ПРОБЛЕМИ КРИМІНАЛЬНОГО ПРАВА ТА КРИМІНОЛОГІЇ

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ОЗНАКИ ПРИЧЕТНОСТІ ДО ЗЛОЧИНУ

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У статті розглянуто ознаки причетності до злочину. Проаналізовано різні думки щодо суспільної небезпеки причетних злочинів, встановлення причинного зв'язку між окремими проявами причетності та предикатним злочином та ін. Зазначено, що причетність до злочину має певний зв'язок з основним злочином, без якого вона не може виникнути, а суспільна небезпечність причетного злочину не може залежати від небезпечності предикатного злочину.

Встановлено важливість визначення причинного зв'язку між окремими видами причетності та предикатним злочином. Визначено, що неповідомлення про незакінчений злочин перебуває у причинному зв'язку з наслідками такого злочину незалежно від того, обіцяне воно чи ні. Причетна особа не втручається в розвиток причинного зв'язку між діянням виконавця основного злочину і спричиненим ним наслідком, і, навпаки, у разі належного повідомлення відповідних адресатів, така особа могла б відвернути злочинний наслідок. Заперечення причинного зв'язку між неповідомленням про незакінчений злочин і наслідком цього злочину є рівнозначним запереченню можливості припинити такий злочин – незалежно від того, повідомить особа про нього чи ні.

Відмічено, що діяльність особи, яка заздалегідь не обіцяла приховати злочин або придбати, отримати, зберігати або збути майно, отримане злочинним шляхом, не перебуває в причинному та такому, що зумовлює, зв'язку з діями співучасників злочину й результатом, що настав. Така поведінка винного не утворює співучасті у виді пособництва.

Зазначається, що при потуранні службова особа своїм самоусуненням від розвитку причинного зв'язку між вчиненням предикатного злочину іншою особою та настанням від нього злочинних наслідків створює сприятливі умови для досягнення мети, яку ставив перед собою виконавець предикатного злочину.

Звертається увага на те, що викрадення майна, заподіяння тілесних ушкоджень або інші суспільно небезпечні наслідки перебувають у причинному зв'язку з діями виконавця основного злочину, є результатом саме його дій. Зазначено, що своєю бездіяльністю особа, яка потурає злочину, сприяє розвитку причинного зв'язку між діями виконавця та

наслідками від предикатного злочину. Якщо для службової особи, яка зобов'язана перешкоджати вчиненню злочину, повідомлення про злочин є способом перешкоджання злочину, то невиконання такого обов'язку є ознакою потурання злочину.

В статті пропонується доповнити Загальну частину кримінального законодавства України нормою, у якій буде наведено поняття причетності до злочину.

Ключові слова: причетність до злочину, причинний зв'язок, неповідомлення, потурання.

ПРИЗНАКИ ПРИКОСНОВЕННОСТИ К ПРЕСТУПЛЕНИЮ

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В статье рассмотрены признаки прикосновенности к преступлению. Проанализировано различные мнения относительно общественной опасности прикосновенных преступлений, установления причинной связи между отдельными видами прикосновенности и предикатным преступлением и др. Указано, что прикосновенность к преступлению имеет определенную связь с основным преступлением, без которого она не может возникнуть, а общественная опасность прикосновенного преступления не может зависеть от опасности предикатного преступления.

Установлена важность определения причинной связи между отдельными видами прикосновенности и предикатным преступлением. Определено, что несообщение о незаконченном преступлении находится в причинной связи с последствиями такого преступления независимо от того, обещано оно или нет. Прикосновенное лицо не вмешивается в развитие причинной связи между деянием исполнителя основного преступления и вызванным им последствием, и, наоборот, в случае надлежащего уведомления соответствующих адресатов, такое лицо могло бы предотвратить преступный результат. Отрицание причинной связи между несообщением о незаконченном преступлении и последствием этого преступления является равнозначным отрицанию возможности прекратить такое преступление – независимо от того, лицо сообщит о нем или нет.

Отмечено, что деятельность лица, которое заранее не обещало укрыть преступление или приобрести, получить, хранить или сбыть имущество, добытое преступным путем, не находится в причинной и таком, что приводит, связи с действиями соучастников преступления и результатом, который наступил. Такое поведение виновного не образует соучастия в виде пособничества.

Указывается, что при попустительстве должностное лицо своим самоустранением от развития причинной связи между совершением предикатного преступления другим лицом и наступлением от него преступных последствий создает благоприятные условия для достижения цели, которую ставил перед собой исполнитель предикатного преступления.

Обращается внимание на то, что похищение имущества, причинение телесных повреждений или иные общественно опасные последствия находятся в причинной связи с действиями исполнителя основного преступления, является результатом именно его действий. Указано, что своим бездействием лицо, которое попустительствует преступлению, способствует развитию причинной связи между действиями исполнителя и

последствиями от предикатного преступления. Если для должностного лица, которое обязано препятствовать совершению преступления, сообщение о преступлении является способом препятствования преступлению, то невыполнение такой обязанности является признаком попустительства преступлению.

В статье предлагается дополнить Общую часть уголовного законодательства Украины нормой, в которой будет дано понятие прикосновенности к преступлению.

Ключевые слова: прикосновенность к преступлению, причинная связь, несообщение о преступлении, попустительство.

SIGNS OF PARTICIPATION IN A CRIME

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The signs of participation in a crime are examined in the article. Different thoughts about social danger of the involved crimes, the causative connection between separate display of participation and the predicate crime etc. are analyzed. It is determined that participation in a crime has a certain connection with the main crime without which it cannot rise. It is also determined that social danger of the involved crime cannot depend on the predicate crime danger.

The importance of existing the causative connection between different types of participation and the predicate crime is stated. It is established that nonreport of an uncompleted crime is in the causative connection with its consequences regardless of being promised or not. A participant doesn't interfere the development of the causative connection between the actions of the main crime executor and the consequence caused by him and, on the contrary, in the case of the report of corresponding addressees, such a person could prevent a criminal consequence. The negation of the causative connection between the nonreport of an uncompleted crime and its consequence is the negation the possibility to stop such a crime - regardless of a person's report of it or not.

It is remarked that the person's activity who doesn't promise beforehand to conceal a crime or to gain, keep or sell the property obtained in a criminal way is not in a criminal and dependent connection with the actions of the crime participants and its result. Such behavior of a guilty person doesn't mean complicity in the form of participation.

It is mentioned that by connivance, an official who with his self-removal from the development of the causative connection between the predicate crime commitment by a different person and the following criminal consequences creates favourable conditions to reach the goal of the predicate crime executor.

Special attention is paid to the facts that theft of property, grievous bodily harm and other socially dangerous actions are in the causative connection with those of the main crime executor and the result of his actions. It is defined that a conniving person conduces with his inactivity the causative connection between the executor actions and the consequences of the predicate crime. If an official who is obliged to hinder a crime doesn't report it, the failure to carry out his duty is a sign of crime connivance.

The General part of the criminal legislation of Ukraine is proposed to be added with the norm defining the notion of participation in a crime.

Key words: participation in a crime, causative connection, nonreport, connivance.

The criminal legislation of Ukraine doesn't have a legal norm formulating the notion of participation in a crime. The same approach was typical for the legislation of the Soviet Ukraine where there was no definition of participation in a crime. The definition of participation in a crime and its variety were determined in the theory of Criminal Law. By the way, the definition of the notion of participation in a crime is of great significance not only for the criminal-legal doctrine but for the practice of application of the criminal legislation.

The theory of complicity in a crime has always influenced the formulation of the main signs of the institution of participation in a crime. Depending on what a legislator has implied by the notion of complicity in a crime and of its type like participation in a crime the notion of participation in a crime and its variety have been defined. It has given possibility to determine the signs uniting and separating the institutions of complicity in a crime and participation in a crime.

The questions of establishing the legally important signs of participation in a crime were examined by the Soviet scientists: G.I. Baimurzin, I.A. Bushuyev, G.B. Wittenberg, M.Y. Korzhansky, V.O. Kuznetsov, V.G. Smyrnov, I.Kh. Khakimov, M.Kh. Khabibulin and have been examined by the modern researchers like A.G. Grytsyuk, L.M. Abakina-Pilyavska, A.V. Zarubin, O.M. Krapyvina, M.M. Lapunin, A.D. Makarov, A.Ye. Milin, Ye.V. Ponomarenko, B.T. Razgildiyev, O.M. Smushak and others.

Nevertheless the integrated research of the problems of establishing the legally important signs of participation in a crime has not been conducted. The only approach to the criteria of differentiation participation in a crime and complicity in a crime does not exist among the researchers. The researchers have different views on the connection of participation in a crime with the predicate crime.

The purpose of the article is to determine the signs characterizing participation in a crime and to establish the connection of some types of participation in a crime with the predicate crime. Participants in a crime and accomplices of a crime have in common the fact of being connected with the predicate crime, without which their activity cannot exist.

Participation in a crime is a derivative from the main (predicate) crime. It can rise only after the completion of the predicate crime and in some cases, after the beginning of the preparation of its committing, for example, at connivance of a crime and at nonreport of it. That's why the grounds of the rise of participation is such a crime that is being committed or the predicate crime that has already been committed. The social danger of the involved crime can't depend on the danger of the predicate crime. Some researchers say there is the dependence between the social danger of participation (involvement) in a crime and the main crime. They think a participant encroaches on the object of the main crime, and that's why,

according to them, the immediate object of the involved crimes coincides with the immediate object of the main crime.

From the point of view of E.Kh.Raal, the social danger of the actions of the participants in a crime is conditioned by the social danger of the crime committed by a different person because the actions of the participants in a crime are conducive to the commitment of the similar crimes by different people in the future and create obstacles to the fight with these crimes. [22, c. 12]. The majority of the Soviet scientists who researched the institution of participation in a crime were of the same opinion about this position [5, c. 36; 26, c. 26–29, 43, 77]. The same thought has been expressed by some modern researchers. So, O.I Semykina, O.V. Zarubin, A.O. Vasyliev, A.M. Abakina-Pilyavska and some other authors say that the social danger of participation in a crime depends on the degree of danger of the main crime [24, c. 13; 9, c. 74; 6, c. 19; 21, c. 21–22; 1, c. 29, 109, 121]. O.V. Glukhova, for example, thinks that the immediate object of the main crime by participation becomes the additional immediate object of the beforehand unpromised concealment of a crime, of the nonreport of a crime or of some other type of participation in a crime [7, c. 58]. Such an approach of the authors is conditioned by the fact that they mix two different in their legal nature institutions: participation in a crime and complicity in a crime. That's why the object of participation in a crime has been examined by these authors exactly in the same way as the object of the predicate crime.

In fact, participation in a crime has a certain connection with the main crime without which it can't rise. However, the social danger of the involved crime can't depend on the danger of the predicate crime.

The degree of the social danger of the predicate crime from which the profits have been made which have been laundered by a participant can be much less in comparison with the second crime – beforehand unpromised laundering of criminal profits.

The predicate crime and the involved crime always differ in the subjects of commitment, in time of the beginning and completion. A person who takes part in the predicate crime can't be involved. A second crime can rise only after the completion of the predicate crime and in some cases, after the beginning of the preparation of its commitment, for instance, at a connivance in a crime and at nonreport of a crime.

The actions characterized as participation in a crime in reality create obstacles in pre-trial investigation or court trial of a criminal case. Such actions make the activity of law enforcement agencies in searching people committing the predicate crime, in bringing them to the criminal responsibility, in searching traces of the crime vain, they also make it difficult to return property obtained in a criminal way to the legal owner or to the state.

The involved people block preventing the criminal activity of the participants of the predicate crimes, its warning and stopping. Besides, a feeling of impunity for their actions has been formed among the accomplices of these crimes that doesn't stimulate their repentance and correction but threatens to continue the criminal activity.

All this leads to the breach of normal activity of the organs of pre-trial investigation, the Procurator's Office, court etc. Even in the cases when a person doesn't intend immediately to create obstacles for the organs of justice to carry out activity obtaining necessary evidence and establishing objective truth in a case in the course of pre-trial investigation or court trial, laundering, for example, criminal profits, keeping or selling them, a person affects the interests in the sphere of justice.

According to S.V. Poznyshev: "he who buys any object knowing that the latter was acquired illegally helps a criminal not only get some profit from the commited crime, but conceal the crime because the legally acquired object is the evidence exposing the criminal [20, c. 216].

The social danger of participation in a crime lies in the fact that a participant complicates with his or her actions or inactivity the process of detecting the predicate crime and of finding the persons who committed it, pre-trial investigation and court trial of such a crime. A guilty person conceals the main (predicate) crime, holding it away from the organs of justice, when he or she not promising in advance conceals a criminal and property obtained illegally, weapon or tools of crime, gains, keeps or sells the illegally obtained property, launders or uses criminal profits [4, c. 119].

Participation in a crime by certain circumstances can create conditions for continuation of the criminal activity of the participants of the main crime. However, it is not complicity in a crime because of the absence of agreement about it between the involved person and the participant or participants of the main crime. An executor, an organizer, an accomplice or an instigator commiting a crime don't count on the activity of a participant.

Unlike the accomplices of a crime, a participant doesn't take part in the commitment of the main crime but helps the executor and other accomplices conceal the traces of the crime, realize the illegally stolen property etc.

A participant with some exception, unlike an accomplice, doesn't intensify the executor's or other acomplices' decisiveness to commit a crime. It is conditioned by the fact that a participant doesn't promise beforehand to conceal a criminal, weapons or means of the crime, its traces or the objects obtained illegally to keep or sell them or to be conducive to the crime concealment. If, for instance, the concealment is not promised beforehand, the actions of the guilty don't create the conditions to commit the main crime.

It should be mentioned that there was a problem in the Soviet literature to define an unpromised in advance nonreport of a crime as relevant to the institution of participation or to the institution of complicity in a crime. A.F. Zelinsky and A.V. Naumov wrote about it in the second half of the XX th century: "If we had been asked, if someone, who promised the executor in advance not to report about him, would this person be condemned for complicity in a crime, we could have answered … the decision of this question would depend on the book used by the judge at Law university [10, c. 28].

Some scientists expressed the thought, that a given in advance promise not to report a crime to the law enforcement organs is considered as a type of complicity in a crime. So, A.N. Trainin, A.A. Piontkovsky, Sh.S. Rashkovska and other Soviet scientists asserted that an unpromised in advance nonreport of a crime is complicity in a crime in the form of intellectual complicity [30, c. 106, 130; 27, c. 264, 290; 16, c. 180]. The supporters of this point of view believed that intellectual complicity in the form of an unpromised in advance nonreport of a crime would be punished only for complicity in the crime belonging to the list fixed in the legal norm that establishes responsibility for the nonreport of a crime [26, c. 19]. Some modern scientists have the same position and qualify an unpromised in advance nonreport of a crime as complicity in a crime [25, c. 10; 21, c. 17].

A.A. Piontkovsky and Sh.S. Rashkovska think, an unpromised in advance nonreport of a crime to be in the causative relation to the crime committed by the executor and other participants; it is favourable to its commitment and encroches the same object along with the main crime; that's why, a mentioned type of the nonreport should be considered as complicity in a crime [16, c. 180; 14, c. 494–495]. The supporters of this position believe that a promise not to report the crime preparation or crime commitment strengthens a criminal's and his accomplices' decisiveness to committ a crime in the future because their actions will be unnoticed by the law enforcement agencies and they can escape criminal responsibility.

It's interesting to note that in some states - former republics of the USSR an unpromised in advance nonreport of a crime is considered to be as participation in the form of complicity. So, for instance, it is said in part 1 of Article 31 (participation in a crime) of the Criminal Code of Uzbekistan that an unpromised in advance nonreport of a truly known crime or its concealment draws responsibility according to Article 241 (nonreport of a crime or its concealment) of the Criminal Code of Uzbekistan. Going out from the statement fixed in part 1 of Article 31 of the Criminal Code of Uzbekistan, a legislator of the Republic Uzbekistan applies a promised in advance nonreport of a truly known crime not to participation but to complicity in a crime.

In the Soviet period, V.O. Kuznetsov, G.A. Kriger, P.I. Gryshayev, P.F. Telnov and other scientists thought that a promised in advance nonreport of a crime can't be considered as a type of complicity [13, c. 99; 8, c. 223–224; 23, c. 73; 28, c. 100].

There have been discussions around this question so far. So, for example, from the point of view of Yu.O. Krasikov, a promised in advance nonreport of a crime belongs to the intellectual complicity because it causes the crime commitment by the executor [12, c. 65–66]. A.S. Yakubov thinks, such a nonreport of a crime strengthens a criminal's decisiveness, gives hope to escape responsibility, stimulates and strengthens his intention to go on with committing a crime. [32, c. 269]. O.V. Glukhova, A.D. Makarov, A.V. Zarubin, other native and foreign scientists have the similar position [7, c. 34, 50; 18, c. 90; 9, c. 94; 2, c. 99]. But A.A. Ter-Akopov, R.S. Orlovsky and others don't agree to it [29, c. 131; 19, c. 75, 118].

V.S. Prokhorov, giving grounds to the necessity to consider a promised in advance nonreport of a crime a type of complicity, gives an example: "the executor's assurance that he can act without obstacles and without being interrupted, that nobody will learn about a committed crime, sometimes is more important than the promise to buy the stolen [31, c. 600–601]. V.S. Prokhorov maintained his thought in the Soviet period that a promised in advance nonreport of a crime strengthens the executor's decisiveness to commit a crime, and in fact is considered to be the elimination of obstacles on the way of committing a crime; that's why such a nonreport creates complicity in a crime [31, c. 593, 620–621, 637].

The example given by V.S. Prokhorov is similar to the case of complicity. However, along with this notice that the executor's decisiveness in committing a crime by complicity will be strengthened not because his promise not to report a crime but from the view he has been secured in eliminating obstacles in committing a crime.

According to other thoughts, a promised in advance nonreport of a crime doesn't respond the signs of complicity because the nonreport of the crime that is being prepared is not conducive to its commitment because the person who doesn't report this crime doesn't create possibilities for it by his promise. It is considered that the promise not to report the crime which is being prepared is not conducive to the crime commitment, doesn't eliminate obstacles for its commitment, doesn't conceal the crime, so such actions don't cause the crime commitment by the executor. As G.A. Kryger and P.I. Gryshayev say, the behaviour of the people involved in a crime is not connected *in a causative way* (our italics. – A.B.) with the criminal result or with the crime commitment [8, c. 203]. The person who promises beforehand not to report the being prepared crime stays away from the main crime and doesn't influence the flow of the criminal actions.

P.F. Telnov, agreeing to the fact that the promises not to report a crime, noninterference into a criminal event can't be conducive to a crime, thinks that, when a person has a legal duty to report a crime, his or her inactivity creates complicity in the form of a promised in advance nonreport [28, c. 99–100]. For instance, Article 51 of the Criminal Code of 1903 contained such a sign of complicity as the promise not to create obstacles to the crime commitment. Actually, when a subject has a duty to create obstacles for a criminal in the commitment of an illegal action but he doesn't do it and moreover he assures the criminal in his nonreport of a crime, the criminal's decisiveness to fulfill the planned becomes stronger. A person who mustn't let the crime commit or report it to the corresponding organs becomes an obstacle for the criminal. However, here the nonreport of a crime has a different legal nature, it becomes a part of the promised in advance connivance of a crime.

We think, the nonreport of an uncompleted crime is in the causative connection with the consequences of such a crime regardless of being promised or not. An involved person doesn't interfere the development of the causative connection between the action of the main crime executor and the consequence caused by him. The denial of the causative connection between the nonreport of an uncompleted crime and the result of this crime is the denial of the possibility to stop such a crime - regardless of a person's report of it or not.

It should be taken into account that the valid criminal legislation of Ukraine doesn't impose a duty on a person to report a being prepared crime to the authorities. Accordingly, a criminal realizes that a person knowing about the crime he is going to commit is not obliged under the threat of punishment to report the crime and his criminal actions to the law enforcement agencies. The exception is only the nonreport to the corresponding establishments and people who are in the dangerous for life state and the nonreport of such state if it has caused grievous bodily harm. In such a case in accordance with Article 136 the responsibility for the person's inactivity comes (nonrendering of aid to the person being in dangerous for life state).

The example given by P.T. Telnov says about an official or a person who, according to the labour agreement, must create obstacles to a crime or report it to the competent organs. If such a person agrees to infringe his or her legal duty, there appears an agreement to commit a crime between him or her and the crime executor. A promised connivance given in advance in this case becomes complicity in a crime.

Going out from the said above, it should be agreed with S.D. Shapchenko who says justly that the position of the legislator of Ukraine about the promise not to report a truly known crime that is being prepared or committed is characterized by the following: he didn't consider such an action as complicity in a crime and in the criminal legislation of Ukraine in 1960 [33, c. 84].

Unpromised in advance concealment isn't connected with the main crime and the subject's behaviour is regarded not as complicity but as involvement. For the crimes fixed by Articles 198 and 396 of the Criminal Code of Ukraine it is typical that the subject's actions are not really conducive to the crime commitment in the result of which criminal profits have been obtained. The activity of the person who doen't promise beforehand to conceal a crime or to gain, keep or sell the property obtained in a criminal way, is not in a causative connection with the actions of the accomplices of the crime and its result. Such behavior of a guilty doesn't create participation in the form of complicity.

The exception may be a person's systematic concealment of a criminal or criminals that would give the grounds to the crime executor and its accomplices to count on such favourable attitude from the concealer's side. These actions were recognized by the court practice of the Ukrainian Soviet Socialist Republic and nowadays have been recognized by the courts of Ukraine as complicity in a crime commitment. Many criminalists support the position of the court practice as to the definition of unpromised in advance systematic concealment of a crime or gaining or selling the property obtained in a criminal way and consider it to be complicity in the commitment of the main crime.

Connivance has the signs that also characterize the institution of involvement in a crime. The existence of the predicate crime unites this type of involvement and other types of the given institution of the criminal law. There is no consent to commit crime between the person who connives at a crime and the crime executor.

The grounds of bringing to responsibility an official for his inactivity is this person's official duty to prevent crime or create obstacles to its commitment. Such a duty is determined by the legal documents regulating the person's official activity or can come out of the norms of the criminal law. A legal duty for an official is doing certain actions or not doing them.

There is no duty for a private person fixed by law to warn, prevent or create obstacles to a crime. This is a right for everyone. Some legal documents of Ukraine say private people have a right to prevent crime otherwise. For example, it is fixed in part 2 of Article 3 of the Law of Ukraine from the 15th of November 2001 that citizens' associations and separate citizens can conduce to some measures preventing family violence. If a person uses such a right, he or she has to realize it in the limits of the norms about the necessary defence, detaining the person having committed crime or extra necessity.

The legislation of Ukraine imposes upon private people in some cases the duty to report a crime that is being prepared or has been committed. If a private person doesn't execute such a duty, his or her inactivity can be regarded as nonreport of a crime. In special legal norms, the criminal responsibility for it is foreseen. We can hardly agree with the researchers thinking that leaving or

nonrendering a person assistance in the dangerous for life state are types of connivance at a crime [18, c. 37, 151].

The duty to act or inact in some way for an official exists if there is danger of bringing harm to the social relations safeguarded by the criminal-legal norms. Such danger goes out from possible criminal actions of a different person profiting the negligent attitude of the official to discharge his or her duties. The threat of crime commitment by a different person must be evident. As O.M. Lemeshko justly says, there must be an evident character of the main crime commitment by connivance at it [17, c. 127].

If a person can't discharge his official duty of warning of crime commitment or preventing it because of valid excuse, his responsibility for connivance at crime is excluded. Valid can be excuses like calamity, physical or psychological compulsion, performance of some special task of preventing or discovering the criminal activity of an organized group or criminal organization. In this case, having an obligation to do certain actions or not to do them in order not to let the crime be committed, a subjective sign - possibility for the subject to perform his official duty – is absent. A person is not responsible for non-performance of his official duty when he is temporarily removed from his post at the moment of rise a source of danger. Connivance at a crime as a type of participation in a crime should be distinguished from complicity in a crime.

Some researchers think that the inactivity of the person conniving at a crime can be examined as complicity having only the one-sided connection with the actions of the accomplices of the predicate crime. For example, O.V. Zarubin states that in the science of criminal law, complicity can be regarded as activity of the person who connives at crime and without the mutual knowledge of the accomplices, because if a guilty has a law-prescribed duty to report the crime preparation or crime commitment and he connives at it, his inactivity should be qualified as complicity in crime [9, c. 96].

However, it shouldn't be agreed to it because there must be conspiracy between a conniving person and an executor and other accomplices that the conniving person won't create obstacles to commit a crime. If there is conspiracy between a conniving person and the executor and accomplices of the predicate crime, the conniving person's inactivity should be regarded as complicity in this crime. Promised beforehand connivance should be regarded as intellectual complicity. Promising beforehand to abandon his official duty, a conniving person strengthens the executor and accomplices' decisiveness to commit a corresponding crime because the crime accomplices are sure their actions to remain unnoticed and that the law enforcement agencies cannot establish their guilt in crime commitment and that it gives them possibility to escape criminal responsibility.

The participants of the predicate crime knowing about the official's abandonment his duty to prevent crime, also know about the absence of obstacles on the way to crime commitment. A conniving person and the participants of the predicate crime must be aware about the role of everyone without going into details.

It should be mentioned, if an official who has to prevent crime or create obstacles to it conspires with the executor or another accomplice of the predicate crime not to perform his official duty, the inactivity of such a person should be qualified according to the rule of the ideal totality of the criminal-legal norms providing the responsibility for connivance in the predicate crime and the official crime commitment as an executor [3, c. 175].

Some Soviet scientists thought, if an official didn't perform his duty to prevent crime commitment, for instance, the storehouse guard chief connived at a crime to help the executor commit it, such an official had to respond in the total combination of crimes - for connivance at a crime and for abuse of his official state [14, c. 498]. In this example it isn't mentioned if the previous agreement between a conniving person and this crime executor is taken into account or if there is conspiracy between them.

It mustn't be agreed to that, if an official is aware of creating favourable conditions to committing the predicate crime because of his negligence and doesn't create obstacles to crime commitment, the official is the crime accomplice regardless of the conspiracy between the official and the executor of the crime. Despite a person's connivance at a crime who knows about the actions of the crime executor, a conniving person doesn't have agreement with the participants of the predicate crime. As a conniving person doesn't inform the crime executor about his negligence that creates favourable conditions to crime commitment, there is no agreement between them which is an compulsory sign of the crime connivance.

By his abandonment from the development of the causative connection between the predicate crime commitment by a different person and the criminal consequences, an official creates favourable conditions to reach the aim put by the executor of the crime. Stealing property, giving grievous bodily harm and other socially dangerous actions are in the causative connection with the actions of the predicate crime executor and are the result of his actions. If a conniving person assures the excutor immediately or through other participants that he doesn't create obstacles in committing crime, it strengthens their decisiveness and motivation to realize their criminal plan. The causative connection in this case is between the united actions of the person neglecting his duty to hinder crime, the crime executor and the criminal consequences coming as a result of the common interests of the conniving person and the executor of the objective side of the predicate crime.

So, the existence of the causative connection between the connivance (and also – nonreport an uncompleted crime) and the consequences of the main crime refutes the affirmation about the non-causative character of connivance (as such) concerning the main crime.

Some authors state the opposite defining non-determination as an involving action of the predicate crime as the main principle during the analysis of some types of involvement. L.M. Abakina-Pilyavska generalizes that "the actions of the involved people are not in the causative-resultant connection with the main (preceding) crime commited by a different person is not conducive to its commitment, but having researched special types of participation qualified by Articles 135, 136 of the Criminal Code of Ukraine, the author indicates, the coming of socially dangerous consequences in the form of grievous bodily harm given to the victim is necessary for the coming of responsibility in this case; the coming of these consequences has to be connected in the necessary causative connection with the victim's inactivity [1, c. 28]. O.M. Lemeshko who also supports the position about the non-causality of the involvement (concerning the consequences of the main crime), states about the official connivance that during the criminal inactivity, encroachment upon the goods protected by law takes place because of non-preventing of socially dangerous consequences, non-interference in the process of their development [17, c. 138]. Then the author draws attention that by conniving to a crime in an office, the criminal consequences in the form of violence of legitimate activity of a concrete law enforcement agency in the sphere of stopping crimes come [17, c. 138]. That is, connivance, according to such logic, causes consequences not to the object which is encroached by the main action, but encroaches the interests of justice protected by law and from this the following conclusion may be drawn that a conniving person doesn't prevent harm commited by the executor of the main crime to the organs of justice; though, it is known that the executor encroaches other goods (health, life, property etc) in most cases. The said above, from our point of view, testifies to some artificiality of derivation of the causative connection in the situation under review.

A conniving person can be admitted as an accomplice in a crime in the form of complicity only if there is a bilateral subjective connection. If a conniving person tells some participants of the predicate crime that they can use his negligent performance of his official duty to commit crime, this person's actions should be quality as complicity in crime or unsuccessful complicity.

O.O. Kvasha states it right that mutual awareness isn't a compulsory condition of common actions of the organizer, instigator, accomplice und executor of a crime and doesn't foresee their acquaintance with each other [11, c. 121]. It is important to establish that every participant awares that he doesn't act alone but together with the others [11, c. 121].

When there is no awareness from the crime executor's about the intent of the involved person not to hinder crime, the causative connection between the actions of this involved person and the consequences caused by the executor is in non-interference into the actualization of the socially dangerous result of the main crime, its inevitability.

A conniving person conduces to the causative connection between the actions of the predicate crime executor and its consequences with his or her inactivity. If for an official who is responsible to hinder crime a notification about a crime is a way to hinder it, the non-performance of his duty is a sign of connivance at a crime.

Chapter VI-1 "Participation in a crime" should be included to the general part of the Criminal legislation of Ukraine. In this chapter, the criminal-legal norm giving the definition to the participation in a crime should be under number 31-1. The norm should be written in such a reduction: "participation in a crime is a socially dangerous action of the subject of a crime fixed in the Criminal legislation of Ukraine that encroaches on the social relations in the sphere of justice und rises in the connection of a different person with the predicate crime and isn't complicity in it.".

THR LIST OF USED SOURCES:

1. Абакіна-Пілявська Л. М. Інститут причетності до злочину в кримінальному праві України : дис. … канд. юрид. наук : 12.00.08 / Людмила Миколаївна Абакіна-Пілявська ; Національний університет «Одеська юридична академія». – Одеса, 2014. – 317 с.

2. Абакумова Ю. В. Інститут співучасті в кримінальному праві України : природа, сутність, сучасні проблеми визначення : [монографія] : / Ю. В. Абакумова ; [за ред. : В. Г. Лукащевича]. – Запоріжжя : КПУ, 2012. – 320 с.

3. Беніцький А. С. До питання про кримінальну відповідальність за потурання злочину / А. С. Беніцький // «Міжнародне, наднаціональне та національне право : проблеми конвергенції» : Матеріали міжнародної науково-практичної конференції, м. Одеса, 13 грудня 2013 р. / [за ред. : д.ю.н., проф. Т. С. Ківалової] ; Міжнародний гуманітарний університет. – Одеса : Видавничий дім "Гельветика", 2013. – С. 173–175.

4. Беніцький А. С. Місце причетності до злочину в кримінальному праві України / Беніцький А. С. // Вісник Луганського державного університету внутрішніх справ ім. Е.О. Дідоренка. – 2014. – № 1 (66). – С. 116–125.

5. Бушуев И. А. Ответственность за укрывательство преступлений и недоносительство / И. А. Бушуев. – М. : Юрид. лит., 1965. – 139 с.

6. Васильев А. А. Уголовно-правовая характеристика прикосновенности к преступлению : автореф. дис. … канд. юрид. наук : 12.00.08 / Васильев Андрей Александрович. – Екатеринбург, 2009. – 28 с.

7. Глухова О. В. Уголовная ответственность за недоносительство и укрывательство преступлений : [монография] : / О. В. Глухова ; Брест. гос. ун-т имени А. С. Пушкина. – Брест : БрГУ, 2010. – 247 с.

8. Гришаев П. И. Соучастие в преступлении по уголовному праву Российской Федерации : [учебное пособие] : / В. А. Григорьев. – Уфа : Изд-во Уфим. ВШ МВД РФ, 1995. – 75 с.

9. Зарубин А. В. Уголовно-правовое регулирование прикосновенности к преступлению : дис. … канд. юрид. наук : 12.00.08 / Зарубин Андрей Викторович ; Тюмен. юрид. ин-т МВД России. – Тюмень. – 2004. – 212 с.

10. Зелинский А. Ф. Нужно решать / А. Ф. Зелинский, А. В. Наумов // Советская юстиция, 1969. – № 12. – С. 25–30.

11. Кваша О. О. Співучасть у злочину : структура та відповідальність : [монограф.] : / О. О. Кваша ; НАН України ; Ін-т держ. і права ім. В. М. Корецького. – Луганськ : РВВ ЛДУВС ім. Е. О. Дідоренка, 2013. – 560 с.

12. Комментарий к Уголовному кодексу Российской Федерации / [под общей ред. Генерального прокурора РФ, проф. Ю. И. Скуратова и председателя Верховного Суда РФ В. М. Лебедева]. – [2-е изд., изм. и доп.]. – М. : Издательская группа ИНФРА-М–НОРМА, 1998. – 832 с.

13. Кузнецов В. А. Борьба с преступным приобретением и сбытом имущества / В. А. Кузнецов. – К. : Наук. думка, 1970. – 160 с.

14. Курс советского уголовного права. Часть Общая : в 6 т. / А. А. Пионтковский ; [ред. кол. : А. А. Пионтковский, П. С. Ромашкин, В. М. Чхиквадзе]. – Т. 2 : Преступление. – М. : Наука, 1970. – 516 с.

15. Курс советского уголовного права. Часть Общая. Т. 1 / [отв. ред. : Н. А. Беляев, М. Д. Шаргородский]. – Л. : Изд-во Ленингр. ун-та, 1968. – 648 с.

16. Курс советского уголовного права. Часть Особенная : в 6 т. / А. Н. Игнатов, В. Ф. Кириченко, Ш. С. Рашковская и др. ; [ред. кол. : А. А. Пионтковский, П. С. Ромашкин, В. М. Чхиквадзе]. – Т. 6 : Преступления против государственного аппарата и общественного порядка. Воинские преступления. – М. : Наука, 1971. – 559 с.

17. Лемешко О. М. Кримінально-правова оцінка потурання вчинення злочину : дис. … канд. юрид. наук : 12.00.08 / Лемешко Олександр Миколайович ; Національна юридична академія України ім. Ярослава Мудрого. – Х., 2001. – 201 с.

18. Макаров А. Д. Уголовная ответственность за прикосновенность к преступлению : дис. … канд. юрид. наук : 12.00.08 / Макаров Анатолий Дмитриевич ; Российская правовая академия Министерство юстиции Российской Федерации. – М., 2004. – 176 с.

19. Орловський Р. С. Кримінальна відповідальність за пособництво вчиненню злочину : дис. … канд. юрид. наук : 12.00.08 / Орловський Руслан Семенович ; Національна юридична академія імені Ярослава Мудрого. – Х., 2000. – 175 с.

20. Познышев С. В. Очерк основных начал науки уголовного права. Особенная часть / С. В. Познышев. – М., 1923. – 296 с.

21. Пономаренко Е. В. Некоторые теоретические и законодательные проблемы прикосновенности к преступлению по уголовному праву Российской Федерации : автореф. дис. … канд. юрид. наук : 12.00.08 / Пономаренко Елена Валерьевна. – Саратов : Саратовская государственная академия права, 2007. – 26 с.

22. Раал Э. Прикосновенность к преступлению по советскому уголовному праву : автореф. дис. … канд. юрид. наук : 12.00.08 / Э. Раал ; Тартуский государственный университет. – Тарту, 1956. – 20 с.

23. Разгильдиев Б. Т. Уголовно-правовые проблемы прикосновенности к преступлению / Б. Т. Разгильдиев ; [под ред. А. П. Горшенева]. – Саратов : Изд-во Сарат. ун-та, 1981. – 96 с.

24. Семыкина О. И. Ответственность за укрывательство преступлений по уголовному праву России : автореф. дис. … канд. юрид. наук : 12.00.08 / Семыкина Ольга Ивановна. – М. : Ставропольский государственный университет, 2003. – 26 с.

25. Сережкина К. Н. Прикосновенность к преступлению в уголовном праве России: оптимизация норм и практики их применения : автореф. дис. … канд. юрид. наук : 12.00.08 / Сережкина Ксения Николаевна. – Самара, 2009. – 24 с.

26. Смирнов В. Г. Понятие прикосновенности к преступлению по советскому уголовному праву / В. Г. Смирнов. – Л. : Издательство Ленинградского университета, 1957. – 129 с.

27. Советское уголовное право (Общая и Особенная части) : [учебник] : / [авт. кол. : В. Ф. Кириченко, М. И. Якубович] ; [под ред. В. Д. Меньшагина]. – М. : Издательство Юридическая литература, 1958. – 515 с.

28. Тельнов П. Ф. Ответственность за соучастие в преступлении / П. Ф. Тельнов. – М. : Юридическая литература, 1974. – 208 с.

29. Тер-Акопов А. А. Преступление и проблемы нефизической причинности в уголовном праве / А. А. Тер-Акопов. – М. : Юркнига, 2003. – 480 с.

30. Трайнин А. Н. Учение о соучастии / А. Н. Трайнин. – М. : Юрид. изд-во НКЮ СССР, 1941. – 158 с.

31. Уголовное право России : Общая часть : [учебник] : / [авт. кол. : А. И. Бойцов, И. В. Волгарева, Б. В. Волженкин и др.] ; [под ред. : Н. М. Кропачева, Б. В. Волженкина, В. В. Орехова]. – СПб. : Издательский

Дом С.-Петерб. гос. ун-та, Издательство юридического факультета С.-Петерб. гос. ун-та, 2006. – 1064 с.

32. Уголовное право. Общая часть : [учебник] : / А. С. Якубов, Р. Кабулов и др. – Ташкент : Академия МВД Республики Узбекистан, 2004. – 435 с.

33. Шапченко С. Д. Співучасть у злочині : постатейний коментар до розділу VI Загальної частини Кримінального кодексу України / С. Д. Шапченко // Законодавство України. – 2003. – № 9. – С. 68–110.

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ПЕРЕДУМОВИ ПОСИЛЕННЯ КРИМІНАЛЬНО-ПРАВОВОЇ ОХОРОНИ ПОДАТКУ НА ДОДАНУ ВАРТІСТЬ

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У статті розглянуто передумови посилення кримінально-правової охорони ПДВ. Оцінено показники адміністрування податку впродовж 1999–2013 рр. Установлено, що коливання «розриву в дотриманні» впродовж 2009–2013 рр. не може бути пояснене економічними чинниками (податковою заборгованістю, рівнем відшкодування, офіційним товарообігом), тому, імовірно, воно зумовлено уникненням оподаткування, зокрема нелегальним. Розглянуто достатність кримінально-правових засобів із протидії зловживанням у сфері адміністрування ПДВ. Установлено, що в 2013 р. втрати ПДВ внаслідок недодержання податкових обов'язків (59 млрд грн.) десятикратно перевищували суму ухилення від сплати ПДВ, що перебувала під кримінальним розслідуванням (тобто латентність злочинів цієї категорії може сягати 90 %). Зроблено висновок, що наявні інструменти кримінального права є недостатніми для протидії даним явищам, зокрема через занижений поріг караності ухилення від оподаткування і невідповідність кримінально-правових заборон різноманіттю й суспільній небезпечності зловживань із цим податком.

Ключові слова: ухилення від сплати податків, шахрайство з ПДВ, незаконне відшкодування ПДВ, ПДВ-розрив, розрив у дотриманні.

ПРЕДПОСЫЛКИ УСИЛЕНИЯ УГОЛОВНО-ПРАВОВОЙ ОХРАНЫ НАЛОГА НА ДОБАВЛЕННУЮ СТОИМОСТЬ

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