

УГОЛОВНОЕ ПРАВО, УГОЛОВНО-ИСПОЛНИТЕЛЬНОЕ ПРАВО

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QUALIFICATION OF CRIMES COMMITTED IN PARTICIPATION ACCORDING CRIMINAL CODE OF UKRAINE

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SUMMARY

The article is devoted to the criminal and legal problems of qualification of crimes committed in participation. Both general and special rules of qualification of crimes committed accessories offer on the base of positions to Criminal Code, taking into account their kinds, forms of participation, degree of completeness of crime (preparation to the crime, encroaching upon a crime) and taking into account influence of separate signs of syllables of crimes on qualification of acts of accomplices.

Key words: qualification of crimes, accessories in a crime, form of participation, corpus delict.

КВАЛІФІКАЦІЯ ЗЛОЧИНІВ, СКОЄНИХ У СПІВУЧАСТІ, ЗГІДНО ІЗ КРИМІНАЛЬНИМ КОДЕКСОМ УКРАЇНИ

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АНОТАЦІЯ

Робота присвячена кримінально-правовим проблемам кваліфікації злочинів, скоєних у співучасті. Як загальні, так і спеціальні правила кваліфікації злочинів, скоєних у співучасті, представлені на основі положень Кримінального кодексу з урахуванням їх видів, форм співучасті, ступеня повноти злочинів (підготовка до злочину, скоєння злочину) та з урахуванням впливу окремих ознак складу злочину на кваліфікацію дій співучасників.

Ключові слова: кваліфікація злочинів, співучасники злочину, форма участі, склад злочину.

Problem setting. A crime can be committed as one, so simultaneously and by a few persons. Most articles of Special part of the Criminal code of Ukraine (farther is CC) foresee criminal responsibility for crimes committed individually. For this reason at the commission of crime by joint efforts a few persons (in participation) legal opinion of committed up to a point is complicated, as requires qualification of act each of accessories in such crime.

Research rationale. The classification of conspiracies brings a series of complex issues related to certain features of a crime by joint efforts of accomplices, in particular: the limits of the accomplice offence perpetration; considering the features of an individual accomplice; a conspiracy with a special subject; abortive crime; excessive act; a voluntary renunciation of criminal purpose and so on.

Despite the fact that many scientific works describe the classifications of the conspiracies, a number of classifications are still discussed. This is particularly because the authors put forward certain proposals for improving the legislative regulation of the institution of complicity to the responsibility of accomplices and the classification of conspiracies.

The purpose of the article is to study the criminal law issues of conspiracies, the establishment of both general and

special rules of conspiracies, considering their types, forms of complicity, the stage of a crime completion and the impact of certain features of accomplices labelling process. The existing scientific works will be the starting point for revealing the regularities in the development of scientific knowledge as to this issue.

Basic material. In accordance with Article 26 CC criminal participation is intentional common participating of a few subjects of crime in the commission of intentional crime. According to Part 1 Article 27 CC accessories in a crime, next to a performer, are an organizer, instigator and accessory.

1. In accordance with Parts 1 and 2 Article 29 CC a performer (accessory) is subject to criminal responsibility after the article of Special part of CC, that foresees a committed by him crime; an organizer, instigator and accessory are subjects to criminal responsibility after corresponding part of Article 27 and by the that article (by part of the article) of Special part of CC, that foresees a crime committed a performer. Thus the act of performer of crime (i.e. person that in participation with other subjects of crime directly or by the use of other persons, that under the law not subject to criminal responsibility for committed, committed crime, foreseen CC) is characterized only after the article (by part of the article) of Special part of CC. The acts

of other accessories (organizer, instigator and accessory) are characterized after corresponding parts of Article 27 CC that regulate the act of such accessories, and by the article (by part of the article) of Special part of CC, that foresees a together committed crime.

It should be noted, that cases take place in inquisitional-judicial practice, when one accessory carries out a few roles in the general commission of crime (for example, role of instigator and accessory; instigator and performer). First, that it is necessary to find out the act of such accessory during qualification, – to set it, which one roles he carried out, i.e. to find out the type of participation (Article 27 CC), and secondly, to recreate it in the formula of qualification (to carry out reference to digital denotation (the number) of the article (of part (of point) of the article) of Special part of CC, and sometimes and General part of CC that foresee committed a person act, on such rules:

a) if the partner of general commission of crime carried out a few roles and including role of performer (accessory) – qualification of its act must come true only after the article (by part of the article) of Special part of CC. At the same time, all roles accomplished by such partner of general commission of crime register in an explain part of corresponding judicial documents and taken into account at awarding punishment to it;

b) if accessory at the commission of crime carried out a few roles, that behave to so-called “other types of accessories” (for example, role of instigator and accessory), then in the formula of qualification each is recreated of these roles. Qualification of acts of such accessory comes true after corresponding parts of Article 27 CC, that regulate the roles of certain types of accessories, and by the article (by part of the article) of Special part of CC, that foresees responsibility for a together committed crime [1, c. 92–95].

2. At the commission of crime in participation it is necessary also to find out the form of participation (i.e. method of co-operation of accessories, that shows, how intentional acts two or more subjects unite in one crime), as it, in most cases, has a fundamental value for qualification of such act [2, c. 177–178]. In accordance with Article 28 CC a crime in participation can be committed: a) by the group of persons (without a previous plot); b) by the group of persons on a previous concert; c) by the organized group; d) by criminal organization.

As of October 1, 2017 such a form of participation, as: a) a conspiracy is an obligatory feature of a crime and a qualifying feature in 12 component elements of a crime (for example, Part 2 of Art. 121, Part 2 of Art. 216, Part 3 of Art. 152, Part 2 of Art. 153, Part 2 of Art. 1971 of the Criminal Code etc.); b) a conspiracy by previous concert is a qualifying feature in 103 component elements of a crime (for example, Part 2 of Art. 110, Part 2 of Art. 1102, Part 2 of Art. 127, Part 5 of Art. 143 of the Criminal Code etc.), and if this form of participation is not a qualifying feature of the corresponding crime, the court considers it to be an aggravating circumstance at imposing a punishment (Part 2, part 1, Art. 67 of the Criminal Code); c) the commission of a crime by an organized group is a mandatory feature of the crime (Art. 392 of the Criminal Code) and a qualifying feature in 49 component elements of a crime (for example, Part 3 of Art. 109, Part 4 of Art. 1102, Part 3 of Art. 146, Part 2 of Art. 147, Part 3 of Art. 149 of the Criminal Code etc.), and if this form of participation is not a qualifying feature (particularly – qualifying) of the corresponding crime, the court considers it to be an aggravating circumstance at imposing a punishment (Part 2, part 1, Art. 67 of the Criminal Code); d) building a criminal organization and participation therein forms an independent component element of a crime, provided by Art. 255 of the Criminal Code. Besides, the articles of the Special Part of the Criminal Code provide for component elements of a crime, that contain the features of certain types

of organized groups and criminal organizations (for example, Art. 257 of the Criminal Code) [3, c. 207–208].

A crime confesses such that is committed *the group of persons*, if in it a few (two or anymore) performers participated without a previous plan between them (P. 1 Article 28 CC). The classification of a conspiracy as committed by a group of persons, in addition to the complicity features, must determine if:

1) several (two or more) accomplices participated in the crime;

2) the accomplices were of one type (joint participants – Part 2, Art. 27 of the Criminal Code). There are no accomplices of other types;

3) conspiracy, that is the agreement on combining efforts for a conspiracy, by accomplices during (*completing*) a crime, *but before it is completed*. The conspiracy is started at offending and finished at actual, but not legal completion of the crime (for instance an accomplice joins another one during the commission of a rape, hooliganism, etc. by the latter).

At the commission of crime characterized the group of persons (simple participation) of act of every accessories after the corresponding article (by part of the article) of Special part of CC. Thus, if the indicated form of participation is foreseen as a characterizing sign of certain corpus delict, then the acts of accessories are characterized after corresponding part of the article of Special part of CC that foresees such characterizing sign. It should be noted, that if the indicated form of participation is not neither basic nor characterizing sign of certain corpus delict, then in accordance with P. 2 Part 1 Article 67 CC of commission of crime without a previous plan is not taken into account the group of persons, as a circumstance that burdens punishment.

A crime confesses committed *on a previous agreement the group of persons*, if it was together accomplished by a few persons (two or anymore) that in good time, i.e. to beginning of crime, arranged about is general commission (P. 2 Article 28 CC). The classification of a conspiracy as committed by a group of persons in collusion, in addition to the complicity features, must determine if:

1) several (two or more) accomplices participated in the crime;

2) the accomplices were of one type (joint participants) or of different types (head for crime and (or) an abettor and (or) an accessory);

3) conspiracy, that is the agreement on combining efforts for a conspiracy, by accomplices before a crime (before the objective component element of a crime), that is before offending, while *preparing for it*. The period from conspiracy to the execution of the objective component element does not matter for the classification.

A crime admits committed *the organized group* if a few persons (three and anymore), that preliminary co-organize in a proof association for this commission and other (additional) the crimes incorporated by an only plan with distribution of functions of the participants of group, sent to the achievement of this plan well-known to all participants of group (P. 3 Article 28 CC), participated in its preparation or commission. The classification of a conspiracy as committed by an *organized group of persons*, in addition to the complicity features, must determine if:

1) several (three or more) accomplices participated in preparing for or commission of the crime;

2) the accomplices were of one type (joint participants) or of different types (head for crime and (or) an abettor and (or) an accessory);

3) the accomplices have pre-arranged a group;

4) this group is stable, namely, the participants have rather stable relationship as of the crime preparation or commission – a stable composition, centralized subordination, uniform rules of conduct, etc.;

5) the group has been created to commit this and other crimes;

6) the members of the group have a common plan of a crime with distribution of functions, which are conducive to the plan achievement;

7) all participants of the group were aware of that plan (committing a specific crime).

At the commission of crime by the group of persons on a previous concert or qualifications are subject of the organized group of act of accessories after the article (by part of the article) of Special part of CC, that foresees responsibility for a crime committed in the corresponding form of participation in case, if it is foreseen as an obligatory or characterizing sign of such corpus delict. Thus during qualification of act of certain accessory it is necessary to take a that role that he executed in a general crime into account, and, in case of necessity, also to refer to corresponding part of Article 27 CC, that foresees the act of such accessory.

If the indicated forms of participation are not neither basic nor characterizing signs of certain corpus delict, then in accordance with P. 2 Part 1 Article 67 CC of commission of crime by the group of persons on a previous agreement or admits the organized group by a circumstance that burdens punishment [4, c. 57].

A crime admits committed criminal organization, if it is accomplished by the proof hierarchical association of a few persons (five and anymore), members of that or structural parts of that on a previous agreement co-organized for joint activity with the aim of direct commission of serious or especially heavy crimes by the participants of this organization, or guidance or co-ordination of criminal activity of other persons, or providing of functioning of both criminal organization and other criminal groups (P. 4 Article 28 CC). The classification of a conspiracy as *committed by a criminal organization*, in addition to the complicity features, must determine:

1) several (five or more) accomplices participated in preparing for or commission of the crime;

2) the accomplices were of one type (joint participants) or of different types (head for crime and (or) an abettor and (or) an accessory);

3) the accomplices have pre-arranged a group;

4) this group is stable, namely is *internally* (a stable composition, centralized subordination, uniform rules of conduct, the plan of a crime with distribution of functions, which are conducive to the plan achievement) and *externally* stabile (establishment of corruption ties in authorities, availability of channels for the exchange of information on the activities of criminal competitors, etc.);

5) this association is hierarchical, i.e. its participants are subordinate to the chief conspirator, it provides for a certain management procedure, as well as contributes to maintaining the functional relations and the principles of interdependence of its participants or structural units in the implementation of joint criminal activity;

6) this association is created for joint activities for: a) an immediate commission of grave or especially grave offences by the participants; b) or management or coordination of criminal activities of other persons; c) or providing for functioning of both the criminal organization and other criminal groups.

During qualification of acts of organizer and participants of criminal organization, it is necessary to follow such *rules*:

a) the creation of criminal organization and participating in it form the independent corpus delict foreseen to the Article 255 CC. In addition, in the articles of Special part of CC, the special types of criminal organizations are regulated for creation or participating criminal responsibility (for example, band (Article 257), terrorist group or organization (Article 258-3) and others like that) is foreseen in that. Thus, the acts of or-

ganizer and participants of criminal organization are subject to qualification after the article of Special part of CC that foresees responsibility for creation or participating in the certain type of criminal organization;

b) the organizer of criminal organization is subject to criminal responsibility for all crimes committed such organization, if they were embraced by his intention. The participants of criminal organization are subject to criminal responsibility for crimes in preparation or commission of that they participated. In this connection, the acts of organizer and participants of the organized group are also subject to qualification and after the articles (by parts of the articles) of Special part of CC, that foresee responsibility for crimes that was accomplished by such organization. Thus, in the formula of qualification, in case of necessity, it is necessary to mark corresponding part of Article 27 CC that foresees the act of certain accessory – organizer, instigator or accessory.

It should be noted, that in accordance with P. 2 Part 1 Article 67 CC of commission of crime *does not admit* criminal organization by a circumstance that burdens punishment, as at that rate, if corresponding criminal organization accomplished one or a few crimes, awarded punishment on the special rules – after totality of crimes.

3. By general rule of limit of responsibility of accessories determined by the limits of act of performer, for this reason at the commission of to them unfinished crime (preparation is to the crime or encroaching upon a crime) other accessories is subject to criminal responsibility for participation in an unfinished crime. At that rate the acts of accessories are characterized after corresponding part of Article 27, that foresees description of act of certain accessory, P. 1 Article 14 or P. 2 or 3 Article 15 CC, that foresee the type of unfinished crime (preparation to the crime, complete or unfinished encroaching upon a crime) and by the corresponding article (by part of the article) of Special part of CC, that foresees responsibility for a complete crime.

4. According to p. 3 Article 29 CC of sign, that characterize the person of separate accessory in a crime, belong in guilt *only* to this accessory. The brought statutory provision over testifies that signs that characterize the person of certain accessory and influence on qualification of crime are subject to the relation in guilt only this accessory, regardless of that or other accessories knew about the presence of such signs. For example, if a performer committed crime repeatedly, and other accessory (organizer, instigator or accessory) commit crime first, then the sign of repeated of commission of crime is taken into account during qualification only of act of performer.

5. Identical reasons (internal motives that is followed by a subject at the commission of crime) and whole (conceivable result a subject aspires to that, committing crime) acts of accessories, if they are marked in disposition of the corresponding article as to the duty or characterizing signs of certain corpus delict, are the necessary condition of qualification of their acts after the same article (by part of the article) of Special part of CC.

At the same time there are possible cases in inquisitorial-judicial practice, when accessories at the commission of general crime follow different reasons and (or) pursue different aims. Consider that at that rate during qualification it follows to go out from that depending on the legislative fixing of signs of subjective side of certain corpus delict reason and aim can carry out a different role, namely to come forward as signs: a) to the duty (basic), b) characterizing, c) privileged, d) such that soften or burden punishment.

If reason or aim are the obligatory signs of corpus delict, then their absence in the act of accessory eliminates criminal responsibility for committed in connection with disparity of signs of actual publicly dangerous act to the signs of corpus de-

lict foreseen by the corresponding article (by part of the article) of Special part of CC. If reason or aim are the characterizing signs of certain corpus delict, then their absence in the act of accessory does not eliminate criminal responsibility, and only pulls qualification committed after other article (by part of the article) of Special part of CC. In case if reason or aim is foreseen neither mainly, nor in the privileged nor in skilled compositions of crimes, then reason and aim are taken into account at awarding punishment as circumstances that soften or burden punishment, or such that characterize a person guilty.

The resulted grounds to set the *rules* of taking into account of reasons and aims of act each of accessories during qualification of committed crime:

1) reasons that was followed by a performer, and aims that he pursued influence on qualification of acts of other accessories only subject to condition, if : a) they are the obligatory or characterizing signs of corpus delict; b) accessories followed them or pursued them; c) accessories did not follow them though, but realized their presence. The marked approach answers P. 3 Article 29 CC, according to that circumstances, that burden responsibility and foreseen in the articles of Special part of CC as signs of crime, that influence on qualification of actions of *performer*, belong in guilt only to accessory that realized these circumstances. Thus, even, if accessory participated in a general crime, following other reasons (pursuing other aim) that does not influence on qualification, then at realization to them of the above-mentioned signs, his action it is necessary to characterize after that article (by part of the article) of Special part of CC, that foresees a crime committed a *performer*;

2) reasons and aim, that is followed by so-called “other accessory” (organizer, instigator, accessory), carrying out the criminal role, belong in guilt and taken into account during qualification of his act or at awarding punishment. Thus, they can have a double value:

a) if they are the obligatory or characterizing signs of corpus delict committed in participation, it determines qualification of acts of such accessories after the corresponding article (by part of the article) of Special part of CC;

b) if aims and reasons that is followed by so-called “other accessories” are not neither obligatory nor characterizing signs of corpus delict, i.e. does not influence on qualification committed a performer then they are taken into account at awarding punishment only to that accessory that follows them or pursues as circumstances, that soften or burden punishment, or as given, that characterize the person of such accessory.

6. The debatable is remained by a question about qualification of acts of accessories, if at a plot on the common commission of crime the obligatory or characterizing signs of his composition were not specified. For example, how to characterize the act of instigator that predisposed a performer to murder, not specifying the method of his commission, and a performer accomplished murder with the special cruelty or method dangerous for life of many persons?

In our view, the decision of this question depends on the specification of signs of corpus delict a plot took place on the commission of that accessories. So, if between accessories an agreement took place about the commission of certain crime (for example, murders, thefts, shakedowns), and a performer accomplished this crime at presence of characterizing (aggravating) signs (for example, special cruelty; violence dangerous for life and health of person), then to characterize the act of accessories taking into account this sign, it is possible only subject to condition, if they: a) beforehand knew about the presence of such sign (in particular, realized beforehand, that negotiate about murder of woman that is in the state of pregnancy) a plot took place exactly on the commission of this crime, or b) on the circumstances of business realized possibility of presence of such sign and assumed the commission of such crime

(for example, predisposing a performer to murder, an instigator assumed possibility of the use of different methods of murder a performer, including dangerous for life of many persons). The brought suggestions over of qualification answer the binding overs of P. 3 Article 29 CC, in accordance with what circumstance, that burden responsibility and foreseen in the articles of Special part of CC as signs of crime, that influence on qualification of act of performer, belong in guilt only to accessory that realized their presence.

7. When accomplices commit a crime with a special subject, it is mandatory that the perpetrator have the features of such a subject. The law does not limit the participation of others (a chief conspirator, an abettor, an accessory) in such an offense. However, the classification of a conspiracy with a special subject, additional conditions in addition to the complicity features must be found, if any, as to which the participants realize, that: a) the conspiracy can be committed only by a special subject; b) the perpetrator has the features of such a subject.

8. Part 5 of Art. 29 of the Criminal Code says that accomplices bear no criminal responsibility for acts committed by the perpetrator, if they were not covered by their intention. In the case of the *excessive act*, the accomplices' actions are classified in accordance with the content and direction of their intent. The theory of criminal law and investigative and judicial practice distinguishes quantitative and qualitative excessive act.

Quantitative excessive act means that a perpetrator committed a crime similar to the agreed by the accomplices, but of minor or major gravity (for example, a murder, instead of the agreed grave bodily injuries).

Classification rules for accomplices actions in case of the quantitative excessive act:

a) the perpetrator action is subject to classification under the article (part of the article) of the Special Part of the Criminal Code, providing for liability for the actually committed crime;

b) other participants' action is subject to classification for a preliminary conspiracy as the agreed crime was not completed due to reasons beyond their control, namely under part 1, Art. 14 or part 2 or part 3, Art. 15 and the Article (part of the article) of the Special Part of the Criminal Code, which provides for liability for an agreed conspiracy.

Qualitative excessive act means that a perpetrator committed another crime instead or in addition to the agreed conspiracy (for example, a rape instead of or in addition to the agreed robbery).

Rules for classification of accomplices' actions in case of the qualitative excessive act: classification of accomplices' actions depends on the crime being committed instead or in addition to the agreed one:

a) if the crime was committed in addition to the one agreed with the accomplices, this act is subject to classification for a set of crimes. This set is a conspiracy of the accomplices, and the crime, resulting from the excessive act. The classification is based on the Article (part of the article) of the Special Part of the Criminal Code, providing for a conspiracy, and the Article (part of the article) of the Special Part of the Criminal Code, providing for a crime committed by one person. The actions of other accomplices are subject to classification according to the article (part of the article) of the Special Part of the Criminal Code, providing for an agreed *completed* complicity;

b) if the crime was committed instead of the one agreed with the accomplices and the perpetrator voluntarily refused to commit the agreed crime, his actions would be classified under the Article (part of the article) of the Special Part of the Criminal Code, providing for the actually committed crime (solely). The actions of other participants would be classified under the Article (part of the article) of the Criminal Code, which provides for liability for *preliminary* conspiracy, as the conspiracy was not completed due to reasons beyond their control, namely

under part 1 Art. 14 or part 2 or part 3 Art.15 and Article (part of the article) of the Special Part of the Criminal Code, which provides for liability for an agreed conspiracy.

9. *An abortive conspiracy* takes place, where a potential accomplice has rejected a chief conspirator, an abettor, accessory efforts (proposal) for a conspiracy, and the actions of the accomplices brought finally no result (failed). *In case of failed abetting, aiding, and failure of a chief conspirator, of their actions will be classified according to the following rules:*

a) failure of a chief conspirator, an abettor, an accessory is classified as preparation for a failed conspiracy, namely, in part. 1 Art.14 and the Article (part of the article) of the Special Part of the Criminal Code, which provides for a crime, failed by unsuccessful accomplices;

b) if participation is a mandatory or a classifying feature of a component element of a crime, the need for classification of failed actions of the accomplices considering this circumstance is explained by the agreed crime structure. For example, unsuccessful abetting a theft should be classified under part 1 Art. 14 part 2 Art. 185 of the Criminal Code;

c) if the conspiracy is neither a mandatory nor a qualified component element of a crime, the failed accomplice action is subject to classification only for preparation of a crime as provided by the relevant article (part of the article) of the Criminal Code. For example, failed abetting to illegal abortion is classified under part 1 Art. 14, Art.134 of the Criminal Code;

d) the role of the unsuccessful accomplice (part 3, part 4 or part 5 Art. 27 of the Criminal Code) is not indicated in the classification, because the person has failed to do so, and therefore the reference to the classification formula in the relevant part of Art. 27 of the Criminal Code, providing for the types of accomplices and describing their actions, is inappropriate.

10. Part 2 Art. 17 of the Criminal Code says, that a person, who voluntarily refused to bring the crime to the end is liable to criminal liability only for the actually committed action containing another crime. These provisions apply to the voluntary renunciation of accomplices. This way an

accomplice, who voluntarily refused to bring the crime to the end, is not subject to criminal liability under conditions stipulated in Art. 17 of the Criminal Code (Art. 31 of the Criminal Code). Thus, other accomplices will be liable for the unfinished conspiracy (preparing for or attempting to its committing), depending on the stage, the conspiracy was terminated. The actions of such accomplices are classified under part 1 Art. 14 or part 2 or 3 Art. 15 of the Criminal Code and the corresponding article (part of the article) of the Special Part of the Criminal Code, providing for liability for the completed conspiracy.

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