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Теоретические основы квалификации совершенных организованной группой преступлений и квалификационные ошибки

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Аннотация: Статья посвящена актуальным на сегодняшний день вопросам квалификации преступлений, совершенных организованной группой. Указанная статья посвящена особенностям, показывающим, что посредством признания содеянного преступным и выбора нормы УК, содержащей данный состав преступления, правоприменитель дает уголовно-правовую оценку, раскрывает его юридическую сущность. В статье рассмотрены теоретические основы квалификации преступлений, совершенных организованной группой. Проанализированы причины появления организованной преступности и важнейшие предпосылки ее развития. Выделяются и описываются ее характерные особенности, имеющие важное значение для квалификации преступлений, как совершенных организованной группой, подчеркивая тем самым, «тип опасного поведения соучастников», а также основные трудности квалификации преступлений. Особое внимание уделено этнической организованной преступности, как представляющей повышенную общественную опасность ввиду ее распространенности, способности порождать негативные социальные последствия, а также постоянную самодетерминацию. На основании статистических данных, приведенных в статье, прослеживается определенная динамика развития организованной преступности в России, которая выражается в постоянном с 2009 года росте регистрируемых преступлений, совершенных организованными группами, и количестве лиц, выявленных в составе организованных сообществ. Основное содержание исследования составляет анализ различных подходов к определению понятия «квалификация преступлений», рассматриваются юридические основания квалификации совершенных организованными группами преступлений.
Ключевые слова: организованная группа, квалификация преступления, уголовно-значимые признаки, квалификационные ошибки

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THEORETICAL BASES FOR QUALIFICATION OF THE CRIMES COMMITTED BY AN ORGANIZED GROUP AND QUALIFYING ERRORS

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Abstract: The article is devoted to actual issues of qualification of crimes committed by an organized group. This article is devoted to features showing that by recognizing the crime committed by the criminal and choosing the norm of the Criminal Code containing this crime, the law-enforcer gives a criminal-legal assessment and reveals its legal essence. The theoretical bases of the qualification of crimes committed by an organized group are considered in the work. The reasons for the appearance of organized crime and the most important prerequisites for its development are analyzed. Its characteristic features that are important for the qualification of crimes as committed by an organized group are highlighted and described, thus emphasizing the «type of dangerous conduct of accomplices», as well as the main difficulties in qualifying crimes. Particular attention is paid to ethnic organized crime, which represents an increased social danger due to its prevalence, the ability to generate negative social consequences, as well as constant self-determination. Based on the statistical data given in the article, there is a certain dynamics of the development of organized crime in Russia, which is expressed in the constant growth of registered crimes committed by organized groups and the number of persons, identified in organized communities since 2009. The main content of the study is the analysis of various approaches to the definition of the concept of «qualification of crimes»; the legal grounds for the classification of crimes committed by organized groups are examined.
Keywords: organized group, qualification of crime, criminally significant signs, qualification errors

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Introduction

Konin V. V. and Popova L. V. expressed themselves very clearly: "With the transition of Russia to market relations, which did not have legislative norms and provisions to ensure the efficiency, integrity, and effectiveness of the emerging market, organized crime received everything necessary for its heyday.

The lack of necessary laws, the transparency of the borders of the newly formed states, the lack of competence, and often the corruption of the authorities, both executive and representative, are the main incentives for the rapid development and qualitative growth of organized crime, coming out of the shadow and, moreover, coming to power. At the same time, the very existence of organized crime is impossible without cover from corrupt representatives of power, both legislative and executive, including among law enforcement officers." [Konin, Popova, 2010, P. 2].

That is why in 2005 specialists, in particular, Chirkov D. K. and Belinsky V. V., noted that, for example, "in 2004, corruption of state authorities is among the most dangerous manifestations, which are seriously hindering economic development of the country.

In 2004, internal affairs agencies uncovered more than 22,000 crimes against state power and interests of the Civil Service, including 665 cases committed by participants of organized groups. At the same time, obvious shortcomings and omissions are visible behind outwardly positive indicators of the fight against official crimes." [Konin, Popova, 2010, P. 18].

For example, academician Kudryavtsev V. N., characterizing in 2007 the studies of professor Kuznetsova N. F. [Kuznetsova, 2007, P. 5], noted that "the issues are new, and while the author did not work the long-known formulas, but analyzed our new criminal legislation (chaotically changing from year to year) and forced to follow the prosecutor's and judicial practice, the monograph by Kuznetsova N. F. "Problems of qualification of crimes" is devoted to the central section of criminal law. Its development in no small part determines the state of legality." [Kuznetsova, 2007, P. 5].

Thus, we can clearly see that although the topic "qualification of crimes committed by organized groups" is old [Ivantsova, 1998], meaning this subject has been seriously investigated, but the fact is that each period (a year or the like) generates, introduces a certain specificity, the peculiarities of which are due to new trends, expressed, for example, in the following statistical indicators – the number of identified persons in an organized group or criminal community (see **Figures 1** and **2**, **Table 1**).

(The form for statistical observation is "4-USS" (code 494) "Information on the state of crime and the results of the investigation of crimes", approved by order of the Federal State Statistics Service of October 13, 2009 No. 222. Provided by information centers of the Ministry of Internal Affairs, State Administration of Internal Affairs, and Departments of Internal Affairs of the Subjects of Russian Federation)

Theoretical foundations for qualifying crimes

Analyzing the legal grounds for qualifying crimes committed by an organized group, of course, it is necessary to begin with the theoretical foundations, the basics of the issue.

Kuznetsova N. F. proposed the following definition: "The qualification of crimes is the establishment of conformity in the signs of a socially dangerous act in accordance with the characteristics of the offense set forth in the norms of General and Special Parts of the Criminal Code, with a conclusion on the application of a particular article of the Code". [Kuznetsova, 2007, P. 25].

Gertsenzon A. A., being the author of the first work in the domestic criminal law on the qualification of crimes, stated: "The qualification of crimes consists of establishing the compliance of this particular act with the characteris-

Figure 1. The number of identified persons in an organized group or criminal community (by years)

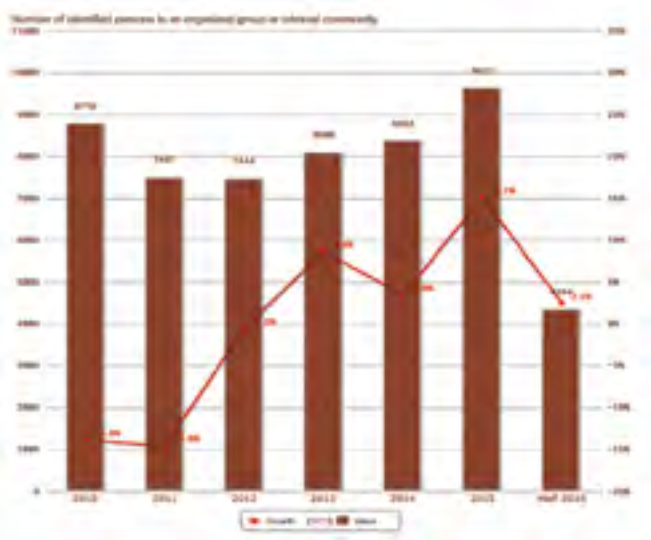


Table 1. Passport of the indicator

Name	A number of Identified persons in an organized group or criminal community
Validity	December 2009 - present time
Form of Statistical Observation	"4-EGC" (code 494) "Information on the state of crime and the results of criminal investigation" approved by Order of Rosstat of October 13, 2009, No. 222. Provide information centers of the Ministry of Internal Affairs, the Central Internal Affairs Directorate, and the Department of Internal Affairs of the subjects of the Russian Federation.
Source (calculation formula)	Form 4-EGC, section 6, line 8, column 1
Description	Reflects the number of persons who committed the crime during the reporting period, while the crime is characterized as committed by an organized group, that is, it was committed by a stable group of persons who had previously united to commit one or more crimes.

tics of a particular crime, as provided for in criminal law". [Gertsenzon, 1947; Kuznetsova, 2007, P. 49].

The definitions of qualifications of crimes proposed in later studies, to some extent coincide with the quoted.

There are some differences, as Kuznetsova N. F. notes, "proceed not from an understanding of qualification as a process of identifying what was done with a description of its composition in the Criminal Code, but from the author's position on the composition of the crime. What is the comparison with the qualification?

Some believe that a crime with a corpus delicti is identified.

The others say – a crime with a criminal law norm.

The third ones note – the composition of a socially dangerous act with the composition of the crime is described in the corresponding norm of the Criminal Code". [Kuznetsova, 2007, P. 53].

Figure 2. The number of identified persons in an organized group or criminal community (by subjects of the Russian Federation)



Kuznetsova N. F. cites the following fact: "The questioning of the Scientific Advisory Council members under the Supreme Court of the USSR, judges, scientists, and members of regional courts, who had been trained in 1987 in the Moscow Institute for Advanced Training of Judges, confirmed that the theoretical debate, fortunately, is far from the interests of practice. The following definitions of the corpus delicti were proposed in the questionnaire:

1. The composition of a crime is the presence in the person's actions of all the signs of a crime provided for in the criminal law.

2. The composition of a crime is the set of (or the system) of objective and subjective signs of a crime – its object, subject, objective and subjective sides.

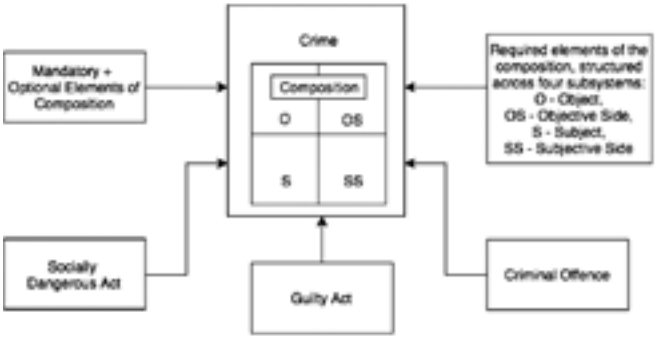
3. The composition of a crime is the legislative model of a crime.

4. A different definition.

197 questionnaires were processed with the following answers: 67% of respondents agree with the definition under item 2; 26% – agree with the item 1; item 3 has caused the consent of a part of interrogated (all of them scientific workers); five people marked item 4 without explaining what they meant. Some answers contained notes on the questions: "Do theorists have nothing else to do?" They need to be understood in such a way that practitioners do not have doubts about the composition of the crime." [Kuznetsova, 1987, P. 14].

It will not be a mistake to consider that when qualifying crimes, the signs of the composition of the committed crime with the signs of the criminal law norm are made, but this is less successful because the law does not have the systemic structuring of elements that are inherent in the composition.

Figure 3. The ratio of crime and corpus delicti [Kuznetsova, 2007, P. 58]



The ratio of crime and corpus delicti can be represented schematically (see the Figure 3). [Kuznetsova, 2007, P. 57].

So, "the qualification of a crime is shown as the establishment of the consistency of a socially dangerous act with the composition prescribed by the criminal law norm." [Kuznetsova, 2007, P. 132]. Neshataev V. N. and Veklenko V. V. speak about the necessity of disclosing the concept of qualification by using the term "encroachment", and not "act". It is pointed out that not all the signs of a committed assault are accounted for in the qualification, but only those that have criminal legal significance. It is concluded that the official qualification of crimes consists of establishing the presence or absence of a criminal offense in a perfect encroachment, sufficient for the onset of criminal liability.

The definition and the characteristics used for the qualification of crimes

Neshataev V. N. and Veklenko V. V. point out: "In the current Criminal Code of the Russian Federation, the

definition for the qualification of crimes is not only absent, but the term "qualification" is not used at all." [Neshataev, Veklenko, 2015, P. 26].

Criminally significant signs to be assessed, as noted by Neshataev V. N. and Veklenko V. V., are:

The characteristics of the public relations protected by the criminal law, according to which criminal assault was committed and, as a result of its commission, the damage was caused (could be caused). The injured person, if necessary, assesses its professional status (for example, if an assault on the life of a law enforcement officer related to his professional and official activities is committed);

The features characterizing the objective side of the deed (the act, the socially dangerous consequences, the causal relationship between them, and, if necessary, optional –place, time, method, tools and means, the situation);

The characteristics of an individual who committed an assault (reaching the age of criminal responsibility, sanity). If there is a special subject, then additional signs, which can be citizenship, motherhood, profession, etc.;

The internal (psychic) attitude of a person who encroaches on public relations protected by the Criminal Code, to the made and future negative consequences, contained in the intellectual and volitional moments, is guilt. The motive, and the purpose, and sometimes the emotions (for example, if there are signs of the offense provided for in Article 107 of the Criminal Code of the Russian Federation) are accounted for." [Neshataev, Veklenko, 2015, P. 26].

Considering the information above, Neshataev V. N. and Veklenko V. V. come to the conclusion that the term "deed", with the help of which the qualification of crimes is disclosed, was used unsuccessfully. Neshataev V. N. and Veklenko V. V. insist that its replacement by the term "encroachment" will be correct and competent not only from the point of view of criminal law but also from the point of view of linguistic forms. "The criminally-legal signs of an encroachment include all the signs relating to the object, the objective, and subjective side, to the subject. While the term "encroachment" provides characterization of the action (inaction) as an element of the objective side of the corpus delicti." [Neshataev, Veklenko, 2015, P. 26].

The qualification of a crime, in fact, is a necessary and mandatory part for the onset of criminal responsibility. It should also be established that there are no criminally significant signs sufficient for the implementation of criminal responsibility [Neshataev, Veklenko, 2015, P. 26].

If in the course of qualifying activities the absence of criminally significant indications sufficient for criminal liability is established, a decision is made to refuse to initiate or to terminate the criminal case, and the relevant procedural document specifies the article of the Criminal Code of the Russian Federation on which this decision is taken.

Through the recognition of the criminal offense committed and the choice of the Criminal Code containing this crime, the law-enforcer gives a criminal-legal assessment, reveals its legal essence.

Neshataev V. N. and Veklenko V. V. suggest defining "official (legal) qualification of crimes as an establishment of presence or absence in perfect encroachment of the criminally-legal signs sufficient for criminal responsibility." [Neshataev, Veklenko, 2015, P. 26].

Qualifying crimes as committed by an organized group

In general, the practice of qualifying crimes as committed by an organized group, as experts note, reflects the "type of dangerous conduct of accomplices" [Galiakbarov, 2000, P. 9]. It takes into account that the predetermined distribution of roles between them emphasizes the stability of a group united for the commission of one or more crimes. At the same time, the difficulties of real application of the law are associated with a sharp increase in the number of trains containing this feature, as well as with insufficient theoretical justification to solve these issues.

Sustainability within the framework of an organized group is characterized by the existence of a well-thought-out plan and methods of committing an assault, the preparation of tools and means, the actual pre-determined execution of actions facilitating the commission of an act, the deliberate creation of conditions for its subsequent commission, etc.

All these indicators are covered by one, more capacious feature – a predetermined distribution of roles. Precisely this criterion is used by investigative bodies and courts in the course of qualifying specific encroachments as committed by an organized group [Galiakbarov, 2000, P. 9].

Obrazhiev K. V., considering the operation of criminal law norms in time, reasonably points out that "it is possible to formulate rules of qualification".

As a general rule, a criminal legal assessment of a crime must be carried out on the basis of a criminal law and the explanations of the Plenum that specified it, which acted during the commission of the crime.

The application for the qualification of a new (changed) decision of the Plenum that worsens the position of the person who committed the crime is unacceptable. For example, the fact of transferring the narcotic drug, committed as a result of a verification purchase, which happened before coming into power of Resolution No. 30 of the Plenum of the Supreme Court of the Russian Federation of June 30, 2015, should be qualified in accordance with Part 3 of Art. 30 and the corresponding part of Art. 228.1 of the Criminal Code of the Russian Federation, since the decision of the Plenum in effect at the time of committing the crime, prescribed exactly this variant of qualification [Obrazhiev, 2016, P. 59].

If the same crime was committed after coming into power of Resolution No. 30[1] of June 30, 2015, then, on the basis of the new explanations of the Plenum, it should be qualified as a finished illegal sale of the narcotic drug.

1 The Resolution of the Plenum of the Supreme Court of the Russian Federation of June 30, 2015 No. 30 "On Amendments to the Decision of the Plenum of the Supreme Court of the Russian Federation of June 15, 2006 No. 14 "On Judicial Practice in Crimes Related to Narcotics, Psychotropic, Potent and Poisonous Substances". *Rossiyskaya Gazeta.* - October 07, 2015. - No. 150. In Russian.

This circumstance is drawn attention to in the letter of the Supreme Court of the Russian Federation of July 10, 2015, No. 7-ВС-4284/12, addressed to the courts of the subjects of the Russian Federation. It states, in particular, that "the clarifications formulated by the Plenum of the Supreme Court of the Russian Federation in chapter 1 of paragraph 13 and paragraphs 13.1, 13.2, 15.1 of Resolution No. 14 of June 15, 2006 (as amended by Resolution No. 30 of June 30, 2015), are mandatory for lower courts with regard for consideration of criminal cases involving crimes committed after June 30, 2015".

Obrazhiev K. V., considering the rules of qualification, rightly points out that "the practical application of [...] rules is made difficult because of two circumstances. The first of these is the uncertainty with coming into effect of the decisions of the Plenum of the Supreme Court of the Russian Federation.

The second circumstance, which complicates the application of rules of action changed as a result of adopting a new (correction of the earlier adopted) resolution of the Plenum of criminal law norms, as Obrazhiev K. V. notes, "consists of the absence of a clear procedure for reviewing court decisions in connection with changes in the Plenum's normative positions" [Obrazhiev, 2016, P. 59].

Let's pay attention to the following aspect of the current reality. In Russia, the activity of criminal organizations, formed according to ethnicity, is growing rapidly.

The growth of organized crime, as noted by jurists, including ethnic criminal groups, requires operational units to actively improve methods of combating this negative phenomenon. The urgency of the problem becomes more significant, given that this element of the organized crime is closely related to the problems of the "shadow economy" [Gribunov, Baskikh, 2013, P. 23], corruption of authorities and administration [Obrazhiev, Chashin, 2013, P. 31], terrorism and other unlawful socially dangerous phenomena.

Under the impact of socio-economic problems, demarcation of ethnicity and global migration processes, the authority of the state and state authorities is no longer significant for the individual and social groups, unlike relatives, acquaintances, representatives of national diasporas, especially those holding any positions in power structures.

At the present time, criminal organized groups created on an ethnic basis have been identified by law enforcement agencies in almost all subjects of the Russian Federation. The greatest activity of such formations is observed in large and particularly large cities with developed infrastructure.

The increased social danger of ethnic group criminality in comparison with the public danger of criminality of persons committing crimes alone is in its higher ability to generate socially negative consequences, and with the increase in the proportion of stable criminal groups – in the increased precedence of its existence.

Thus, Konin V. V., Obrazhiev K. V., Popova L. V., Chashin K. and other researchers point out, the criminal legal science pays great attention to the study of the qualification of crimes [Obrazhiev, Chashin, 2013, P. 31], including qualifications of crimes committed by an organized group.

In the theory of criminal law, as experts say, "the erroneous qualification is establishing by the qualifier himself and fixing in the relevant criminal procedure of the foreseen nature of the revealed act to the composition of the crime, which in fact this act is not covered by" [Lebedev, 2014, P. 142; Blagov, 2003, P. 17].

As the study of cases has shown, the basis for changing the qualifications of the criminal actions or excluding the qualifying attribute of the organized group from the charged accusation was the circumstance that in a court session:

- there was no evidence of the stability of the group;
- it was not proved that the perpetrators had united in advance to commit the crimes[2].

The examination of cases showed that courts, in majority, correctly apply the criminal law.

However, when using the sign of committing a crime by an organized group, shortcomings were revealed:

- The courts recognized as proven the facts that were not established in the verdict, or were refuted by the materials of the case;
- There was no motivation for the qualifying attribute.

The judge of the Moscow Regional Court, Potemkina L.A., in the note from the Moscow Regional Court stated: "It seems that the reasons for the mistakes were:

- insufficient preparation of cases for hearing,
- incomplete clarification of the circumstances relevant to the case during the trial" [3].

In order to prevent errors and improve the quality of cases, Potemkina L. A., it seems, rightly believes that the following should be recommended to the courts:

- to study regularly the current legislation and judicial practice,
- to analyze the mistakes made,
- to periodically generalize the practice of application by courts of cases in the specified category with the subsequent use of generalization results to consider cases[4].

Avoiding mistakes in qualification of crimes

To avoid making mistakes in qualifying, it is necessary to take into account the recommendations of the Plenum of the Supreme Court of the Russian Federation relating to the specifics of the qualification of crimes committed by an organized group: the Decree of the Plenum of the Supreme Court of the Russian Federation of June 10, 2010 No. 12 "On judicial practice of considering criminal cases on the organization of a criminal community (organized group) or participation in it"[5].

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2 Reference of the Moscow Regional Court "Based on the results of the consideration by the courts of the Moscow Region in 2000-2002 of criminal cases involving crimes committed by an organized group". SPS ConsultantPlus. In Russian.

3 Ibid.

4 Ibid.

5 The Resolution of the Plenum of the Supreme Court of the Russian Federation of June 10, 2010 No. 12 "On the judicial practice of considering criminal cases on the organization of a criminal association (criminal organization) or participation in it". *Rossiyskaya Gazeta*. - June 17, 2010. - No. 130. In Russian.

The Resolution of the Plenum of the Supreme Court of the Russian Federation of June 28, 2011 No. 11 "On judicial practice in criminal cases related to crimes of an extremist orientation"[6].

The Resolution of the Plenum of the Supreme Court of the Russian Federation of February 09, 2012 No. 1 "On some issues of judicial practice in criminal cases related to crimes of a terrorist nature"[7].

In Russia, there is a complex criminal situation, characterized by a high level of crime. Organized crime continues to have significant impact on criminalization of social relations.

The actions of organized crime are manifested mostly with crimes committed by organized groups and criminal communities.

The qualification of a crime is the establishment of the consistency of the composition of a socially dangerous act with the composition prescribed by the criminal law norm.

The definition of identity between the composition of the perfect ("actual composition") and the composition of the crime described in the dispositions of a certain criminal law norm ("legal composition") is held in exact sequence.

First, the object of the deletion with the object or objects described in the articles of the Criminal Code of the Russian Federation is compared.

Then the signs of the objective side are identified, then the identification of the subject of the crime with the instructions of the Criminal Code about the author or an accomplice of the crime is carried out.

The final step in the qualification is the comparison of the subjective side of the composition of the committed with the characteristics of the characteristics in the norms of the Criminal Code of the Russian Federation.

It is possible to make the following qualifying conclusion: the composition of the crime in the act of one or another subject is what article of the Criminal Code provides for or the nature of the crime in the act of Mr. N is absent.

It is eligible to identify those signs that have a legal, namely criminal-legal significance since they are important for qualification.

Through recognizing the criminal offense and choosing the norm of the Criminal Code of the Russian Federation, which contains this crime, the law-enforcer gives a criminal-legal assessment, in other words, discloses its legal essence.

The rules for qualifying the crimes committed as part of an organized group of crimes, as the researchers rightfully noted, can be generally accepted as established.

Qualification errors – is an incorrect legal assessment of socially dangerous acts from the point of view of legality and validity. They are usually made by the legislator, law enforcers, and right-spreaders.

The main reasons for qualifying mistakes are the shortcomings in legislation and the lack of professionalism of law enforcement officials.

6 The Resolution of the Plenum of the Supreme Court of the Russian Federation of June 28, 2011 No. 11 "On judicial practice in criminal cases related to crimes of an extremist nature". *Bulletin of the Supreme Court of the Russian Federation*. - 2011. - No. 8. In Russian.

7 The Resolution of the Plenum of the Supreme Court of the Russian Federation of February 09, 2012 No. 1 "On some issues of judicial practice in criminal cases related to crimes of a terrorist nature". *Bulletin of the Supreme Court of the Russian Federation*. - 2012. - No. 4. In Russian.

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