

PROBLEMS OF QUALIFICATION OF COMPLICITY IN CRIMINAL OFFENSES WITH A SPECIAL SUBJECT

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Abstract. The article is devoted to the study of actual problems of the qualification of complicity in criminal offenses with a special subject. The authors of the article pay special attention to the lack of an agreed point of view in the science of criminal law regarding the recognition of general and special subjects as complicit in a criminal offense and the need to develop rules for the qualification of criminal offenses with a special subject in complicity. The main doctrinal approaches to the qualification of complicity of a general subject in criminal offenses with a special subject are considered. It has been established that the rules for qualifying the actions of accomplices require a differentiated approach and depend on the characteristics of the special subject and the characteristics of other elements of the criminal offense.

Keywords: subject of a criminal offense, general subject, special subject, qualification of criminal offenses with a special subject, complicity, qualification of complicity with a special subject.

INTRODUCTION

In the theory of criminal law and in practice, the questions that arise when qualifying the actions of accomplices in criminal offenses with a special subject acquire important meaning. Despite the detailed regulation of the institution of complicity in Chapter VI of the General Part, the issue of recognizing general and special subjects as complicit has not been resolved there. Certain norms in this regard are formulated only in Chapter XIX of the Special Part «Criminal Offenses Against the Established Order of Military Service». Yes, in accordance with the regulations of parts 2 and 3 of Art. 401 of the Criminal Code of Ukraine, persons who are not military servants of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other military formations formed in accordance with the laws of Ukraine, the State Special Transport Service, the State Service of Special Communications and Information Protection of Ukraine, as well as other persons defined by law (that is, special subjects who bear criminal liability for war crimes), for complicity in these criminal offenses they are liable under the relevant articles of Chapter XIX of the Special Part.

Therefore, the legislator notes that the organizer, instigator or abettor in a military criminal offense can be any person, including one who is not

endowed with the characteristics of a special subject of a criminal offense. However, the rules of the Criminal Code of Ukraine do not provide answers to whether it is possible to talk about the complicity of such persons in other criminal offenses with a special subject provided for in the Special Part, and how to correctly qualify their actions in such cases. There is no unequivocal solution to these issues in the theory of criminal law.

LITERATURE REVIEW

The analysis of the criminal law literature allows us to distinguish three positions of scientists regarding the recognition of persons endowed with general characteristics as accomplices in criminal offenses with a special subject. Thus, according to M. N. Merkushev (Merkushev, 1957), V. I. Tkachenko (Tkachenko, 1976), complicity in such criminal offenses is impossible, except for actual military criminal offenses. An argument in favor of this position, according to M.N. Myerkushev, is the fact that the spread of the general rules of complicity to crimes with a special subject will lead to «an unlimited extension of the circle of persons who will be criminally liable, and will undermine the idea of distinguishing independent bodies of a crime with a special subject».

We should note that this point of view did not receive approval and is refuted in the theory of criminal law. The vast majority of scientists such as: P. I. Grishaev (Grishaev, 1959), V. V. Ustymenko, V. I. Terentiev, F. G. Burchak, A. N. Trainin, P. F. Telnov, M. I. Panov, L. D. Haukhman, S. S. Avetisyan and other scientists), on the contrary, believe that the complicity of persons who are not endowed with additional special features, can be in any criminal offenses committed by a special subject.

MATERIALS AND METHODS

The methodological basis of the research is a complex of general scientific and special methods of cognition. The article is based on the general scientific dialectical method of cognition, which was used to clarify the concept of a special subject of a criminal offense, establish the problems of complicity in criminal offenses with a special subject and the meaning that gives an opportunity to consider the studied phenomena in development and interrelationship, unity and contradictions. In addition, special scientific methods were used. In particular, the dogmatic method was used to clarify the meaning of the rules contained in legislative and by-law regulations and applied in legal doctrine, regarding the complicity of a special subject of a criminal offense. The logical-normative method was used in the formulation of proposals for the improvement of the Criminal Code of Ukraine.

RESULTS AND DISCUSSIONS

In our opinion, the content of the General Part of the Criminal Code are universal and apply to all actions, without exception, provided for by the norms of the Special Part of the Criminal Code. A direct prohibition against the complicity of general subjects in crimes with a special subject is lacking in The Criminal Liability Act. Accordingly, Articles 26, 27 and 29 of the Criminal Code of Ukraine, as well as other norms of the General Part of the Criminal Code, which regulate the liability of accomplices, apply to all criminal offenses provided for in the Special Part of the Criminal Code of Ukraine, including

criminal offenses with a special subject. Therefore, such socially dangerous acts can be committed in complicity with a person who is not endowed with additional special features. As P.F. Telnov rightly notes, any exception of this rule can be established only in a legislative manner (Telnov, 1974).

It is difficult not to agree with the arguments of E. A. Bachurin in favor of the stated position (Bachurin, 2005). Thus, according to the scientist, the possibility of liability of persons who are general subjects for complicity in criminal offenses with a special subject is due to the fact that: a) in fact, any act in crimes with a special subject can be performed by any person, despite the fact that the characteristics of a special subject are determined by the object of encroachment; b) complicity does not create special conditions of criminal liability, in connection with which any person who has committed a socially dangerous act is obliged to bear it (Bachurin, 2005). The complicity of general and special subjects of a criminal offense is recognized by judicial practice, too. Thus, in paragraph 11 of the resolution of the Plenum of the Supreme Court of Ukraine (hereinafter RPSCU) dated April 26, 2002 No. 5 «On judicial practice in cases of bribery» it is stated that the actions of a person who contributed to the commission of a crime to the person who gave or received bribe, or organized this crime, or incited its commission, should be qualified as complicity in giving or receiving a bribe. At the same time, the question of the qualification of the actions of accomplices must be resolved taking into account the direction of his intention, based on whose interests, on whose side and on whose initiative — the one who gave or the one who received the bribe — he acted (Kyrychko, 2010).

Similar explanations are contained in RPSCU dated December 26, 2003 No. 15 «On judicial practice in cases of abuse of authority or official powers». According to para. 3, point 3 of the mentioned resolution, both official and non-official persons may be recognized as organizers, instigators, abettors of abuse of power or official powers. The actions of such accomplices must be qualified according to the relevant parts of Articles 27 and 365 of the Criminal Code. And although after making changes to Art. 365 of the Criminal Code of Ukraine dated April 18, 2013 No. 222-VII «On amendments to the Criminal and Criminal Procedure Codes of Ukraine regarding the implementation of the Action Plan on the liberalization of the visa regime for Ukraine by the European Union» this RPSCU has lost its relevance, but the given clarification nevertheless testifies in favor of the fact that in life there are cases of complicity in crimes with a special subject of persons who are not them (Law of Ukraine, № 222-VII, 2013).

V. V. Alekseev does not see any fundamental obstacles to recognizing the possibility of co-commitment of general subjects in criminal offenses with a special subject (Alekseev, 1991). At the same time, according to the scientist, it is enough for one of the participants, who performed the actions that form the objective side of the criminal offense, to have the characteristics of a special subject. This opinion is shared by R.S. Orlovsky, too (Orlovsky, 2019).

The third position is represented by the views of those criminologists who propose to resolve the issue of complicity of the general subject in the criminal offenses differentiated, depending on the legislative characteristics of the special subject of the criminal offense. Thus, according to O. O. Piontkovsky, A. F. Zelinsky, R. R. Galiakbarov and N. K. Semernyova to talk about such complicity is impossible in cases where the disposition of the article of the Special Part of the Criminal Code provides for a so-called special-specific subject of a criminal

offense (Pionkovsky, 1961; Zelinsky, 1971; Galiakbarov, 1973; Semernyova, 2011). The latter refers to such a subject, the characteristics of which are precisely specified in the law, which, according to scientists, excludes the possibility of criminal liability for this criminal offense of other persons.

Let's consider how justified this approach is. Yes, the subjects knowingly giving false testimony during the pre-trial investigation, enforcement proceedings or investigation by a temporary investigator or a special temporary investigative commission of the Verkhovna Rada of Ukraine or in court under Art. 384 of the Criminal Code of Ukraine are witnesses, victims and experts who give a knowingly false opinion, and translators who make a knowingly false translation, as well as appraisers who provide a false property valuation report during enforcement proceedings. Accordingly, other participants in the criminal process (suspects, the accused) and civil proceedings (plaintiffs, defendants) cannot be held responsible for such actions. That is, other persons not specified in part 1 of Art. 384 of the Criminal Code, cannot act as perpetrators (co-perpetrators) of this criminal offense. At the same time, they can be instigators, abettors or even organizers of knowingly false testimony, and therefore their actions require qualification under the relevant part of art. 27 of the Criminal Code and art. 384 of the Criminal Code of Ukraine.

In turn, A. I. Rarog and A. V. Korneeva, whose views can also be attributed to the third position, give another exception to the general rule about the possibility of complicity in criminal offenses with a special the subject. Scientists believe that such complicity is, in principle, impossible in those crimes, the subject of which is endowed by the legislator with features that exclusively characterize the person of the culprit and indicate his reduced social danger (which allows to attribute a crime with such a special subject to the circle of crimes extenuating circumstances), because such signs cannot be extended to other accomplices. A. I. Rarog and A. V. Korneeva define the murder of a mother of her newborn child as an example of such a criminal offense (Rarog, 2002; Korneeva, 2006).

This position is questionable, and here's why. The special psychophysical condition in which the mother of a newborn child is found is recognized as a circumstance that mitigates her responsibility and serves as a basis for constructing a privileged component of the crime. This condition is unique to a woman during or immediately after childbirth. It really cannot be extended to other persons (and we support the scientists in this), and therefore the co-perpetrators of such a murder are subject to criminal liability under clause 2, part 2 of Article 115 of the Criminal Code of Ukraine (for such qualified murder as intentional murder of a minor child). Actions of persons who perform the functions of organizer, instigator and abettor in the killing by the mother of her newborn child under the circumstances specified in Art. 117 of the Criminal Code — qualified under the relevant part of Art. 27 of the Criminal Code and clause 2 of part 2 of Art. 115 of the Criminal Code. So, can the impossibility of qualifying the actions of other participants in this crime as complicity in infanticide indicate the absence of complicity in such cases at all, as claimed, for example, by A. I. Rarog. We remind that according to Art. 26 of the Criminal Code of Ukraine, complicity is the joint intentional participation of several subjects of a criminal offense in the commission of an intentional criminal offense. When killing a newborn child, both the mother and other persons (for example, the child's father or other relatives) by their joint intentional actions

commit the same intentional crime — murder. The fact that the actions of such persons, in contrast to the actions of the mother, are qualified under other articles of Section II of the Special Part of the Criminal Code is due to the differentiation of criminal responsibility for intentional murder, when the legislator, along with simple murder (part 1 of Article 115 of the Criminal Code), distinguishes qualified (part 2 of Article 115 of the Criminal Code) and privileged types of murder (Articles 116, 117 and 118 of the Criminal Code). In addition, criminal law knows other cases when the actions of accomplices are qualified under various articles of the Special Part of the Criminal Code. Such a situation occurs, for example, with qualitative excess of the perpetrator.

So, the complicity of other persons in criminal offenses, the subject of which is endowed with signs that reflect only his reduced social danger, is possible, but their actions require qualification under the articles that provide for the responsibility for the commission of such an act by the general subject of the criminal offense with reference to the relevant part of Art. 27 of the Criminal Code (if necessary). In such cases, it is necessary to talk about other rules for the qualification of complicity in criminal offenses with a special subject, and not about the impossibility of such complicity in general.

Thus, summarizing the above, we can conclude that all criminal offenses with a special subject, provided for in the Special Part of the Criminal Code of Ukraine, can be committed in complicity with a person who is not endowed with special features. At the same time, the rules for qualifying the actions of accomplices in such cases require a differentiated approach and obviously depend on the features of both the features of the special subject of the criminal offense and the features of other elements of the criminal offense with a special subject.

The question of how to correctly qualify the actions of persons who are general subjects of a criminal offense and who committed a criminal offense in complicity with a special subject is still debatable in the science of criminal law. This is due to the problem of the division of functional roles of persons in such participation.

According to part 1 of Art. 2 of the Criminal Code, the only and sufficient basis for criminal liability is the presence of a body of a crime in a socially dangerous act committed by a person. The dispositions of the articles of the Special Part of the Criminal Code describe the specific elements of a criminal offense (Panov & Kharytonov, 2020), taking into account the actions of the perpetrator in the completed criminal offense (Stashis & Tatsy, 2010). Therefore, there is no doubt that the perpetrator (co-perpetrator) of a criminal offense with a special subject can be a person endowed with additional characteristics, that is, a special subject of a criminal offense. The basis of criminal liability of organizers, instigators and abettors for complicity in a criminal offense is the presence in the actions of each of them signs of constituent elements of a criminal offense consisting of the norm of the General part — Art. 27 of the Criminal Code — and the Special Part, which provides for criminal liability for the commission of this criminal offense (Hutorova, 1997). In connection with this, other persons who are general subjects of a criminal offense, in cases of joint commission with the perpetrator of a criminal offense with a special subject, can be recognized as its organizers, instigators or abettors. Depending on the role they play in complicity, their actions require qualification under the relevant part of Article 27 and that article (part of the article) of the Special Part of the Criminal Code, which provides for liability for a criminal offense committed by a special subject.

The argument in favor of this conclusion is that the mentioned persons do not directly form the objective side of the criminal offense with a special subject, but perform the actions described by the legislator in parts 3, 4 or 5 of Article 27 of the Criminal Code of Ukraine, creating the basis for the successful commission of a specific criminal offense by the perpetrator.

In the scientific literature, the question of whether a person who has the characteristics provided for in Part 1 of Art. 18 of the Criminal Code (general subject), become a co-perpetrator of a criminal offense with a special subject. The situation is complicated by the fact that in some of the criminal offenses, the group commission is a qualifying feature, namely «the commission of a criminal offense by a group of persons based on a prior conspiracy». Accordingly, the resolution of the mentioned issue will depend on (a) the qualification of the actions of both the special subject and other persons who, together with him, will participate in the commission of a criminal offense, and so (b) the degree of criminal punishment that the court will impose on accomplices in such cases.

In the theory of criminal law, there are two diametrically opposed positions regarding the mentioned problem. Thus, according to A. N. Trainin (Trainin, 1957), P. I. Gryshaev (Gryshaev, 1959), F. G. Burchak (Burchak, 1969), V. I. Terentiev (Terentiev, 2001), M. I. Panov and other scientists, persons who are not characterized by special features can only be organizers, instigators or abettors of crimes with a special subject. In turn, B. V. Volzhenkin (Volzhenkin, 2000), E. A. Bachurin, V. V. Ustyenko (Ustyenko, 1989), V. A. Alekseev, A. P. Kozlov (Kozlov, 2010), R. D. Sharapov (Sharapov, 2001), S. D. Shapchenko (Shapchenko, 2003) and other scientists note: if the objective side of a criminal offense includes actions that can be performed by the general subject of a criminal offense, then the commission of such actions require qualification as co-commitment in a criminal offense with a special subject. At the same time, it is emphasized that the mandatory condition for recognition in such cases of a group of persons under a prior conspiracy is the presence of signs of a special subject of a criminal offense in at least one of the accomplices, who performs actions which are part of the objective side of the criminal offense (Alekseev, 1991).

The leading argument in favor of the first position, according to its supporters, is that only a person who is a special subject can harm social relations protected by a certain norm of the criminal law, and therefore no one, except a special subject, can't fulfill the objective side of a specific criminal offense. Other scientists claim that even the realization of a part of the actions that form the objective side of a specific constituent element of a criminal offense by a person, who is a general subject, does not turn him into a special subject of a criminal offense.

In support of the second point of view, according to which the general subjects of a criminal offense in certain cases can be recognized as co-perpetrators of a criminal offense with a special subject, scientists have traditionally cited the Soviet judicial practice in rape cases (this is the revision of Article 117 of the Criminal Code of the Ukrainian SSR in 1960). The disposition of this article contained an indication of the sexual characteristics of the victim, namely, she could only be a female person, this allowed us to conclude that the subject of rape could be exclusively a male person. The objective side of this crime was (and remains) complex, because along with

the act (sexual intercourse itself), the legislator indicated the way in which it can be committed: with the use of physical violence, threats or with the use of the helpless state of the victim (On the practice of applying by courts of the legislation of the Ukrainian SSR on liability for rape..., 1984). So, in practice, a woman who used violence against a victim, i.e. partially fulfill the objective side of rape, was recognized as a co-perpetrator of this crime and a member of a group of persons.

Lets emphasize that today this example is inappropriate, since in Art. 152 of the Criminal Code of Ukraine, which provides for criminal liability for rape, the sexual characteristics of the victim are not specified. However, this approach should be maintained in the future, since the Special Part of the Criminal Code of Ukraine of 2001 also provides for a number of articles characterized by a complex objective side, which includes actions, some of which can be fulfilled by a person, along with a special subject of a criminal offense, which is not endowed with additional features. For example, these are criminal offenses provided for in part 2 of Art. 373 of the Criminal Code (compulsion to testify with the use of violence or with abuse of a person), part 3 of Art. 393 of the Criminal Code (escape from a place of imprisonment or from custody combined with the use of violence or the threat of its use), Art. 405 of the Criminal Code (threat or violence against the chief), etc.

At the same time, it should be remembered that the current criminal law also provides for such constituent elements of criminal offence where co-commitment of a general and a special subject of a criminal offense is actually impossible. As already mentioned, persons who are general subjects of a criminal offense can only be organizers, instigators or abettors of knowingly false testimony (Article 384 of the Criminal Code of Ukraine). This conclusion is due to the fact that the objective side of this criminal offense (it consists in such actions as knowingly false testimony, knowingly false conclusion, knowingly false report or knowingly false translation) can be physically performed only by those persons whose scope is clearly defined in the disposition Art. 384 of the Criminal Code: witness, victim, expert, appraiser or translator. It also applies to criminal offenses provided for by Articles 372 of the Criminal Code (bringing a known innocent to criminal responsibility), part 1 of Art. 373 of the Criminal Code (compulsion to testify), 374 of the Criminal Code (violation of the right to defense), 375 of the Criminal Code (imposition by a judge(s) of a knowingly unjust sentence, decision, resolution or decree), etc. So, as S. D. Shapchenko rightly noted, "in certain crimes, the relationship between the act and the features of a special subject is functionally inseparable, in connection with which it can be stated: the act provided for in the legal structure of the corresponding crime can be committed only by a special subject. Such crimes include, in particular, treason, abuse of authority or official position, official forgery, receiving an illegal benefit. When committing similar criminal offenses in complicity, an accomplice who does not have the characteristics of a special subject of a criminal offense (unless he acts as an indirect perpetrator of a criminal offense) cannot be recognized as an perpetrator (co-perpetrator) under any conditions" (Shapchenko, 2003).

In the end, it is worth highlighting two more examples of criminal offenses with a special subject, where the functional division of roles of persons not endowed with special features, is decided according to other rules for complicity. This is the deliberate killing by the mother of her newborn child

(Article 117 of the Criminal Code), which we mentioned earlier, as well as such a pair of criminal offenses as treason in the form of espionage (Article 111 of the Criminal Code) and espionage itself, as an independent criminal offense (Article 114 of the Criminal Code).

In the first case, as already mentioned, any person can be an accomplice to the killing of the mother of her newborn child (even complicity in the form of co-perpetration is possible), but their responsibility must follow the norms, the disposition of which provides for in the capacity of the perpetrator of the criminal offense as the general subject (specifically for a qualified type of intentional killing). The following rule applies here: features that are not related to the committed act, but to the person of the perpetrator, should not affect on the responsibility of another accomplice, and blame only the accomplice to whom they belong, regardless of whether he is aware of them or not (Dudorov & Pysmenskyi, 2010). In connection with this, we consider incorrectly proposed by some scientists (for example, M.Y. Korzhanskyi, N.K. Semernyova), the qualification of the actions of persons who did not directly fulfill the objective side of the criminal offense, provided for in Art. 117 of the Criminal Code, but fulfilled other roles in complicity, such as organization, instigation or abettorship in the mother's killing of her newborn child (according to the relevant part of Article 27 of the Criminal Code and Article 117 of the Criminal Code of Ukraine) (Korzhanskyi, 1996).

As noted by S.S. Avetisyan, in the case of complicity in socially dangerous acts provided for in articles 111 of the Criminal Code and 114 of the Criminal Code, a situation is created when a non-special subject of a criminal offense cannot be criminally liable for committing a criminal offense, whose subject has a certain specify, not only as a perpetrator (co-perpetrator) of this criminal offense, but also as its organizer, instigator or abettor. The responsibility of such persons arise not for complicity in and with such subject, but for the commission of another criminal offense that encroaches on the same relations (Avetisyan, 2007). Yes, it is known that the subject of high treason (Article 111 of the Criminal Code) can only be a citizen of Ukraine. At the same time, the actions of a foreigner or a stateless person who will assist such a citizen in gathering information that constitutes a state secret, or receive it for the purpose of transferring it to relevant foreign authorities, are not recognized as complicity in this criminal offense, but require qualification for the commission of a separate crime — espionage, provided for in Art. 114 of the Criminal Code. In turn, if a citizen of Ukraine assists a foreign citizen in gathering the information, which we are talking about, he will not be recognized as an abettor in espionage, but as a perpetrator of the crime provided for in Article 111 of the Criminal Code, because such actions are recognized as a separate form of treason (properly giving a foreign state, a foreign organization or their representatives different help in realization subversive activities against Ukraine). It seems that in the given example there is a situation where the legislator artificially divides the actions of accomplices of one criminal act into two independent categories of crimes — treason and espionage, guided by the characteristics of the special subject of the crime.

CONCLUSION

Summarizing the above, we can draw the following conclusions. 1) the perpetrator (co-perpetrator) of a criminal offense with a special subject can be any person who is endowed with an additional mandatory feature, that is, a special subject of a criminal offense; 2) persons who are not endowed with the characteristics of a special subject of a criminal offense, for committing in complicity with such a subject the actions provided for in parts 3, 4 and 5 of Article 27 of the Criminal Code, must be recognized as organizers, instigators or abettors of any criminal offense with a special subject; 3) the possibility of recognizing a person who is a general subject, a co-perpetrator of a criminal offense with a special subject, must be decided in each specific case individually, depending on the specific features of the concrete constituent elements of the criminal offense, in particular, on the specifics of its objective side; 4) such person must always be recognized as a co-perpetrator of a criminal offense with a special subject in cases where she, together with the latter, performed at least part of the actions that form the objective side of such criminal offense; 5) the specifics of the construction of individual components of a criminal offense with a special subject, provided for in the Special Part of the Criminal Code, significantly complicate the possibility of developing general (uniform) rules for the qualification of the actions of accomplices in cases where, along with the special subject of the criminal offense, a person, participates in its commission, is not endowed with such features.

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