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DISTINGUISHING MEDIATED PERFORMANCE OF A CRIMINAL OFFENSE AND COMPLICATION IN A CRIMINAL OFFENSE

ABSTRACT

The purpose of the article is to distinguish between the indirect execution of a criminal offense and complicity in a criminal offense. This is due to the fact that in judicial practice there are quite a lot of cases when the objective side of a criminal offense is committed by several persons, but only one of them (the indirect executor) acts culpably, and other persons are misled about the true nature of their actions. It is also common for criminals to use persons who have not reached the age of criminal responsibility for the indirect execution of a criminal offense, especially when committing self-interested criminal offenses against property. The concept of such mediated performance was studied, its system was defined, and typical methods of its execution were characterized. The judicial practice of qualifying the indirect execution of a criminal offense by using persons who are not the subjects of a criminal offense, the use of persons who have the characteristics of a common subject of a criminal offense, but act innocently, or who act under the influence of irresistible physical or mental coercion, has been analyzed. The common and distinguishing features of the indirect execution of a criminal offense and complicity in it are given, and the main criteria that must be taken into account for making such a distinction are established. It is established that the indirect execution of a criminal offense will be provided that the objective side of the criminal offense is not executed by the guilty person either in whole or in part. After all, if a person performs at least a certain part of the objective side, then he acts as an executor (co-executor) of the act, and not as an indirect executor of it.

Keywords: complicity in a criminal offense, indirect execution of a criminal offense, separation of acts, common subject, real subject, the directedness of intent, carelessness

JEL Classification: I38, J17, J44, J53

INTRODUCTION

The process of distinguishing related acts is an important component of their correct qualification and establishing the guilty party. This is because the phenomenon we are studying has many similar features with related criminal law institutions, primarily with complicity in a criminal offense. After all, quite often in the indirect commission of a criminal offense, there are two or more persons, including persons who are endowed with the characteristics of a common subject of a criminal offense.

In judicial practice, there are quite a lot of cases when the objective side of a criminal offense is committed by several persons, but only one of them (the indirect executor) acts culpably, and other persons are misled about the true nature of their actions or do not have the general features of the subject of a criminal offense.

Therefore, it is important to establish when an act can be considered committed in complicity, and when only by one subject in a way of indirect execution.

Complicity in a criminal offense is a form of criminal activity. Its specificity lies in the fact that:

- participation in the commission of a criminal offense must involve two or more persons causing its increased public danger;
- the composition of a criminal offense is carried out only due to the joint activities of all accomplices, while the acts of some of them may lack all the signs of a criminal offense specified in the article of the Special Part of the Criminal Code of Ukraine.

The commission of certain types of criminal offenses is possible only in complicity (for example, participation in a gang or an attack committed by it during banditry, or leadership of a criminal organization. The legislative definition of the concept of "complicity" includes the following features:

- the presence of two or more subjects of a criminal offense involved in the commission of the same intentional criminal offense;
- the commonality of their participation in a criminal offense;
- intentional nature of the activities of accomplices. The first two signs characterize the objective (a special way of committing a criminal offense, which is characterized by a community of actions), and the last - the subjective side of complicity (a deliberate form of guilt).

LITERATURE REVIEW

In the science of criminal law, the problems of indirect execution of a criminal offense have been studied in the works of the following scientists: A.A. Aydinyan, S.O. Zagorodnyuk, K.P. Zadoya, V.V. Kuznetsov, Yu.Yu. Lemishko, O.M. Obushenko, N.M. Onishchenko, Z.E. Romaniivka, I.M. Fedorchuk, O.M. Khramtsova, Yu.V. Hristova and others.

According to Honcharenko, V. H. (2013). «The principles of criminal proceedings, which have ideological, law-making and law-enforcement significance and provide stable and fundamentally correct regulation of criminal law relations, otherwise – reliable protection of substantive criminal law, must operate at all stages of criminal proceedings and be inviolably binding on all participants in criminal proceedings who have rights and obligations provided by law – with or without their own procedural interests. Moreover, these principles must be unconditionally respected by all members of society and not violated directly or indirectly by them».

In the scientific works of Horodovenko, V.V. (2006), the problems of interaction between the judiciary and the legislative and executive branches of power are considered in detail. International acts in the field of organization of the judiciary are analyzed and proposals are made on the implementation of international legal standards of judicial independence in national legislation.

In the article Zinchenko I. A. «Participation in a Crime According to the Criminal Law of the Ukraine-England: a Comparative Legal Aspect» the institute of complicity under the criminal legislation of Ukraine and England is considered. A comparative legal analysis of the norms of the Criminal Code of Ukraine which regulate the institute of complicity and the corresponding positions of English criminal law is implementing, their similarities and differences are defining. The characteristic of the types of accomplices is given, and the peculiarities of their responsibility are found out. The decisions of the English courts from the specific cases are given.

However, the study of the state of research on the scientific problem confirms that due attention has not been paid to the study of the distinction between the indirect execution of a criminal offense and complicity in a criminal offense.

In view of this, it is necessary, first of all, to analyze the judicial practice of qualifying the indirect execution of a criminal offense by using persons who are not the subjects of a criminal offense, the use of persons who have the characteristics of a general subject of a criminal offense, but act innocently, or who act under the influence of irresistible physical or mental coercion.

AIMS AND OBJECTIVES

The purpose of the article is to distinguish between indirect execution of a criminal offense and complicity in a criminal offense. Achieving this goal is due to the fact that in judicial practice there are quite a lot of cases when the objective side of a criminal offense is committed by several persons, but only one of them (the indirect executor) acts culpably, and other persons are misled about the true nature of their actions. It is also common for criminals to use persons who have not reached the age of criminal responsibility for the indirect execution of a criminal offense, especially when committing self-

interested criminal offenses against property. The concept of such mediated execution was studied, its system was defined and typical methods of its execution were characterized.

METHODS

To solve all aspects and dimensions of the scientific problem proposed in the article, the following research methods were used in particular: general scientific, theoretical, and empirical, verification and refutation of hypothesis and theory, description, explanation, comparison, systematic and formal, generalization, and systematization.

RESULTS

According to Part 1 of Article 27 of the Criminal Code of Ukraine, accomplices in a crime are the perpetrator, organizer, instigator, and accomplice. Sometimes in practice, such a figure as the initiator of a crime is distinguished. However, the initiator of the crime, strictly speaking, is either the instigator or the organizer of the crime, so the Ukrainian legislator did not resort to the allocation of the initiator as an independent accomplice to the crime.

The perpetrator (co-executor) of a crime (part 2 of Article 27 of the Criminal Code) is a person who, in complicity with other subjects of the crime, directly or through the use of other persons who are not subject to criminal liability for the crime according to the law, committed a crime under the Criminal Code. The performer is the central (main) figure of complicity, without him there is no complicity. This happens because only the perpetrator fulfills the objective side of the crime and carries out what was conceived by other accomplices.

The organizer of a crime (part 3 of Article 27 of the Criminal Code) is a person who organized the commission of a crime (crimes) or supervised its (their) preparation or commission. An organizer is also a person who created or led an organized group or criminal organization, or a person who provided funding or organized the concealment of criminal activities of an organized group or criminal organization. The organizer dominates all accomplices and regulates and directs their criminal activities.

An instigator (part 4 of Article 27 of the Criminal Code) is a person who, by persuasion, bribery, threat, coercion, or otherwise inclined another accomplice to commit a crime, that is, the instigator excites other accomplices' intent to commit a crime.

An accomplice (part 5 of Article 27 of the Criminal Code) is a person who, by advice, instructions, provision of means or tools, or removal of obstacles, contributed to the commission of a crime by other accomplices, as well as a person who promised in advance to hide a criminal, instruments or means of committing a crime, traces of a crime or objects obtained by criminal means, to purchase or sell such items, or otherwise contribute to the concealment of a crime. It should be borne in mind that Ukrainian judicial practice suggests a possible combination of the actions of accomplices in several roles at once. For example, a person may be both the organizer and executor of a crime or the instigator and accomplice of a crime. The combination of several roles in the act of an accomplice must necessarily be taken into account by the court when imposing punishment.

In the Criminal Code of Ukraine, the possibility of indirect execution of a criminal offense is referred to in Part 2 of Art. 27. In a general sense, indirect execution of a criminal offense can be understood as cases when a person uses other persons who are not subject to criminal liability for the committed offense to carry out the objective side of the criminal offense. In such a case, although the person does not directly commit a criminal offense, the occurrence of a criminal and unlawful consequence is causally connected with his actions. After all, it is she who acts both as an organizer and as an instigator. And it is she who is recognized under such conditions as a perpetrator of a criminal offense - an indirect perpetrator.

In this case, there is a combination of objective signs - because a criminal and illegal act is committed and a criminal and illegal consequence occurs.

There is also a complex combination of subjective elements - because a person who directly commits a criminal offense does not understand the illegality and significance of his actions. She is, in fact, used as a tool for committing a criminal offense, deceived, framed.

Complicity is characterized by the following most significant features:

- the act is committed by several persons who are the subjects of a criminal offense (quantitative feature). A criminal offense cannot be qualified as committed by a group of persons when it is committed by only one person using technical means, animals, forces of nature, etc. Only two or more people can commit a criminal offense as a group [7, p. 192];
- actions of persons are coordinated. Such agreement may arise both on the basis of prior agreement and without it;
- each participant participates in the performance of the objective side (simple forms of complicity without the allocation of roles - all co-performers) or acts as an instigator, organizer, or accomplice (complex forms of complicity with the allocation of roles);
- the objective side is characterized by the presence of functional consistency and interconnection between socially dangerous actions of the subjects of the criminal offense. The actions of accomplices are mutually complementary and mutually determined. There can be different ways of agreeing and achieving a relationship: oral, written, through conclusive actions [4, p. 321];
- the subjective side of the criminal offense committed by the subjects is characterized by the intentional form of guilt, and the willful sign of the intention of the accomplice to the criminal offense is manifested in the desire to jointly commit a socially dangerous act (in the material components of the criminal offense - also in the desire or conscious assumption of the occurrence of socially dangerous consequences of the joint criminal activity).

For example, M.Y. Korzhansky indicated that complicity is possible under the condition that one of the accomplices facilitates the commission of a crime by another accomplice, and the latter, in turn, understands such assistance and perceives it [5, p. 76].

Complicating the process of distinguishing the researched institutions is the fact that complicity may also include persons who do not directly perform the objective side of the act (instigator, accomplice, organizer). Yes, according to para. 2, paragraph 16 of the resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of crimes against life and health of a person" dated February 7, 2003 No. 2, those persons who, although they did not commit acts which the death of the victim was directly caused, but, being united with other co-perpetrators of the murder with a single intention aimed at depriving the victim of his life, they performed at least part of the volume of actions that the group considered necessary for the realization of this intention" [8]. For example, it can be the actions of an accomplice who provided the tools to commit a criminal offense, or deliberately "lured" the victim to the place of the commission of the criminal offense agreed upon by the accomplices.

The interesting position of Yu.V. Hristova is that the use of the term "indirect executor" when qualifying the indirect execution of a criminal offense is not correct, because such a term characterizes a certain activity only when the act is committed with complicity. Therefore, it can be discussed only in relation to those criminal offenses committed in complicity. When it comes to the indirect commission of a criminal offense, the person who commits such an offense is, in her opinion, not a perpetrator (co-perpetrator), but a person who is subject to criminal liability (a subject of a criminal offense) [10, p. 314].

However, such a position contradicts the norm of Part 2 of Art. 27 of the Criminal Code of Ukraine, where the executor (co-executor) is called, including a person who uses persons who are not the subjects of a criminal offense to commit a criminal offense. Therefore, when distinguishing between complicity and indirect execution and later in this article, the person who uses other persons for the indirect execution of a criminal offense will be called the indirect executor, and the person who performs the objective side will be called the real executor.

In our opinion, the key criteria for distinguishing between complicity in a criminal offense and its indirect execution by the subject of a criminal offense are the following criteria:

- In the case of co-participation, the objective party may be performed by several co-executors. In the case of mediated action, there is always a subject who does not perform the objective side of the action (the indirect performer) and one or more persons who actually perform the objective side of the action (the real performer). Therefore, there can be no mediated performance when the act is committed jointly by an adult together with minors. For example, PERSON_1, together with minors PERSON_3 and PERSON_4, opened the door and entered the house by pulling out the staple from the frame of the front door, on which the padlock was held. In one of the rooms PERSON 1 and minors PERSON_3 and PERSON_4 discovered and stole food products worth UAH 450. In the future, the abducted were disposed of at their own discretion [2]. In this case, there is no indirect performance, because the guilty person also personally performed the objective side of the act. A group of people is also missing;

- Persons will be accomplices provided that there is a qualitative criterion - each person who takes part in the joint commission of an act is endowed with the features of the subject of the corresponding composition of the criminal offense. In the case of indirect execution, this feature can be inherent only to the indirect executor (subject). After all, according to para. 2, paragraph 24 of the resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of crimes against property" in the case when from a group of persons who committed a crime, only one person is the subject of the crime, and the rest of the persons due to lack of judgment or due to not having reached the age from which criminal responsibility may arise, or for other reasons cannot be the subjects of a crime, the actions of a guilty person who is brought to criminal responsibility under such circumstances cannot be considered as the commission of a crime by a group of persons [9];
- Between the mediated executor and the person who actually performs the objective side of the act, there is no subjective two-way connection, in which each subject is aware of the commonality of the act, its social danger, the common nature of the committed criminal offense, the focus of the act on joint result and the desire for its occurrence. For example, in the evening, PERSON_2 decided to steal a metal post from PERSON_8, in the house where he worked at the time and had the keys to the gate. Realizing that he will not steal the column himself, PERSON_2 noticed boys PERSON_5, PERSON_4, PERSON_7, and PERSON_6 sitting near the store. He asked the boys to help him pick up one metal post. The boys agreed to his request, as he told them that the pole belonged to him and that it should be taken from a man for whom he works and who allowed him to take this pole. Arriving at the house, he opened the gate with the keys he had. The interrogated PERSON_6, PERSON_7, PERSON_5, and PERSON_4 explained that they had no intention of stealing the metal post because PERSON_2 did not say anything about it, he only asked them to help him take the post that the owner had given him in the same way as he had previously helped him. In addition, they all freely entered the territory where the pillar [3] was located. However, in such cases, it must be clearly established that the persons who performed the objective side of the act did not understand the true nature of their actions. In the opposite case, it is possible to talk about the commission of a criminal offense by a group of persons, where one person acts as an organizer and instigator, and other persons who were incited by the culprit act as executors;
- In the case of complicity, persons voluntarily join their efforts, while in the indirect commission of a criminal offense, a person may agree to perform an act under the influence of coercion or threats. For example, an intermediary executor forces the real executor to commit a certain criminal offense by threatening his relatives with violence;
- As a rule, with complicity, persons are familiar with each other, while with the indirect commission of a criminal offense, such persons may meet immediately before committing the act, and the real perpetrator may not even know the subject of the criminal offense (which was the case in the judicial case described above practices). Although even with complicity, the accomplices may not know each other but get to know each other immediately before committing a criminal offense. It is important that at the same time they understand the commonality of their actions (for example, two people who have met by chance enter the interior of a car together and from there lay out a certain property, which they then sell and divide the acquired funds among themselves);
- When the action of the real performer is stopped, his behavior may indicate that he really does not understand the socially dangerous and criminally illegal nature of his actions. For example, a person who fraudulently took possession of someone else's property in order to later transfer it to an intermediary executor during his arrest may not resist, try to escape, or get rid of the property (throw it away), because he thinks that he is doing completely legal actions, about which another person asked.

Also, when distinguishing between indirect execution and complicity in a criminal offense, the subjective attitude of one person to the presence of signs of the subject of the corresponding criminal offense in another person should be taken into account. So, for example, if a person incites another person, who is of unsound mind, to commit theft by a group of persons, but does not know about his unsound mind, then, in our opinion, there is an attempt to commit a criminal offense committed by a group of persons. After all, as indicated by A.A. Aydiyanyan, the indirect commission of a crime involves the subject's awareness of the fact that he is using a person to commit the crime who, due to various circumstances, is not subject to criminal liability for him [1, p. 142].

The same will be true if a person unknowingly uses an underage person to commit a criminal offense. After all, in such cases, the person's intention is aimed at the joint commission of a criminal offense with another subject (with a division of roles), and not at using him as a real executor in indirect execution.

Therefore, if the culprit mistakenly believed that the person who performs the objective side of the criminal offense is his subject, his actions should be qualified according to Part 2 of Art. 15, Part 3 (4 or 5) of Art. 27, and the corresponding article (part of the article) of the Special Part of the Criminal Code of Ukraine. That is, it is necessary to turn to the

construction of legal fiction - to qualify the committed as an attempt on the complicity of the corresponding kind [6, p. 101].

DISCUSSION

In law enforcement practice, there may also be cases of so-called incitement to incitement or incitement to aiding and abetting or organizing a criminal offense. For example, Person_A sought to involve another Person_B in carrying out the carjacking. But having no influence on him, he influenced another Person_B so that he, in turn, influenced B and influenced the latter to steal the car. In this case, such actions of Person_A can also conditionally be called indirect execution of a criminal offense. After all, such a person does not directly incite the performer but acts indirectly. But, according to V.O. Navrotskyi, when qualifying such indirect incitement, it is necessary to proceed not from the role that the person who was incited to commit a criminal offense should perform and is performing, but to take into account the essence of the actions of the instigator himself. After all, part 4 of Art. 27 of the Criminal Code of Ukraine refers to incitement to commit a criminal offense. Accordingly, incitement takes place regardless of the role in the criminal offense of the person whom the instigator incited to participate in the criminal offense. Therefore, incitement to incitement, incitement to the organization of a criminal offense, and incitement to aiding and abetting in a criminal offense should be qualified as any incitement - according to part 4 of Art. 27 and the corresponding article of the Special Part of the Criminal Code of Ukraine [7, p. 174]. Accordingly, in such cases, the act should be qualified as complicity in a criminal offense. After all, all individuals act deliberately and understand the socially dangerous nature of their actions and their commonality in action.

CONCLUSIONS

So, summarizing the judicial practice, we note that the indirect execution of a criminal offense and complicity in it have many common features, which is due to the fact that in both cases, several people are involved in the organization and execution of the act.

In order to distinguish between the indirect execution of a criminal offense and complicity in it, one should first take into account the presence of the persons who perform the act, and signs of the subject of the criminal offense. The indirect performance will be provided that only the real performer has such characteristics. Therefore, there will be no complicity when using persons who have not reached the age of criminal responsibility and unconvinced persons to perform the act. It is also necessary to establish the existence of a subjective two-way connection between the mediated executor and the person who actually performs the objective side of the act, in which each subject is aware of the commonality of the act, its social danger, the common nature of the committed criminal offense, the direction of the act on the joint result and the desire for its occurrence. There will be no complicity when one person acts intentionally and the other acts under a delusion as to the true nature of his act. Also, in order to distinguish between the indirect execution of a criminal offense and complicity in it, attention should be paid to the nature of the relationship between the persons (whether they are familiar with each other or not), to the voluntariness of their joint efforts, to the degree of coherence of their actions, to the nature of the behavior of the actual perpetrator of the act, especially when its action is stopped by law enforcement agencies, etc.

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Омельчук О., Захарчук В.

РОЗМЕЖУВАННЯ ОПОСЕРЕДКОВАНОГО ВИКОНАННЯ КРИМІНАЛЬНОГО ПРАВОПОРУШЕННЯ ТА СПІВУЧАСТІ В КРИМІНАЛЬНОМУ ПРАВОПОРУШЕННІ

Метою роботи є проведення розмежування опосередкованого виконання кримінального правопорушення та співучасті в кримінальному правопорушенні. Це зумовлено тим, що в судовій практиці досить багато випадків, коли об'єктивна сторона кримінального правопорушення вчиняється кількома особами, однак лише одна з них (опосередкований виконавець) діє винно, а інші особи введені в оману щодо справжнього характеру своїх дій. Також поширеним є використання злочинцями для опосередкованого виконання кримінального правопорушення осіб, які не досягли віку кримінальної відповідальності, особливо при вчиненні корисливих кримінальних правопорушень

проти власності. Досліджено поняття такого опосередкованого виконання, визначено його систему та охарактеризовано типові способи його вчинення. Проаналізовано судову практику кваліфікації опосередкованого виконання кримінального правопорушення шляхом використання осіб, які не є суб'єктами кримінального правопорушення; використання осіб, які мають ознаки загального суб'єкта кримінального правопорушення, але діють невинно, або які діють під впливом непереборного фізичного чи психічного примусу. Наведено спільні та розмежувальні ознаки опосередкованого виконання кримінального правопорушення та співучасті в ньому, встановлено основні критерії, які потрібно враховувати для проведення такого розмежування. Констатовано, що ключовим для їх розмежування є встановлення не лише відсутності чи наявності ознак загальних суб'єктів у осіб, які виконують діяння, але й встановлення умислу на спільне вчинення діяння та розуміння наслідків таких дій. Установлено, що опосередковане виконання кримінального правопорушення виникає за умови, що об'єктивна сторона кримінального правопорушення не виконується винною особою ні повністю, ні частково. Адже якщо особа виконує хоча б певну частину об'єктивної сторони, то вона виступає виконавцем (співвиконавцем) діяння, а не опосередкованим його виконавцем.

Ключові слова: співучасть у кримінальному правопорушенні, опосередковане виконання кримінального правопорушення, розмежування діянь, загальний суб'єкт, реальний суб'єкт, спрямованість умислу, необережність

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