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Research Article

CRIMINAL LIABILITY FOR ORGANIZATION OF A CRIMINAL ASSOCIATION: EXPERIENCE OF FOREIGN COUNTRIES

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ABSTRACT

The article analyzes and discusses the experience of foreign countries, which established liability for the crime of organizing a criminal association as a crime with a nature of terrorism from a scientific and theoretical point of view. The legislative frameworks of foreign countries regarding the organization of criminal associations as well as the opinions of leading experts in the field of criminal law were investigated. In the article, recommendations and proposals for improving the standards of criminal law that define liability for the crime of organizing criminal association have been developed based on the examination of foreign experience.

KEYWORDS

A crime with a nature of terrorism, criminal association, fight against criminal association, legal analysis, socially dangerous act.

INTRODUCTION

Researching how criminal associations are organized in foreign countries also allows to determine ways to further improve the legal means of combating this crime.

The concept of criminal association is not established in the criminal law of all countries. For instance, this concept is not recognized by the laws of Norway,

Romania, Sweden, and Serbia. At the same time, the term "organized criminal group" is used in Romania and Serbia in accordance with the terms of the UN Convention on Combating Transnational Organized Crime.

At the moment, even in countries where criminal liability for the activities of criminal organizations is

provided, a single concept is not used: in some countries “criminal organization” (Spain, Malta, Germany), in others “criminal association” (France), and in a third group of countries (Hungary) both concepts are used. This is explained by the fact that a single approach has not been developed in the science of criminal law regarding the content of these concepts.

Regarding the concept of criminal association, countries can be divided into two groups. Canada and Finland are included in the first group that fully or partially reflect the concept of “criminal association” based on the provisions of the UN Convention on Combating Transnational Organized Crime. The second group of nations (Albania, Spain) define “criminal association” in accordance with their own internal (own) methodologies[1].

In particular, in accordance with Article 467.1(1) of the Criminal Code of Canada, “criminal organization” means a group, however organized, that (a) is composed of three or more persons in or outside Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

According to the Finnish Criminal Code, “a criminal association is an organized association of at least three persons, formed over a certain period of time, acting in concert with the purpose of committing one or more crimes”.

According to Article 570 bis of the Spanish Criminal Codea "criminal organisation is construed to be a group formed by more than two persons, on a stable basis or for an indefinite term, in collusion and co-

ordination to distribute diverse tasks or duties in order to commit criminal offences”.

According to Article 28 of the Criminal Code of Albania, “criminal organization is the highest form of cooperation that is composed of three or more persons and that can be distinguished by the special degree of organization, structure, stability, duration, as well as by the purpose of committing one or more criminal acts to gain material or non-material benefits”.

The analysis of foreign experience reveals that in many countries (Spain, Albania, France, Canada) criminal liability is established for the creation of a criminal organization, for its leadership, and for involvement in its operations. At the same time in some countries the range of criminal (legal) punishable acts has been expanded. In particular, in Malta and Finland, criminal liability is established for financing a criminal organization, and in Hungary, Canada, Finland and Switzerland - for aiding and abetting its activities [2]. In addition, liability for belonging to a criminal organization has been established in Malta [3].

In some countries, the criminal law prohibition is not strictly limited, for example, in Finland and Hungary, the list of these actions is not strictly limited, while liability is determined for specific actions.

In addition, other techniques are employed in order to make the members of the criminal group more criminally liable. According on the type of crime (degree of severity), penalty for involvement in a criminal organization's activities varies, particularly in France. In Spain and Malta, the size of the criminal organization leads to a more severe sentence.

In Germany, the leaders of criminal organizations will be punished more severely. At the same time, in Article 129 of the Criminal Code of Germany, the courts are

given the right to exempt from punishment a participant of a criminal organization whose guilt or contribution to the activity of a criminal organization is not significant.

It should be noted that the possibility of being exempt from criminal liability or punishment, or the possibility of having the punishment reduced, is implied in the majority of foreign countries, including Albania, France, Hungary, Spain, and Switzerland. This is done to increase the effectiveness of the fight against criminal organizations.

At the same time, in some countries, certain types of criminal organizations, for example, terrorist organizations (Spain, Germany, Albania), criminal organizations whose activities are related to drug trafficking (Albania) are distinguished [4].

V. N. Skotinina distinguishes two models of foreign countries applied to criminal organizations. According to him, the main drawback of the Anglo-American model is the absence of clear criminal signs of a criminal association at the level of federal legislation (USA). This matter falls within the jurisdiction of common law (England). In some European countries, the original model of differentiation of liability for the organization of organized forms of criminal activity is used, where strict liability for the organization of a criminal organization and participation in its activities is established. For example, in Italy, it is indicated that a criminal association must have five characteristics: gathering and presenting information; elimination of the behavior of law enforcement institutions; access to basic socio-economic services; have an internal structure; to give its activity a "legal" tone from the outside [5].

In the German Criminal Code, actions such as "recruitment" and "support" are also included in the

objective aspect of this crime. At the same time, in most CIS countries, "committing a crime" is provided as the objective of the subjective aspect of the crime, while in the Russian Federation, "committing serious or extremely serious crimes" is provided. In the Republic of Belarus, the goal is not provided at all.

Aggravating circumstances are provided only in the Criminal Codes of Russia (commitment using official position) and Belarus (commitment of crime by highly dangerous recidivist, persons convicted of serious crimes, official using official position).

In the Criminal Code of the Federal Republic of Germany and Criminal Code of France, the norms aimed at combating criminal organizations can be divided into two groups: 1) norms providing liability for certain types of crimes committed by members of a criminal association; 2) norms determining liability for the establishment of certain types of organized crime - criminal association, terrorist association, armed group, political groups banned by the constitutional court.

In particular, Article 129 of the Criminal Code of the Federal Republic of Germany provides for liability for "organization of criminal organizations", according to which: "Whoever forms an organisation or participates as a member in an organisation the objectives or activities of which are directed at the commission of offences, whoever supports such an organisation or recruits members or supporters for such an organisation shall be punished" [6].

In Japan, the issue of participants is not carefully regulated. Its forms, including criminal association, are not provided. In the Criminal Code of Japan, creating a criminal association or organized group for the purpose of committing crimes such as arson, murder, robbery, counterfeiting of money is regarded as

preparation for these crimes. When a specific crime is committed by these groups, their actions are classified according to the types of participation (organizer, executor, assistant, witness) [7].

According to Article 294 of the Criminal Code of China, whoever organizes, leads and actively participates in an organization of criminal syndicate which conducts an organized activities of offences or crimes by violence, threat or other means, plays the tyrant in a locality, perpetrates all kinds of evils, bullies and oppresses or cruelly injures or kills common people, and seriously undermines the economic and social order shall be punished. According to the third part of Article 294 of the Criminal Code of China, whoever commits any crime mentioned in the preceding two paragraphs and commits another crime shall be punished according to the provisions of combined punishment for several crimes [8].

In the United States, the Street Crime and Safety Control Act of 1968 refers to organized crime. It is defined as “the operation of a highly organized and disciplined association engaged in services prohibited by law, including gambling, prostitution, usury, drug distribution, and other similar illegal activities”.

According to Article 416 of the Criminal Code of Italy, “Association means an illegal mafia-type association whose participants use the violent power of the association, as well as depend on it to commit crimes, and act for the purpose of obtaining benefits or privileges for themselves or third parties through economic activity, concession, permit, contract and public service” [9].

Membership in any secret organization that hides its composition and intended course of action is illegal under Swiss Criminal Code 260ter. In Switzerland, only

membership, participation, profiteering and support of a criminal organization are prohibited [10].

According to Article 172 of the Criminal Code of the United Arab Emirates, any person who participates in a criminal scheme whether for the purpose of perpetrating crimes shall be punished. Also, according to Article 180, whoever establishes an association, organization, or corporation that aims at calling to overthrow or take over the system of government shall be sentenced to term imprisonment.

Shall be sentenced to death or life imprisonment, whoever appoints himself leader of an armed gang or occupied in it any commanding position, managed its operations or organized it, for the purpose of usurping or plundering lands or property owned by the government or by a group of people (Article 187) [11].

Article 216 of the Criminal Code of Iraq stipulates criminal liability for participating in a criminal conspiracy to commit a number of crimes prohibited by the Criminal Code. Among these crimes are the crimes of overthrowing the republican regime by force, changing the constitution or the order of formation of the government by force [12].

According to Article 205, any person who sets up a secret association in circumstances other than those prescribed in the preceding Paragraphs or who assumes control of such association or any principle office belonging to such association is punishable by detention.

According to the Criminal Code of Egypt, persons who formed a criminal gang in Egypt or outside it, directly participated in it or led it, organized its activities, financed it, and supported it shall be punished [13].

Members of a criminal association shall be held liable under Article 249 of the Criminal Code of Lithuania as

perpetrators regardless of their roles in the commission of a criminal act which is covered by their intent. At the same time, the grounds for exemption from criminal liability are also defined in the fourth part of this article. At the same time, such relief is not applied to persons who participated in the commission of the crime of murder, as well as those who were previously exempted from criminal liability.

The criminal laws of most of the CIS and Baltic states provide criminal liability for the establishment of a criminal organization, its leadership and participation in its activities. At the same time, in some countries, the minimum number of members of a criminal association is clearly defined as two or more (Criminal Codes of Kyrgyzstan, Azerbaijan) or not less than five (Criminal Code of Ukraine) [14].

In particular, Article 255 of the Criminal Code of Ukraine establishes criminal liability for “creation of a criminal organization for the purpose of committing a grave or special grave offense, and also leadership or participation in such organization, or participation of offenses committed by such organization” [15]. At the same time, this article stipulates that a mitigating measure in the form of exemption from criminal liability shall not be applied to the organizer or leader of a criminal association.

Article 285 of the Criminal Code of Belarus establishes criminal liability for the establishment of a criminal organization or participation in its activities, and a penalty of 15 years of imprisonment can be imposed for these actions. The Criminal Code of Belarus, like the Criminal Code of Ukraine, does not apply exemption from criminal liability to the organizer and leader of a criminal organization.

Article 223 of the Criminal Code of Armenia provides criminal liability for the organization of a criminal

association or participation in it. Article 235 of the Criminal Code of the Republic of Kazakhstan stipulates criminal liability not only for creating a criminal association, but also for creating an organized group and leading its activities.

Based on the foregoing, it is appropriate to include the institution of exemption from criminal liability as a positive foreign experience in improving the criminal law norm on the organization of a criminal association, as well as differentiation of liability due to the expansion of the objective side of the crime.

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