P. and without previous concert with S. are refused by the existing evidences in the case. During the court hearing convicted Ya. and B. confirmed that P. and S. alternately, with the assistance of each other, strangled the victim F., squeezing his neck and holding the resistance, together used violence against the fallen to the floor victim, but after, as the victim lost consciousness and had no signs of life, thinking he was dead, commanded them to take measures to conceal the traces of the murder and began to carry out things from the apartment of the victim. After the discovery of the victim's signs of life P. with a knife, which was given by S., stabbed in the throat the victim. The Court of first instance correctly taken into account the specific circumstances of the case, indicating that the convicted P. and S. made a concerted joint actions aimed at killing the victim F., and each of them was involved in its execution, linking their activities with each other, being aware of the actions of others and directing their efforts to achieve the total desired result, which is confirmed by the fact that they have jointly participated in the process of beating the victim, alternately stifling as long as the victim has ceased to show signs of life, about the deprivation of life of the victim they alerted others and then, finding signs of life of the victim, decided to complete the plans for which S. gave a knife to P., who, realizing a common goal and a common intent, aimed at killing, struck with this knife a fatal blow to the throat of the victim [15] . Based on the actual circumstances of the case, we suppose that the conclusion of the court of first instance is well-founded and convicted P. and S. in killing of F., committed by a group of persons by previous concert.

It is important to note that courts often qualify criminal offenses committed by a group of persons as a group of persons by previous concert. There are also examples in practice, when the court, having examined the evidence insufficient, qualifies the action of the involved person as complicity in a criminal offense. Thus, the court verdict found guilty A. ambush concealment committed by K. assaulted related to robbery with Staff only invasion and using the object used as a weapon, as he had learned from the K., whom he helped to escape from the crime scene on the managed car.

The Court found that on May 13, 2013 about 16 hours K. on a motor vehicle «K» with the public rooms ... under the control of A. came to the building market, where A. headed on his personal affairs, and K — in open space warehouse № 24. Inside the warehouse, threatening the use of the object used as a weapon, demanded from G. cash available on hand for what he fired the shot in the air and, seizing 65,000 tenge, ran through the exit from the territory of warehouse space. In a parked before mentioned car near the warehouse asked A. to go faster and the latter fulfilled his request. On the route A. learned from the words of K. about robbery committed by K. A. dropped him out of the car. The court appeal of the judicial collegium on criminal cases of the court of Astana on January 10, 2014 changed the verdict against A. His actions are reclassified from Art. 363 of the Criminal Code to the p.5 of the Art. 28, p. «c» and «d» of p.2 of the Art. 179 of the Criminal Code, with the application of the Art. 55 of the Criminal Code and is assigned to 2 years of imprisonment in a general regime colony. The cassation court left the amended verdict and the appeal against the decision against A. unchanged. Supervisory judicial collegium on criminal cases of the Supreme Court of the Republic of Kazakhstan acquitted in the case of judicial acts against A. for the following reasons.

From the file follows that the Court of first instance, considering the guilt of A. in committing the robbery by previous concert with K. based only on the testimony of a person under the pseudonym «A» that according to the words of A. he was aware of the committing jointly with K. robbery, concluded that failure to prove previous concert between A. and K., as argued by A. and K., who gave consistent testimony of A. innocence in the crime, is not refuted by the totality of evidence sufficient for conviction in A. committing robbery. Moreover, the witness D. in the main proceedings September 11, 2013 showed the court that on an identikit, which was drawn from the words of S. submitted to it by the investigator, she identified a customer who threatened them, but it was not A. These readings were without a proper study of appellate judicial board. The court of appeal in the legal assessment of the actions A. admitted committing robbery with proven illegal entry to the premises. However, the victim calls the incident G. place warehouse, D. - salesroom. Thus, in the main proceedings, D. showed that access to the shop floor, where the crime was committed open

and she saw K. perceive it as a trade customer. According to the protocol of inspection of the scene, the crime scene was not a trading floor.

Moreover, despite the fact that all parts of the decisions of the appeal judicial collegium comprise logically linked document in which the resolutive must flow from the introductory and descriptive-motivational part, descriptive-motivational contradicts the resolution. So, recognizing committing of armed assault by previous concert A. with K. as executor and accomplice, with the legal assessment of the actions of convicts on appeal actions A. reclassified with no sign under paragraph «a» of the second part of Article 179 of the Criminal Code «on the preliminary arrangement by group of person», even though in the appeal the prosecutor asked to impute this feature. Court of Appeal made a mistake in differentiation of a simple form of complicity from a complex in which except executors in committing a crime participate and other of accomplices (accomplices, instigators and organizers). Indeed, the qualification of action of organizer, instigator or accomplice comes by appropriate article of the Criminal Code, providing for liability for a specific offense, with reference to the Article 28 of the Criminal Code, except the cases when they simultaneously were co-executors of the crime, and is the basis for imputation a feature «a group of persons by previous concert». Thus, the appeal court came to the conclusion of mutually exclusive conclusion: a crime committed by A. as an accomplice in the group of persons by a previous concert, thus qualifying his actions without this feature [16; 60]. In this example clearly seen the substitution of the implication to the crime with the complicity in a criminal offense, as well as a group of persons by previous concert — simple complicity (co-execution). Along with this, it should be noted that the court qualified the of action of accomplice by appropriate article of the Criminal Code, which provides liability for the particular criminal offense, without reference to the Article 28 of the Criminal Code, which is contrary to the requirement of p. 3 of the Art. 29 of the Criminal Code.

In p. 2 of the Art. 31 of the Criminal Code is established that the group of persons by previous concert commit the criminal offense jointly. In this regard, A.P. Kozlov notes that such a group - always of one-time existence because criminal intent and conspiracy of participants to commit only one particular crime coming from the present situation, and are realized in one desired crime [5, 246]. In this regard, we have a question: If such a group will make not one, but two or more criminal offenses? We would like to observe that in his judgments A.P. Kozlov is inconsistent because at the same time argues that if the commitiing of each crime the criminal intent and concert of persons arose independently, it is applied to this crime, regardless of the number of crimes committed by the group, it is a group of persons with previous concert [5; 246]. A proper position on this issue, in our opinion, takes Bykov, according to which a group of persons by previous concert, is able to commit not one, but several crimes [10; 20].

To avoid such discrepancies of legislative norms, we suggest to present p. 2 of Art. 31 of the Criminal Code as follows: «The criminal offense is considered committed by a group of persons by previous concert, if it was attended by individual, who have agreed beforehand on joint committing of one or more criminal offenses».

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Б.Ж.Қыздарбекова

Адамдар тобы, алдын ала сөз байласқан адамдар тобы: ажырату өлшемдері және саралау мәселелері

Мақала адамдар тобымен, алдын ала сөз байласқан адамдар тобымен жасалған қылмыстық құқық бұзушылықтарды саралау мәселесіне арналған. Адамдар тобы, алдын ала сөз байласқан адамдар тобы түсініктері заңнамалық және доктриналдық анықтамалары, сонымен қатар қылмысқа қатысудың аталған нысандарын ажыратудың негіздері талданған; топтық қылмыстық құқық бұзушылық және қылмысқа қатысу түсініктерін бөліп қарастырудың дұрыс еместігі туралы қорытынды негізделді. Автор заңнамалық және доктриналдық жалпыға танылған көзқарастарға қайшы, адамдар тобына қоса орындаушылармен қатар, көмектесушілерді де жатқызуды ұсынды. Аталған мәселені зерттеудің жаңа жолдары автормен ұсынған теоретикалық тұжырымдардан, сонымен қатар заңнаманы жетілдіруге қатысты ұсыныстар жүйесінен көрініс табады.

Б.Ж.Кыздарбекова

Группа лиц, группа лиц по предварительному сговору: критерии разграничения и проблемы квалификации

Настоящая статья посвящена рассмотрению проблемных вопросов квалификации уголовных правонарушений, совершенных группой лиц, группой лиц по предварительному сговору. Проанализированы законодательные и доктринальные определения понятий «группа лиц», «группа лиц по предварительному сговору», а также критерии разделения данных форм соучастия; обоснован вывод о недопустимости разделения понятий «групповое уголовное правонарушение» и соучастие». Автор, вразрез законодательному и общепринятому доктринальному подходам, допускает участие в группе лиц не только соисполнителей, но и пособника. Новые подходы к исследованию данной проблемы выражены в сформулированных автором теоретических положениях, а также в системе предложений по совершенствованию законодательства.

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