

COMPARATIVE ANALYSIS OF LEGISLATION OF RUSSIAN  
FEDERATION AND REPUBLIC OF KAZAKHSTAN AT CRIMES  
PERPETRATED WITH ORGANIZED CRIMINALITY

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Abstract

The problem of organized crime one of the most pressing issues facing society and the state. The basis for comparison, to study the dynamic of organized crime to put the commission of those crimes, which are a manifestation of organized crime. It needs to create and adopt a comprehensive law on combating organized crime. «Criminal legislation» should be brought into compliance with international treaties ratified by the RK, in particular the UN Convention against Transnational Organized Crime.

Keywords: Organized crime; high latency; transnational organized crime; participants in the criminal proceedings.

Introduction

The problem of organized crime is one of the most critical problems facing the society and the state. The topicality of researching this problem assumed special significance as a result of passing the Concept of juridical policy of the Republic of Kazakhstan for the period of 2010-2020, approved by the Decree of the President of the Republic of Kazakhstan dated August 24, 2009 № 858. [1] According to the 2nd part of the Concept “Main directions of the national law development”, one of the important directions of the juridical policy will be bringing the criminal law to conformity with international agreements, ratified by Kazakhstan, and strengthening criminal liability for the crimes, committed as a member of an organized criminal group or a criminal association. At the same time a strict criminal policy is

carried on concerning people guilty of grave crimes and absconding of criminal prosecution.

According to the data of MIA of the RoK, 11 criminal cases were excited in 2010 by the facts of establishment and leadership of organized criminal groups (further referred to as OCG) (Art.235 of Criminal Code of the RoK) and 4 cases by the facts of banditry (Art. 237 of CC of the RoK). 16 criminal “authorities”, 14 leaders and 81 members of OCG with a great amount of weapons and narcotic drugs were brought to trial. Last year 31 criminal cases were excited by the facts of establishment and leadership of OCG and 6 cases by the facts of banditry. 49 criminal “authorities”, 55 leaders and 258 members of OCG with a great amount of weapons and narcotic drugs were brought to trial. [2] Criminological situation for the last years shows that organized criminality continues holding leading positions in criminality and poses a serious threat to a normal functioning of the society and the state.

#### Organized criminality in the Republic of Kazakhstan

Organized criminality in Kazakhstan is a special level of group criminality. At present time the crimes, forming it up, are committed by highly organized criminal associations, joining a significant number of people, professionally prepared for criminal activity, frequently well-armed. Organized criminality in Kazakhstan has a tendency to consolidate, gains more professional character, penetrates into legal spheres of business, establishes close contacts with corrupted officials in different governmental structures and transnational criminal associations; the organized forms are improved. In modern conditions the main trait of the criminality is penetration into power, foreign-economic sphere of the state activity, into commercial structures. Therefore, control of organized crime is one of the most urgent problems in the modern society.

Statistic data of the last year's show negative changes in the dynamics of the crimes, committed by organized criminal groups, gangs and criminal associations (criminal organizations). Statistic data for the period from 2003 till July 2009 show by the end of 2005 a general increase of a total number of the crimes, registered in the country, provided in articles 235 and 237 of the Criminal Code of the Republic of Kazakhstan (further referred to as CC of RoK). If in 2003 this numbers were 86 and 17 correspondingly, in 2004 – 104 and 11, in 2005 the numbers registered – 70 and 16. Further, from 2006 till 2008 the rates of the registered crimes, provided in articles 235 and 237 of CC of RoK were approximately equal (51 and 8 correspondingly, and in the first half of 2009 they made up 48 and 3 crimes. The analysis of the statistics by these articles separately showed that the rate of the registered crimes provided in the article 237 of CC of the RoK decreased, and in the article 235 – steadily increased. [3]

Organized crime is characterized by high latency. The statements should be noted by professors Naumov A.V., Kudryavtsev V.N., Lunyov V.V. who suggest assuming the commitment of the crimes which are a demonstration of organized crime as a basis of comparisons, studies of dynamics of organized crime. [4, p. 182] One of the most dangerous characteristics of organized crime is corruption. Nowadays corruption offences are committed, as a rule, by members of stable criminal associations, whose activity is aimed at maximum profiting from criminal business. The statement by Professor Dolgova A.I. is fair; she thinks that “struggle against corruption should be interrelated with the struggle against organized crime”.

A rather new level of criminal activity requires a timely prevention, identification, suppression of crimes and bringing to trial the people, guilty of the crimes in cases of organized groups and criminal associations (criminal organizations). However, the struggle against organized criminal activity cannot be realized effectively enough on the basis of the existing system of criminal norms of the counteraction against accomplice ship, since this penal institute is not able in present-day situation to be realized on the basis of the existing scheme of criminal norms of the counteraction against accomplice ship, as this penal institute in present-day conditions is not able to provide resistance to complex and scaling manifestation of organized forms of criminal activity in full measure. It conditions for the necessity of the further scientific research and the search of the measures on the control of criminal activity of the organized groups and criminal associations (criminal organizations).

Comparative analysis of articles 209 and 210 of Criminal Code of the Russian Federation and articles 235 and 237 of the Criminal Code of the Republic of Kazakhstan

It should be expedient to revise the construction of corpus delicti provided in article 235 of CC of the RoK “Establishment and leadership of a criminal group or a criminal association (criminal organization), participation in a criminal association”, since it does not conform with a current state of organized crime and does not reflect adequate criminal measures of counteraction against it. If we make a comparative analysis of articles 209 and 210 of Criminal Code of the Russian Federation (further referred to as CC of the RF) and articles 235 and 237 of CC of the RoK, we can come to the following conclusions.

Firstly, the composition of banditry provided in article 209 of CC of the RF and article 237 of CC of the RoK coincides in the description of the crime and by construction both articles include 3 parts. The only difference is the provided sanctions. Part 3 of article 237 of CC of the RoK says: “the actions, provided by parts 1 and 2, committed by a person using his/her official position, are punished by custodial coercion for the period from 10

to 15 years”, while part 3 of article 209 of CC of the RF has a sanction - custodial coercion for the period from 12 to 20 years. [5] Secondly, article 210 in CC of the RF provides criminal liability for organization of a criminal association (criminal organization) or participation in it. That is, chapter “Crimes against public safety and public order” in CC of the RF does not include any independent article, providing criminal liability for organization of or participation in organized criminal group. Organized criminal group as one of the types of organized criminal formations is provided by Russian legislator in the corresponding articles of CC of the RF as a qualificatory characteristic. Article 235 of CC of the RoK provides criminal liability both for organization of or participation in an organized criminal group and criminal association (criminal organization).

Thirdly, it is necessary to change and complete part 2 of article 235 of CC of the RoK, for the purpose of more precise definition of the elements of the objective side of the crime. For instance, by analogy, part 1 of article 210 of CC of the RF can be referred to, in which changes and additions were made in 2009. So, part 1 of article 210 of CC of the RF provides a detailed characteristic of the objective side of this crime: “Establishment of a criminal association (criminal organization) for the purpose of a joint commitment of one or several grave crimes or leadership of such association (organization) or organization departments, and coordination of criminal actions, establishment of stable relations between different functioning groups, development of plans and creation of the conditions for commitment of crimes by such groups, or division of the spheres of criminal influence or criminal incomes between them, made by a person using his influence on a participant of the organized groups, as well as participation in the meetings of the organizers, leaders or other representatives of the organized groups for the purpose of commitment of at least one of the above mentioned crimes”. [6] Besides, part 4 of the mentioned article provides criminal liability for “commitment of the actions, mentioned in part 1 by a person, holding the highest position in a criminal hierarchy”. [7] This norm is an innovation. According to the statistics, at present time in Russia people, who committed the crimes, provided by article 209 of CC of the RF, are brought to trial by article 210 of CC of the RF, and the reason to this fact is imperfection of the composition of article 209 of CC of the RF, by Professor Milyukov’s [8] statement.

Fourthly, it is possible to consider the suggestion on including the following note in article 235 of CC of the RoK: “A person, of his own free will breaking his participation in an organized criminal group, criminal association (criminal organization) or organization department included in it, or in a meeting of the organizers, leaders or other representatives of the organized groups, and actively assisting in discovering or prevention of these crimes, is excused from criminal liability, if there is no other corpus delicti in his actions.”

Fifthly, according to the sanctions of articles 235 and 237 of CC of the RoK, the degree of the punishment in the form of custody is higher in article 237 than in article 235 of CC of the RoK. Russian legislator considers criminal association (organization) more perilous for public than banditry, and the sanction is correspondingly maximum according to part 4 of article 210 of CC of the RF – life imprisonment. By Rakhmetov S.M.'s opinion, legislative construction of the sanction degree in the form of custody is higher by article 237 than by article 235 of CC of the RoK and conforms to a real public risk from banditry, by the reason of such mandatory attribute as arms. Professor Milyukov considers that the current construction of corpus delicti provided by article 209 of CC of the RF includes the attributes of banditry not in the full measure. [9] Besides, the sanction of article 209 should be toughened, that is for instance, should be ratable to the sanction of part 4 of article 210 of CC of the RF, providing the liability for this crime in the form of life imprisonment.

Organized crime is a demonstration of the highest criminal order. Nowadays organized crime poses hazard for radical social-economic and democratic changes, it easily adapts itself to changing social conditions, penetrates into economy and politics. Current condition of organized crime can be valued on the assumption of taking into account historic, territorial, social-economic factors; it contains many characteristics common to the analogous phenomenon in other countries of the CIS. By Professor Rogov's opinion, organized crime has such characteristic features as mass functioning of stable criminal associations, criminal activity as a business, corrupt relations with officials from party, government and state bodies. Economic criminality must not be identified as organized criminality. Suggesting differentiation of the notions of economic and organized crimes, Rogov I.I. fairly notes that though crimes in the sphere of economy make a basis of organized crime, it is not limited by them, but embraces also narcotic and pornography business, prostitution, illegal gaming, racket, and joining with professional general crime. [10, p. 9-10]

#### Criminal aspects of the control of organized crime in the Republic of Kazakhstan

At present time, the existing legislation of Kazakhstan can not to a full degree realize criminal prosecution of organized criminal formations and in the first turn their leaders. The reason of this situation is the fact that criminal investigation and criminal procedure are often isolated from each other. By the statement of Professor Moldabayev S., the mechanism of using the results of criminal investigation as proofs in criminal cases is not regulated in procedural criminal law of the Republic, the institute of witnesses' (informants') defense is not properly worked through in the pre-trial legal proceeding. [11]

For instance, in the USA the method “Introduction of the system of judicial immunity and witnesses’ defense” [12] is applied in control of organized crime. The goal of judicial immunity is denunciation of the leaders of criminal organizations on the basis of the evidence of less significant members of the organization. Taking into consideration the circumstance that criminals cruelly revenge on those who not only give evidence to the police but also are ready to appear in court as a witness of prosecution, it is necessary to take measures on the defense of such witnesses. For this purpose judicial immunity is established for the informant and police defense is proposed for his/her close relatives. The prosecutor making investigation and considering that the witness’s life is at risk because of the evidences can put a question of applying the defense program for this witness. The inquiry is sent to the operating department of the Department of Justice of the USA, which makes a decision on the method of defense. After that the witness receives a new birth certificate, he gets a new number in the social insurance system. The witness is granted housing, not available for those against whom his/her evidence is directed; he/she is given a monetary allowance and other forms of assistance till he/she is able to provide him/herself. The expenses connected with a witness defense are rather great. Such approach is justified only when an important criminal “authority”. For the purpose of a witness’s defense and obtaining evidences, the court agrees to accept the evidences fixed by means of video technics as a proof, if it does not break constitutional procedural criminal norms. In this case the removal of a witness by members of organized criminal groups is senseless, as even in the case of his/her death, the recorded video evidences will play their role.

In the documents U.N.O., Security Council and its other departments successfully adhere to the position of interrelation of organized crime, corruption and terrorism. Organized crime and terrorism are designated as “new challenges and threats for the mankind”. So, in the aspect of terrorism prevention and struggle against it, U.N.O. in the Resolution of General Meeting 60/288 called on the states to consider the question of immediate joining the U.N.O. Convention against transnational organized crime and three complementary protocols to this Convention. The Convention, in its turn, pays a special attention to the struggle against corruption, considering it as an efficient method of struggle against organized crime.

It should be noted that regional and subregional international organizations, following U.N.O. positions, hold such approaches in their documents. [13] Such kinds of organizations, established not long ago, include the struggle against these crimes into their charter goals. For instance, the Charter of the CIS [14] refers the struggle against organized crime to the spheres of joint activity of the states. The Charter of Shanghai organization of cooperation [15] refers joint counteraction against terrorism, struggle against other kinds of transnational criminal activities and illegal migration to its goals. The Charter of the Organization of the Treaty on collective security [16] notes

the struggle against international terrorism, organized transnational crime and other threats by its members-states as one of the directions of its activity.

Characterizing modern organized crime, Dolgova A.I. notices that nowadays “organized criminals, who capitalized by criminal means, successfully act legally using officially registered legal entities. In their unlawful (though modified) activity they aim at using legal structures and opportunities; become active figures in official political structures. They control many federal and regional governmental and social institutes, local government bodies”. [17, p. 3]

In the practical activity of law machinery control of organized crime is mainly added up to denunciation and bringing to trial of bribe takers. Corruption for organized criminals is a means of ensuring not only a lucrative impulse, but also a political interest, as they have poly-motivation: obtaining extra incomes and power for their conservation and increasing. [18, p. 370] Organized crime is primary related to corruption and terrorism, it underlies these criminal phenomena. Therefore, struggle against organized crime is to a considerable degree struggle against corruption.

Dolgova A.I. writes that organized criminals use the interrelation of corruption and the most dangerous types of criminal violence, in particular, terrorism. Organized criminal formations are the greatest corrupter – a subject of bribery to official and other people, possessing governmental or other commissions, authority and possibilities. On the other hand, the most successful and long acting bribe takers are the members of organized criminal activity.[19, p. 5-6]

Nowadays organized crime has a number of characteristic features and they have its transnational character. The crimes which are a demonstration of organized crime are committed in the space, making up the territory of several independent states, and sometimes in such crimes there are participants who are citizens of different states. By the opinion of Professor Volzhenkin B.V. in such cases in relation to organized crime a principle of universal jurisdiction should be used. [20, p. 649] At present time a principle of universal jurisdiction is applied in the cases of commission of crimes, provided in international conventions, whose members-states are obliged to prevent independently of the place of commitment and the citizenship of the guilty persons.

Professor Volzhenkin B.V. considers a treaty between the states-members of the CIS a possible basis for universal jurisdiction. Such treaty must include a provision on the right of law machinery of the state, which excited a criminal case and discovered the signs of organized crime, to investigate all the crimes, committed by the criminal association, independently on the place of their commitment and to call to account all the people involved in spite of their citizenship. The states – members of the CIS must agree on the

prejudicial power of the sentences, passed by the courts of each state. [21, p. 650]

Some definite priority directions can be observed in the activity of transnational organized criminal groups, they are conditioned by the specific features of the region and criminal traditions. For example, Middle Asia – mainly illegal narcotics turnover; Northern Caucasus and Transcaucasia – theft of arms and ammunition; Baltic countries – currency and import-export operations with strategic raw materials and products; Far East – machinations with automobiles brought from abroad, racket, foreign economic crimes connected in particular with smuggling of natural resources. Organized criminals acting in Caucasus and Middle Asian regions often operate with extremist groups.

In the struggle with organized crime, Professor Volzhenkin says, revision of some provisions of criminal law and international law concerning the place of committing a crime, prejudicial meaning of judicial decision on criminal cases in other states, observance of the rule “double criminality” for criminal extradition and some others. [22, p. 652]

## Conclusion

In the works devoted to research of organized crime, in particular, its forms some remarks are advanced. As M. Abisatov notes, the current construction of part 4 of article 31 of CC of the RoK equates such different by their nature forms of accompliceship as organized group and criminal association. [23, p. 157]

In Resolution of Supreme Court of the RF dated on July 10, 2010 № 12 “On judicial practice of legal investigation of criminal cases on organization of criminal association (criminal organization) or membership in it” it is said that criminal association (criminal organization) differs from other forms of criminal groups including organized groups, by more complex structure, presence of the goal of joint commitment of grave crimes for obtaining directly or indirectly financial or material benefit, and by possibility of integration of two or more organized groups with the same goal”. [24] A conclusion can be made that in legislative construction of *corpus delicti* provided by article 210 of CC of the RF and in the content of the features of criminal association (criminal organization), mentioned in the given Regulation of Supreme Court of the RF, unity is not its characteristic feature.

Normative regulation of Supreme Court of the RoK № 2 dated on June 21, 2001 “On some issues of applying the legislation on liability for banditry and other crimes, committed in complicity by the courts” says that criminal association differs from organized criminal group and gang by unity and by



the goal of its establishment – for commitment of grave crimes. [25] Criminal association has a greater degree of organization and consists of separate criminal associations or organized criminal groups. Part 4 of article 31 of CC of the RoK and the above mentioned normative regulation of Supreme Court of the RoK provide an obligatory feature of a criminal association (criminal organization) – unity. By Abisatov's opinion, it is inexpedient to indicate unity of a criminal association in a legislative construction, as the notions of unity and organization are synonyms. The feature of unity includes such aspects as unity and unanimity, and these features are not peculiar to a criminal association. [26, p. 156] Investigation practice objectively evidences that, in spite of in outward appearance peaceful coexistence and cooperation of the leaders of organized criminal formations within criminal association they regularly struggle for territories, spheres of influence and financial streams. For example, for this reason at the end of the 90s the most powerful at that time in Kazakhstan criminal association "of Red Diamond" [27, p. 157] broke apart, which consisted of several organized criminal groups and criminal associations. After the murder of the leader of this organized criminal association in Spain in 1998, the leaders of the groups making up the association could not solve the problems of dividing the business, power and spheres of influence, and as a result, this criminal association broke into separate organized criminal groups and criminal organizations.

In present conditions organized crime is a constituent of such complex and global phenomena as economic and connected with it hard political competition owing to working up and dividing economic markets and resources. Under organized criminal activity including, in particular, terrorism and corruption, in fact, invasion of some states into the territories and in other spheres of sovereignty of other countries is realized.

As Sudakova R.N. and Verbovaya O.V. note, accumulation of significant material values in the hands of criminals will inevitably result in the necessity of political provision of their economic interests, and from this – their attempt to control the power in the country, the threat of politicization of organized crime, its intrusion into the sphere of political interests.[28, p. 3]

Therefore, all the said above is an evidence of the necessity to make changes and additions into the criminal legislation. It is necessary to develop and to adopt a complex law "On control of organized crime". Existing criminal legislation should be brought in conformity with international treaties, ratified by the Republic of Kazakhstan, in particular, with UNO Convention against transnational organized crime.

The issue of making changes and additions into procedural criminal law, directed at more precise regulation of introduction the results of investigation into a criminal procedure, giving more significant guaranties

of safety to the subjects of such activity and to the participants of criminal proceedings.

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