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## **Controversial Issues of Classification of Murder Committed by an Organized Group**

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*Based on an analysis of judicial practice and provisions of the theory of criminal law the authors examine the controversial issues of classification of murder committed by an organized group, pay attention to the contradictory nature of judicial decisions on specific criminal cases and offer advice on the proper classification of actions of the perpetrators in these cases.*

*Keywords: gang, classifying feature, organized group, complicity, murder.*

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The current state of jurisprudence in cases of murder committed by an organized group shows that executors of law not only have to solve common problems of the doctrine of complicity connected with the identification and determination of features of an organized group, its distinction from other forms of complicity in a crime, the establishment of the roles of accomplices who formed such a group, and the limit of their liability, but also they have to deal with the solution of specific problems that arise when classifying such murders.

In this article, it seems urgent to focus on the analysis of several separate issues that, in our view, are essential for the proper classification of murder committed by an organized group.

1. Part 2 of Art. 105 of the Criminal Code of the Russian Federation exhaustively lists the circumstances that, in the opinion of the legislator, significantly increase the degree of

public danger of murder themselves in each case of their determination.

However, in reality the situations when the actions of a perpetrator have signs of several circumstances determining murder may occur. In this regard, S.V. Borodin notes that each of the circumstances specified in Part 2 of Art. 105 of the Criminal Code has an independent meaning. It is therefore unacceptable to use only one of the points of Part 2 of Art. 105 of the Criminal Code when qualifying actions of a person guilty of premeditated murder with aggravating circumstances, despite the fact that several aggravating circumstances stated in this article were determined. Only the classification of all actions of the guilty can comprehensively assess the public danger of murder and assign a fair punishment taking into account the details of the identity of the offender<sup>1</sup>.

The Plenum of the Supreme Court of the Russian Federation in the Paragraph 17 of the

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Resolution No. 1 dated January 27, 1999 “On judicial practice in murder cases (Article 105 of the RF Criminal Code)” (hereinafter – Regulation on murder cases) explains that a murder committed with aggravating circumstances provided by two or more paragraphs of the Part 2 of the Art. 105 of the RF Criminal Code must be qualified according to all these paragraphs<sup>2</sup>. At the same time it is even stated in some sources that the Paragraph 17 of the Regulation does not require any comments due to the clear and unequivocal recommendations of the Plenum of the RF Supreme Court.

However, it appears that such situations are still worthy of individual analysis and clarification, since, as seen from the following examples from the jurisprudence in specific criminal cases, the prosecution and the courts often have difficulty in qualifying actions that contain a number of aggravating circumstances specified in the Part 2 of the Art. 105 of the RF Criminal Code. One such case is the question of classification of actions of those responsible for the murder by an organized group followed by the banditry, and, as a consequence, the choice of the correct classification: 1) either by the Subparagraphs “g”, “h” of the Part 2 of the Art. 105 of the Criminal Code; 2) or only by the Subparagraph “h” of the Part 2 of the Art. 105 of the Criminal Code.

The Paragraph 10 of the Resolution on murder cases contains only an explanation that when classifying murder according to the Paragraph “g” of the Part 2 of Art.105 of the Criminal Code it is necessary to consider the definition of a crime committed by an organized group of persons as stated in Art.35 of the Criminal Code, and to identify members of the group with the accomplices without reference to Art.33 of the Criminal Code. The Paragraph 11 of the Resolution states that murder conjugate with robbery, extortion and banditry should be classified as murder in the process of committing

these crimes according to the Paragraph “h” of the Part 2 of Art.105 of the Criminal Code together with the articles of the Criminal Code providing for the responsibility for robbery, extortion or banditry.

The Resolution of the Plenum of the Supreme Court of the Russian Federation dated January 17, 1997 No. 1 “On the application of law on liability for banditry” (hereinafter – the Resolution on banditry cases) explains that the courts should keep in mind that Art. 209 of the Criminal Code that determines the responsibility for creating a group, leadership and participation in it or in the attacks committed by it, does not include responsibility for the commission by the group members participating in the attack the criminal acts that form a separate crime, and therefore in these cases courts should be guided by the provisions of the Article 17 of the Criminal Code stating that when there are multiple offenses a person is liable for each offense under the relevant article or a part of the article of the Criminal Code of the Russian Federation<sup>3</sup>.

However, it is not hard to notice that such an explanation cannot give a complete answer to the question of which one of the paragraphs of the Part 2 of the Article 105 of the Criminal Code (or several paragraphs at the same time) is necessary to be considered when qualifying a murder committed by a group.

Meanwhile, the analysis of jurisprudence indicates that there is no unified approach of the courts considering these cases in the first instance the Russian Federation. Thus, the Kemerovo Region Court awarded a sentence to Z., Ya. and Kh. Classifying their actions, among other crimes committed by them, according to the Subparagraphs “g”, “h” of the Part 2 of Art.105 of the Criminal Code. In this case, justifying the chosen classification, the Court referred to the fact that the crime was committed by them in a settled armed group (gang), that

is, an armed kind of an organized group, so the actions of all accomplices, regardless of their role in the crime, are subject to classification as the joint participation in a crime. This crime was committed by the defendants as one of the stages of their criminal activities aimed to attack citizens meaning that it was followed by banditry. An indication of murder by an “organized group” refers to the objective side of the crime, to a form of complicity. An indication of murder followed by “banditry” refers to the subjective side of the crime, to the motives of the crime. Therefore, the court finds it necessary to qualify the actions of the defendants according to both these features<sup>4</sup>.

In another case, the Krasnoyarsk Regional Court citing the conclusions concerning qualification of actions of A. pointed out that since a murder and an attempted murder was committed by him as a member of an armed group – a gang, his actions should be to classified as the murder committed by an organized group, and he must be found guilty of committing crimes provided for by the Part 2 of Art.209; Subparagraphs “a, f, g, h” of the Part 2 of Art.105; Part 3 of the Article 30 and Subparagraphs “a, f, g, h” of the Part 2 of Art.105<sup>5</sup>.

The Moscow Regional Court proved the participation of V. in a settled armed group (gang), in which he, among other things, committed murder of S.S.D. and an attempted murder of S.A.A. and M.A.N. stating that V. was their co-executor and classified his actions according to Art.105 Part 2 Subparagraph “f”, “g”, “h” of the Criminal Code and Art.30 Part 3 and Art.105 of the Criminal Code Subparagraphs “a”, “f”, “g”, “h”<sup>6</sup>.

The Supreme Court of the Republic of Tatarstan classified actions of Z. who as a gang leader organized a series of attacks and murders of citizens, according to Art.209 Part 1 of the Criminal Code, Art.105 Part 2, Subparagraphs “a, g, h” of the Criminal Code as the murder of

two persons committed by an organized group for mercenary motives combined with banditry<sup>7</sup>.

However, other courts of the Russian Federation held the opposite position and carried out the classification of actions of the perpetrators who committed murder in a gang only according to the Paragraph “h” of the Part 2 of Art.105 of the Criminal Code without imputation of the Paragraph “g” of the Part 2 of Art.105 of the Criminal Code. Thus, the Nizhny Novgorod Regional Court classified the actions of V. and K. according to the Part 2 of Art.209 of the Criminal Code, and due the facts of deprivation of victims’ life actions were classified according to the Subparagraphs “a, h” of the Part 2 of Art.105 of the Criminal Code. In this case, however, the court concluded that the classification of actions of the defendants on committing murder according to the Paragraph “g” of the Part 2 of Art.105 of the Criminal Code (as a member of an organized group) is unnecessary and covered by the classified indication “combined with banditry”, since murder committed in a gang that is formed to attack people to steal property and kill people implies that the killings were committed by a settled group of people united to commit one or more offenses, moreover this settled group was armed<sup>8</sup>. For similar reasons the Nizhny Novgorod Regional Court considered that the classification imputed by the bodies of preliminary investigation and the prosecutor in other cases was erroneous<sup>9</sup>.

Moreover, it should be noted that the unity of jurisprudence on the matter is sometimes absent even within a single court of the Russian Federation.

Thus, G. according to a designed plan of murder kept the victim K.R. in a car. When arrived to a carriage road another person pulled K.R. out of the car and intentionally made two shots to the head and body of K.R. causing her death. The St. Petersburg City Court qualified G.’s actions under

the Part 2 of Art.209 of the Criminal Code, and Subparagraphs “g”, “h” of the Part 2 of Art.105 of the Criminal Code<sup>10</sup>. However, in another case considered by the same court, on the contrary, the Paragraph “g” of the Part 2 of Art.105 of the Criminal Code was excluded from the charges as too imputed, since the actions of Z., I. and K. were combined with banditry, the presence of which covers the indication referred above<sup>11</sup>.

There is no unity of opinions on the issue in the theory of criminal law. A.N. Popov said that all gang members who participated in the attack should be identified as accomplices of murder committed during the attack. The gang has all the indications of an organized group. Therefore, murder committed by a gang must be classified under the Paragraph “g” and the Paragraph “h” of the Part 2 of Art.105 of the Criminal Code, as well as under the relevant part of Art.209 of the Criminal Code<sup>12</sup>.

D.Yu. Kraev takes the same position believing that a gang is indeed a kind of an organized group, but murder “combined with banditry” and murder “committed by a gang” are different concepts reflecting different characteristics (features) of murder. Thus, the first concepts speaks of the connection of murder to the establishment of the gang, its leadership, participation in the gang and attacks committed by it, i.e. of the causation of murder by these offenses (this is the meaning of the term “conjugation” and strengthening of the criminal responsibility for such a connection). The second concept shows a high degree of organization of the perpetrators, which on its part (and without regard to the above offenses) is an aggravating circumstance<sup>13</sup>.

N.N. Saleva argues with the above authors believing that the gang’s possession of signs of an organized group is covered by the term “gang”<sup>14</sup>. L.V. Innogamova-Khegai also believes that when the murder is committed not just by an organized

group of persons, but by a gang, their deeds should be classified according to the Paragraph “h”, but not according to the Paragraph “g” of the Part 2 of Art.105 of the Criminal Code, since the rule of murder conjugate to banditry is special with regard to the general rule of murder committed by an organized group of persons<sup>15</sup>.

We think that the existence of diametrically opposite decisions of courts on the issue, the lack of uniform interpretation, understanding and application of criminal law contradict the requirement of the need for unity of jurisprudence in the Russian Federation (Part 4 of Art. 9 of the Federal Constitutional Law “On courts of general jurisdiction in the Russian Federation” dated February 7, 2011 No. 1-ФКЗ). This situation can be estimated as violation of the principle of equality of citizens before law and court regardless of their place of residence in the territory of the state (Part 1 of Art. 19 of the Constitution, of the Russian Federation, Art. 4 of the Criminal Code of the Russian Federation).

It seems that the legal positions of courts that believe that murder conjugate to banditry must be classified both according to the Paragraph “g” and the Paragraph “h” of the Part 2, Art.105 of the Criminal Code, are erroneous not only due to the fact that they contradict the rules worked out by a general theory of the classification of crime that are referenced by the above authors, but also, in our opinion, do not comport with the explanations given by the Plenum of the Supreme Court of the Russian Federation on cases of banditry and by the general provisions of the doctrine on complicity in the crime.

Indeed, murder committed by an organized group is indicative of a high degree of organization of perpetrators. However, it should be noted that the gang, as traditionally explained by the Plenum of the Supreme Court of the Russian Federation both in the current and former Resolution on cases of banditry<sup>16</sup>, is itself a stable organized

group of two or more persons united in advance to attack citizens or organizations. From other organized groups, as indicated in the Paragraph 3 of the current Resolution on cases of banditry, the gang differs by only two features – armament and criminal targets – committing attacks on citizens and organizations.

Thus, as seen from the explanation of the Plenum of the Supreme Court of the Russian Federation, a feature of organization of the perpetrators is already taken into consideration when implementing classification for murder according to the Paragraph “h” of the Part 2 of Art.105 of the Criminal Code (“conjugate to banditry”) and does not require additional legal assessment according to the Paragraph “g” of the Part 2, Art.105 of the Criminal Code on the grounds of murder by an organized group. A different approach, in fact, leads to violation of international and constitutional norms of inadmissibility of a second conviction of the same offense, as well as the principle of equity based on them (Article 4 of the Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>17</sup>, Part 1 of Art. 50 of the Constitution of the Russian Federation, Part 2 of Art. 6 of the Criminal Code), since the actual circumstances of the “organized nature of the gang members’ actions” determined in the case will receive double assessment in the sentence of the court.

One could not agree with the above conclusions of the Kemerovo Regional Court that “a factor of committing murder by “an organized group” refers to the objective side of the offense, to a form of complicity, but a factor of murder “conjugate to banditry” refers to the subjective side of the crime, to the motives of the crime” since murder followed by banditry can only be done at least in deliberate joint participation of two or more persons – complicity in the crime, a form of which, in turn, is a gang.

It seems that the correct solution of the analyzed issue is important not only for the classification of murder and compliance with the principle of equity, but also for the determining of punishment for its commission, because, as can be seen from Paragraph 17 of the Resolution on murder cases, when sentencing it is necessary to take into account the presence of several classifying circumstances.

Given that the murder committed by a gang has all the features characteristic of the murder by an organized group and is, therefore, a special rule due to the allocation additional features of the gang (distinguishing it from other organized groups), it appears that, as contained in the Paragraph 17 of the Regulation on murder cases, an explanation that “murder with classifying features provided by two or more paragraphs of the Part 2 of Art. 105 of the Criminal Code must be classified according to all of these paragraphs”, must be added with the words “except in cases of competition between them”, and the Paragraph 11 of this Resolution must be added with the following paragraph: “Murder committed by a gang is subject to classification according to the Paragraph “h” of the Part 2 of Art. 105 of the Criminal Code (murder conjugate to banditry) and does not require additional classification according to the Paragraph “g” of the Part 2 of Art. 105 of the Criminal Code according to the feature of a murder “committed by an organized group”.

2. The definition of an organized group formed in the Paragraph 10 of the Resolution on murder cases provoked a discussion in literature. It recognizes a group of two or more persons united with an intent to commit one or more murders.

N.K. Semerneva believes that an organized group in the context of Art. 105 of the Criminal Code is a combination of two or more persons to commit one or more murders<sup>18</sup>. According to

A.N. Popov, we can not accept the fact that an organized group can be created with the purpose of committing any crimes. Murder should be recognized as murder committed by an organized group when this group was formed with the aim of committing serious crimes, the design element of which is the use of violence against a person such as murder, rape, extortion, robbery, kidnapping, hostage taking, terrorism, etc<sup>19</sup>.

It seems that the interpretation of the Paragraph “g” of the Part 2 of Art. 105 of the Criminal Code given by the authors regarding the necessity of classification of this action under this paragraph, depending on the purpose of creating of an organized group is restrictive in its scope. As the research on criminological characteristics of murders committed by organized groups shows, usually organized criminal groups are quite rarely formed for the commission of murders, though such cases have spread in recent years<sup>20</sup>.

It should be noted that the Part 3 of Art. 35 of the Criminal Code does not link the existence of an organized group, as a form of complicity, either with any category of crime for the commission of which it was created, or with reference to the object of criminal acts of assault members of the group, or with the way of criminal assault used by convicted persons.

In our opinion, a situation in which members of an organized group may be initially united to commit one or more offenses, the main elements of which do not imply the use of violence to the victim (e.g., non-violent robbery and theft of vehicles), and subsequently, in the process of continued existence of such a group commit murder for its interests, is acceptable.

In addition, the accomplices at the time of reaching an agreement on the establishment of an organized group may not specify a way to achieve a desired future outcome for them (with or without violence).

In such circumstances, in our opinion, for the proper classification of actions of the perpetrators of murder by an organized group, it is important to determine the general features of an organized group provided for by the Part 3 Art.35 of the Criminal Code (the presence of two or more persons, stability, purpose – committing one or more offenses), as well as a joint intent of the members to commit murder, no matter what crimes such a group was formed for initially.

3. The situation where the murder is committed by gang members in the attack, but in the absence of a direct agreement to commit murder also received consideration in the theory of criminal law.

A.N. Popov says that irrespective of whether or not a direct agreement to commit murder in the attack was reached between the members of the gang, the murder must be attributed to the all members of the gang because their involvement in an armed attack implies that at any time during an attack a weapon may be used in the interest of the whole gang. The gang is created to carry out armed attacks. The gang members participating in them thereby consent to the use of weapons, which can lead to any consequences, including the death of the victims. Therefore, all the gang members who participate in the attack should be recognized as co-perpetrators of murder committed by the gang<sup>21</sup>.

It seems, however, that such a conclusion is made without taking into account a substantial feature of the gang – its armament, and, moreover, ignores the fundamental norms of the General Part of the Criminal Code of the Russian Federation – the principle of guilt and the institute of complicity in a crime.

In the subparagraph 4 of the Paragraph 5 of the Resolution on banditry cases the Plenum of the Supreme Court of the Russian Federation explains that a gang is recognized to be armed if at least one of its members has weapons other gang

members know about it. Armament assumes the presence of fire or cold weapon, including missile weapons both factory-made and homemade, and various explosive devices, as well as gas and air guns (subparagraph 1 paragraph 5 of the Resolution).

As stated in Art. 1 of the Federal Law dated December 13, 1996 No. 150-ФЗ “On Weapons”, gas weapon is a weapon intended for temporary chemical lesions on a live target through the use of tear or irritating substances (paragraph 8); air guns are the weapons intended to hit a target at a distance with a projectile receiving directional motion due to the energy of compressed, liquefied or solidified gas (paragraph 7)<sup>22</sup>. In their turn, the bullets of traumatic and gas action, as is evident from their definitions, are not intended to cause the death of a person (paragraph 15, 16, Art. 1 of the Federal Law “On Weapons”).

In our opinion, the above legislation let us come to the conclusion that awareness of the gang members of the presence of pneumatic or gas weapon does not give grounds to believe that at any time during the attack other persons participating in the gang may use it in the interest of the whole gang with the intent to cause death.

Moreover, as indicated by V.S. Komissarov, by the use of a weapon should be understood

not only the use of weapons itself, but also threats of its usage<sup>23</sup>, which the gang members may be limited to during attacks committed by it. Therefore, the presence of awareness of existing of weapons of any kind possessed by one of the gang members can not testify in each case about the anticipation of the possibility of using it for its intended purpose, but not as an instrument of threat in attack on citizens or organizations.

In this case, with the absence of a direct agreement of the gang members to commit murder there are no objective or subjective grounds for liability, because the murder was not due to the joint participation of two or more persons, and death of the victim is not the result of their common actions. In addition, in the absence of a direct agreement to commit murder it is impossible to speak about the presence of a joint intent of the co-perpetrators to cause death. This, in our opinion, we should speak about the excessive act.

Another approach to this issue could create an opportunity to attract a person to criminal liability without his guilt of the result which significantly expands the grounds of criminal responsibility and, in fact, is an objective imputation.

<sup>1</sup> Бородин С.В. [S.V. Borodin] Преступления против жизни. М., 1999. С. 90 – 91.

<sup>2</sup> Постановление Пленума Верховного Суда РФ от 27 января 1999 г. № 1 «О судебной практике по делам об убийстве (ст. 105 УК РФ)» // Бюллетень Верховного Суда РФ. 1999. № 3. [Resolution of the Plenum of the Supreme Court on January 27, 1999 № 1 “On judicial practice in cases of murder (Article 105 of the Criminal Code)” // Bulletin of the Supreme Court. In 1999. Number 3]

<sup>3</sup> Постановление Пленума Верховного Суда РФ от 17.01.1997 № 1 «О практике применения судами законодательства об ответственности за бандитизм» // Бюллетень Верховного Суда РФ. 1997. № 3. [Resolution of the Plenum of the Supreme Court from 17.01.1997 No. 1 “On the practice of courts of law on liability for banditry” // Bulletin of the Supreme Court. In 1997. Number 3.]

<sup>4</sup> Приговор Кемеровского областного суда от 17.05.2011 по делу № 2-28-2011 // Официальный сайт Кемеровского областного суда: <http://oblsud.kmr.sudrf.ru>. [The verdict of the Kemerovo Regional Court from 17.5.2011 in the case No 2-28-2011 // Official site of the Kemerovo Regional Court: <http://oblsud.kmr.sudrf.ru>.]

<sup>5</sup> Приговор Красноярского краевого суда от 22.10.2010 по делу А. // Официальный сайт Красноярского краевого суда: <http://kraevoy.kr.k.sudrf.ru>. [The verdict of the Krasnoyarsk Regional Court on 22.10.2010 in the case of A. // Official site of the Krasnoyarsk Regional Court: <http://kraevoy.kr.k.sudrf.ru>.]

<sup>6</sup> Приговор Московского областного суда от 24.03.2011 по делу № 2-18/11 // Официальный сайт Московского областного суда: <http://www.mosoblsud.ru>. [The verdict of the Moscow Regional Court on 24.3.2011 in the case No. 2-18/11 // The official website of the Moscow Regional Court: <http://www.mosoblsud.ru>.]

<sup>7</sup> Приговор Верховного Суда Республики Татарстан от 26.01.2011 по делу № 2-13/2011 // Официальный сайт Верховного Суда Республики Татарстан: <http://vs.tat.sudrf.ru>. [The verdict of the Supreme Court of the Republic of Tatarstan

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## **Спорные вопросы квалификации убийства, совершенного организованной группой**

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*На основе анализа судебной практики и положений теории уголовного права авторы рассматривают спорные вопросы квалификации убийства, совершенного организованной группой, обращают внимание на противоречивый характер судебных решений по конкретным уголовным делам и предлагают рекомендации по правильной квалификации действий виновных в рассматриваемых случаях.*

*Ключевые слова: банда, квалифицирующий признак, организованная группа, соучастие, убийство.*

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