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The Right to Privacy and Data Protection in the Information Age

Tigran D. Oganesian*
Institute of Legislation and Comparative Law
under the Government of the Russian Federation
Moscow, Russian Federation

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Abstract. The article considers the legality of mass surveillance and protection of personal data in the context of the international human rights law and the right to respect for private life. Special attention is paid to the protection of data on the Internet, where the personal data of billions of people are stored. The author emphasizes that mass surveillance and technology that allows the storage and processing of the data of millions of people pose a serious threat to the right to privacy guaranteed by Article 8 of the ECHR of 1950.

Few companies comply with the human rights principles in their operations by providing user data in response to requests from public services. In this regard, States must prove that any interference with the personal integrity of an individual is necessary and proportionate to address a particular security threat. Mandatory data storage, where telephone companies and Internet service providers are required to store metadata about their users' communications for subsequent access by the law enforcement and intelligence agencies, is neither necessary nor proportionate.

The author analyses the legislation of some countries in the field of personal data protection, as well as examples from practice. Practice in many States is evidence of the lack of adequate national legislation and enforcement, weak procedural safeguards and ineffective oversight, which contributes to widespread impunity for arbitrary or unlawful interference with the right to privacy.

In conclusion, we propose a number of measures aimed at improving the level of personal data protection in accordance with the international standards. In order to provide guarantees and a minimum level of adequate data protection in the face of new challenges to human rights in an ever-changing digital environment, the author proposes to solve a number of pressing issues. Firstly, States should not have the right to ask companies for and have absolute access to user data without a court order. Secondly, the process of sending a request and receiving data from a telecommunications company should be regulated in detail and transparent. The availability of specialized judges with technical expertise shall be valuable.

* Corresponding author E-mail address: t.oganesian@mail.ru
ORCID: 0000-0001-8239-694X

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Introduction

The digital age, or the information age, is characterized by the widespread use of computers, the Internet and digital technologies, involving collection and processing of personal data of millions of people. Search engines, social networks, messengers make our lives easier, allowing us to communicate with the world and express opinions. The collection and storage of personal data are also indispensable tools of state bodies in the fight against crime and terrorism. However, despite its many advantages, the digital age also poses challenges to privacy and data protection, as vast amounts of personal information are collected and processed in increasingly complex and opaque ways. Mass surveillance and technologies to store and process the data of millions of people pose a serious threat to the right to privacy guaranteed by Article 8 of the Convention for the protection of human rights and fundamental freedoms drafted in 1950 (ECHR, Convention).

As Orla Lynskey notes, Data protection legislation has until recently been viewed by lawyers, politicians, and academics as "marginal and technical" (Lynskey, 2017: 253). However, this perception has changed as data protection has become the focus of attention for a number of reasons. Firstly, the dramatic increase in the processing of personal data has inevitably led to the need for uniform standards of data protection. Secondly, the right to data protection has been recognized internationally in the case-law of the European Court of Justice (ECJ) and the ECHR.

According to the Eurobarometer survey conducted in March 2015 among citizens of the European Union (hereinafter – the EU), 8 out of 10 people believe that they do not have full control over their personal data (Special Eurobarometer, 2015: 4). And only 15% of citizens believe that they have full control over their data, while half of the respondents (50%) believe that they have partial control, and almost one third (31%) believe that they have no control over personal information on the Internet. As for Russian citizens, 68% of respondents believe that in Russia personal data are poorly protected from illegal use and only 11% of all respondents indicated that personal data in our country as a whole are well protected (Results of the public opinion Fund survey, 2013).

As recalled by the General Assembly in its resolution 68/167, the international law of human rights provides a universal structure, according to which it is necessary to evaluate any interference in the rights of an individual to inviolability of private life (UN General Assembly Resolution 68/167). The International Covenant on civil and political rights of 1966 provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. Other international human rights instruments contain similar provisions. While the right to privacy under the international human rights law is not an absolute right, any case of interference must be carefully and critically assessed as necessary, legitimate and proportionate.

The international human rights law provides a strong and universal framework for the promotion and protection of the right to privacy, including in the context of surveillance, interception of digital communications and the collection of personal data. However, experience in many States indicates a lack of adequate national legislation and enforcement, weak procedural safeguards and ineffective oversight, which contributes to widespread impunity for arbitrary or unlawful interference with the right to privacy.

Theoretical framework

The study is based on consideration of some issues of mass surveillance and data protection in the context of the right to privacy. Particular theoretical attention is paid to authors who study the evolutionary interpretation of the provisions of Article 8 of the Convention in the light of "modern conditions," which allows the ECHR to include the right to personal data protection (Nardell, 2010: 46). At the same time, long before the development of digital technologies, a number of researchers warned that the processing of information by computers in combination with the availability of data can lead to serious risks, in particular, have a negative impact on privacy (Westin, 1970: 299; Raymont, 1986: 119). In the context of the analysis of national data protection norms, some experts note that as a result of the use of the term "confidentiality" in the US, this definition was subsequently integrated into international and European legal instruments in the field of personal data protection (González Fuster, 2016: 6). In this regard, some authors argue why the data protection legislation has until recently been viewed by lawyers, politicians and academics as "marginal and technical" (Lynskey, 2017: 253).

Experts' research on the impact of digital technologies not only on human privacy, but also on a wide range of other human rights, from freedom of expression and freedom of Assembly to protection against discrimination, is of great interest (Bernal, 2016: 245; Raymont, 1986: 119; Chesterman, 2012: 414).

Statement of the problem

The development of digital technologies has made it easier to monitor, collect and process personal data. Personal data obtained illegally against millions of users of social networks and messengers represent important information for their intended use. In this regard, the international legal regulation of personal data protection plays a key role. The problem of mass surveillance is still not adequately addressed, either at the national or international levels. Although the right to respect for private life under Article 8 of the ECHR applies extraterritorially, it is clear that the rules governing state surveillance require additional legal standards. As the United Nations High Commissioner for Human Rights rightly pointed out, government surveillance "has gone from an exceptional measure to a dangerous habit" (Report of the Office…, 2014). It is clear that the protection of the privacy of millions of people from mass surveillance needs to be addressed at both national and international levels.

Methods

The methodological basis of the research included general scientific methods of cognition: dialectical, logical, system, statistical, etc. In addition, the methods inherent in the science of international law were used: the system-legal method, the comparative-legal method and the method of interpretation of law. The latter was particularly relevant when considering the legal nature and specificity of the decisions of the European court of Human Rights. The method of legal analysis, which allows to identify patterns and trends in the development of national legislation, legal positions of international courts in the field of data protection, is of particular importance.

The chronological method determines the sequence of international legal acts, court practice of the ECHR, regulating the protection of personal data. The technical and legal method makes it possible to analyse the content of Convention No. 108, as well as other documents in the field of automated data processing. The involvement of statistical data allows us to assess the attitude of European society to the protection of their data and to conclude that data protection has become one of the issues of concern to people. With the help of the comparative legal method the specificity of the judgments of the European Court of Human Rights, as well as the legislation of individual countries on the protection of personal data is considered.

In general, the systematic methodology is associated with the fact that the research is closely linked with practice, which allows us to examine the real processes and phenomena.

Discussion

The conventional framework of the Council of Europe on data protection

Article 8 of the Convention for the protection of human rights and fundamental freedoms of 1950 guarantees everyone the right to respect for personal and family life, housing and correspondence and prevents interference by public authorities with the exercise of this right, except where such interference is provided for by law and is necessary in a democratic society in the interests of national security or public order. As noted by G. Nardell, ECtHR interprets Paragraph 1 of Article 8 of the ECHR quite "generously and widely" (Nardell, 2010: 46). This evolutionary interpretation of the provisions of Art. 8 of the Convention, in the light of "modern conditions," allows the Strasbourg court to include the right to protection of personal data.

Mass surveillance is prima facie interference with Article 8 of the ECHR. The European Court of Human Rights at the time issued decisions in several cases concerning data protection and surveillance, including the interception of communications (Malone v. the United Kingdom), multiple forms of surveillance (Klass and Others v. Germany), storing of personal data by public services (Leander v. Sweden, S. and Marper v. the United Kingdom). Article 8, Paragraph 1, of the Convention affirms the right to privacy. Communications intercepted and stored under the mass surveillance programmes without the consent of an individual are subject to Article 8 of the Convention.

The Council of Europe Convention on the protection of individuals with respect to the automatic processing of personal data (hereinafter – Convention 108) provides additional protection for any data processing carried out by the private and public sectors, including the processing of data by judicial and other law enforcement authorities (Convention No. 108). The Convention defines "personal data" as "any information about a particular or identifiable natural person (data subject)," which includes communications intercepted by the government surveillance programmes.

This Convention is the first binding international instrument to protect individuals from abuses that may occur in the collection and processing of data, and at the same time aims to regulate the cross-border flow of personal data.

The Convention 108 not only provides safeguards for the collection and processing of personal data, but also prohibits, if national law does not provide adequate safeguards, the processing of "sensitive" data regarding a person's race, political opinion, health, religion, sexual life, criminal history, etc. The Convention also gives a person the right to know that data is collected and, if necessary, to be able to correct them.

The Council of Europe adopted the Convention against cybercrime (Budapest Convention) in 2001, which, along with the Convention 108, regulates the activities of states in the cyberspace.

It should be noted that the Convention 108 and the Budapest Convention were adopted as regional European instruments, but eventually acquired the international, albeit not universal, status, since they allow non-European countries to join. The Budapest Convention was ratified by 56 countries, including non-CoE member states that signed it (USA, Canada, Japan and South Africa). Similarly, the Convention 108 has expanded its scope, to which, in addition to 47 CoE member states, Mauritius, Senegal, Tunisia and Uruguay have acceded.

Today, it is obvious that both conventions require appropriate modifications in connection with the changed realities of the development of mass surveillance technologies. The evolution of information and communication technologies, which offers unprecedented opportunities for humanity, poses new challenges, including in the area of criminal justice and the rule of law in the cyberspace.

The Protocol amending the Convention No. 108 contains relevant innovations that reinforce the requirement that data processing be proportionate and that the principle of data minimization be applied. The modernized Convention also strengthens the accountability of data controllers and the transparency of data processing; introduces additional safeguards

for relevant persons in the context of algorithmic decision-making, such as the right to know the logic behind data processing.

All the changes and additions to the Convention 108 and the Budapest Convention will provide a unique tool to promote safety and adequate protection of the rights and freedoms of an individual in the face of new challenges to human rights in a constantly changing digital environment. In addition to these two fundamental acts, the General Data Protection Regulation (GDPR) of the European Union entered into force on 5 May 2018, amending and improving the principles enshrined in the previous EU Directive.

PACE Reaction

The practice of mass surveillance is a fundamental threat to human rights and violates the right to privacy enshrined in Article 8 of the ECHR. A report prepared by Dutch Deputy Peter Omzigt, beginning with a quote by Alexander Solzhenitsyn: "Our freedom is based on the fact that others do not know about our existence," confirms that states do participate in mass surveillance, having a chilling effect on the exercise of fundamental freedoms.

In the report, PACE expressed concerns about "far-reaching, technologically advanced systems" used by states for the collection, storage and analysis of personal data of citizens. The Assembly recognized the need for "effective targeted surveillance of suspected terrorists and organized criminals," while noting that mass surveillance did not contribute to the prevention of terrorist acts (PACE Resolution 2045, 2015).

PACE proposed the adoption of the international "intelligence Code," which establishes general rules for the monitoring of citizens and the exchange of intelligence. In order to restore confidence between Council of Europe member states and between citizens and their own governments, it is necessary to establish a legal framework at the national and international levels that protects human rights, especially the right to privacy.

All of this points to the urgent need to establish a clearer legal framework for the activities of intelligence agencies to monitor within and beyond national borders. The Council of Europe has an important role to play in this regard, as stated by the Council of Europe Commissioner for Human Rights N. Muižnieks, "groundless mass storage of communication data is fundamentally contrary to the rule of law, incompatible with the basic principles of data protection and ineffective" (The rule of law…, 2014: 22).

Protection of personal data on the Internet

At the beginning of the digital era, American poet and essayist John Perry Barlow said that the Internet would open "a world in which anyone anywhere could express their beliefs without fear of being forced into silence" (Barlow, 1996). The digital revolution and technological advances have not only changed people's attitudes to personal data, but in turn have challenged existing concepts of privacy and remedies. It's hard to disagree with C. Chesterman who said that "efforts to protect privacy have always been forced to respond to new threats and technologies" (Chesterman, 2012: 414). At the same time, Alan F. Westin warned that the information processing by a computer in combination with the availability of data can lead to serious risks, in particular, have a negative impact on privacy (Westin, 1970: 299).

Internet companies have become central platforms for discussion, access to information, trade and human development. They collect and store personal data of billions of people, including information about their habits, locations and activities.

Few companies comply with human rights principles in their operations by providing user data in response to threats and demands from governments. Some states require to remove links, websites and other materials that are alleged to be in violation of national law. Public authorities are increasingly seeking to remove content out of court. Some states have established specialized government units to communicate with companies to remove content. The group of the European Union on the transfer of information on the Internet, for example, "seeks terrorist and violent extremist content

on the Internet and works with suppliers of online services with the aim of eliminating this content" (EDRi, 2016: 3). The European Union code of conduct on combating illegal hatred on the Internet provides for an agreement between the European Union and four major companies, including on the removal of unwanted content.

Each company undertakes to comply in principle with the national legislation in which it operates. As Facebook notes, "if, after careful legal review, we determine that content is illegal under the local law, we will make it unavailable in the relevant country or territory" (Facebook, Government requests). One of the instruments of minimization is transparency: many companies report annually on the number of government requests they receive from each state. However, companies do not always disclose sufficient information on how they respond to government requests and do not regularly report on government requests.

A distinction must be made between failures and government requests to companies to delete data. Such companies as Facebook, Google, and Twitter are receiving increasing requests from intelligence agencies each year to provide user data and delete content. A common purpose of this kind of interference (failures) are not only social networks, but messengers (for example, WhatsApp, Telegram). This is particularly common when rising public dissent and protests are considered to be fuelled by the digital communication networks. Communication shutdown, in such circumstances, disorientate protesters and disrupts the coordination between the leaders of the protest or movement. Blackouts can also be used as a security measure in a period of uncertainty following terrorist attacks. A striking example of the pre-smartphone era is the suicide bombings in London in July 2005, followed by the disconnection of the cell phone signal in the area around the affected metro station. This measure was strongly condemned in the United Kingdom and reflects an approach more widely adopted in the non-democratic countries.

In this regard, the report of Jan Rydzak, PhD in Government and Public Policy of the University of Arizona and former Google policy officer of the global network initiative is of interest. The report presents the results of the author's research on the impact of network violations on human rights. The author argues that massive violations of rights on the Internet by restricting access to social networks and exercising control over user data constitute a radical form of digital repression that restricts numerous rights enshrined in the international treaties (Rydzak, 2018: 9).

In his report, the American scientist considers new technological means of suppressing protests, noting that since 2011, network failures and massive network outages have become a widespread tool for information control. As the author of the report rightly points out, "requests for personal data and content removal are part of the information monitoring and control mechanism in many states" (Rydzak, 2018: 7). Based on world development indicators and own observations (2017), Rydzak lists the countries with the fastest growing trends in state control over the Internet for 2005-2015: Bahrain (72.4%), Kazakhstan (69.9%), Azerbaijan (69%), Qatar (68.2%), Russia (58.2%), Albania (57.2%), Saudi Arabia (56.9%). It is noteworthy that this list includes three member states of the Council of Europe: Azerbaijan, Albania and Russia.

To overcome this problem, we should emphasize the role of partnerships between the Council of Europe and leading companies with access to billions of personal data around the world, such as: Facebook, Google, Kaspersky Lab, Digital Europe, GSMA Europe, Deutsche Telekom. As Executive Director of the Global Network Initiative Judith Lichtenberg rightly pointed out, "by underpinning this partnership, the Council of Europe is investing in a dialogue between states, companies and the civil society to address the critical global digital rights challenges facing all countries."

The first ever report on the regulation of online content, in which a special rapporteur examines the role of states and companies in social networks in creating an enabling environment for freedom of expression and access to information on the Internet, can make a significant contribution. In the face of contemporary threats such as "fake news," "virtual"

extremism, the special rapporteur urges states to refrain from adopting laws that require "active" monitoring or filtering of content that is incompatible with the right to respect for private life (Report of the special…, 2018). States should refrain from imposing disproportionate sanctions, whether fines or incarceration, on companies that do not wish to meet states' requests for data.

Recognizing that surveillance of electronic communications data may be necessary for the national security interests, government mass surveillance programmes raise issues of compliance with the international legal standards. States must demonstrate that any interference with the personal integrity of an individual is necessary and proportionate to address a specific security threat. Mandatory data retention, where telephone companies and Internet service providers are required to store metadata about their users' communications for subsequent access by the law enforcement and intelligence agencies, is neither necessary nor proportionate (Report of the Office…, 2018).

In assessing the need for action, the Human Rights Committee, in its general comment No. 27 on Article 12 of the International Covenant on Civil and Political Rights, stressed that "restrictions must not violate the very essence of the right [...]; the relation between the right and restriction, between the norm and exception must not be reversed" (CCPR/C/21/Rev.1/Add. 9, p. 3. 11). In addition, such measures should be proportionate: if there is a legitimate aim and appropriate safeguards, the state may be allowed to monitor; however, the burden of proving that intervention is necessary and proportionate rests with the government. Thus, the mass surveillance programmes can be considered arbitrary, even if they serve a legitimate purpose and have been adopted on the basis of an accessible legal regime. In this regard, the Human Rights Committee stressed the importance of "measures to ensure that any interference with the right to privacy is consistent with the principles of legality, proportionality and necessity, regardless of the nationality or location of persons whose communications are under direct supervision" (CCPR /C/USA/CO/4, para. 22).

Legal positions of the European Court of Human Rights

Technological advances have changed the nature of data that can be obtained through surveillance – for example, the increased use of smartphones and related devices provide a new dimension of data, such as geolocation data and biometric data, including face and fingerprint recognition. This combination of factors means that the new digital surveillance is qualitatively and quantitatively different from the traditional surveillance or interception of communications. Where traditional data have been considered as an element of the right to privacy, as reflected in Article 8 of the ECHR, the new form of communication (data) has a broader meaning, a broader scope, affecting a wider range of human rights. Mass surveillance affects not only privacy, but also a wide range of other human rights, from freedom of expression and assembly to protection against discrimination. As p. Bernal rightly points out, "confidentiality acts as the guardian of these rights" (Bernal, 2016: 245).

The ECHR has consistently held the view that the collection and storage of personal data by the police or national security authorities constitutes an interference with Article 8 (1) of the ECHR (Malone v. the United Kingdom, Klass and Others v. Germany, Leander v. Sweden). Many other decisions of the ECHR are related to the interference in the right to privacy by conducting surveillance and observation. For example, the ECHR came to the conclusion that there has been a violation of Article 8 of the ECHR in the case of Allan v. the United Kingdom, when the authorities secretly recorded a private conversation between a prisoner in a prison cell. The court held that the use of audio and video recording devices in the applicant's cell, in the prison visit area and in relation to another prisoner constituted a violation of the applicant's right to privacy. Since there was no regulatory system in place at the time to regulate the use of secret recording devices by the police, this interference was not in accordance with the law.

Transactions involving the processing of personal data may not be subject to Article 8 of the ECHR unless the private interest or

personal life of an individual has been jeopardized. In its case law, the ECHR considers the concept of "private life" as a broad concept, covering even aspects of professional life and social behaviour. The court also notes that the protection of personal data is an important part of the right to respect for privacy (Handbook on European Data Protection Law, 2018). However, despite the broad interpretation of privacy, not all types of personal data processing in themselves jeopardize the rights protected by Article 8 of the Convention. Where the ECtHR considers that the processing operation in question affects the right of individuals to respect for private life, it examines whether such interference is justified. The right to respect for private life is not an absolute right, but must be balanced and consistent with other legitimate interests and rights.

For example, in Rotaru v. Romania the applicant alleged a violation of the right to respect for private life in connection with the possession and use by the Romanian intelligence service of a file containing his personal information. The ECHR pointed out that, while domestic legislation allows for the collection, recording and archiving in secret files of information affecting national security, it does not impose any restrictions on the exercise of these powers, which remain at the discretion of the authorities. For example, domestic legislation does not specify the types of information that can be processed with respect to individuals, as well as the circumstances in which such measures can be taken and other procedural aspects. The Court therefore concluded that domestic legislation did not meet the requirements of Article 8 of the ECHR (§ 57).

Another aspect of the protection of personal data is not only the collection of data, but also their storage. So, in Brunet v. France the complainant appealed against the storage of information in the police database containing information on convicted persons, accused persons and victims. Despite the fact that the criminal proceedings against the applicant were discontinued, the data stored in the database. The ECtHR, having found out that there had been a violation of Article 8 of the Convention, considered that in practice the applicant had not been able to delete his personal data from the database. The ECtHR also examined the nature of the information included in the database and indicated that it was intrusive into the applicant's private life because it contained personal data about the applicant. In addition, the Court found that the period of retention of personal records in a database of 20 years is excessive, especially considering the fact that no court has issued a guilty verdict to the applicant.

The collection and compilation of several types of protected information from various sources creates new human rights risks that this court cannot turn a blind eye to, given that almost everything we do leaves a digital trail. Similarly, the protection of health data is fundamental to the realization of the right to respect for private and family life, in particular when it comes to information on HIV infection.

As for the compliance of Russian legislation with the Council of Europe's Convention standards, in addition to the key ruling in the case of Roman Zakharov v. Russia, in which the ECHR found that the system of secret interception of telephone communications in the Russian Federation does not meet the requirements of Article 8 of the Convention (§ 244), other decisions will be made in the future that are important for the development of domestic practice and legislation in the field of personal data protection.

Currently, due to the adoption of a package of anti-terrorist laws in Russia, the ECHR has adopted two complaints from Telegram on the decision of the Russian authorities to block the messenger in the country. In the complaints, Telegram points out that "the Russian authorities did not even try to establish a balance between the need to counter terrorism and ensure public security and the protection of citizens' rights to respect for private life."

Protection of personal data in selected countries

Gloria González Fuster notes that, as a result of the use of the term "privacy" in the United States, this definition was subsequently integrated into the international and European legal instruments in the field of personal data

protection (Gonzalez Fuster, 2016: 9). The USA most often faces the problem of protecting users' personal data, since most of the global IT companies are registered there. In this regard, global companies are the most vulnerable and are able to transfer millions of personal data to third parties. For example, a scandal occurred when it became clear that Cambridge Analytica illegally used the data of 87 million Facebook users in the interests of the election headquarters of Donald Trump and the organizers of the campaign for the UK's withdrawal from the EU. In a letter dated June 08, 2018, Facebook had to tell the US Congress about the information that the social network collects information about its users and about the sources where it receives it. Facebook, in particular, collects and stores information about the time and duration of work in the network, information about online purchases of users; contacts from the user's address book, etc.

Section 702 of the Foreign Intelligence Surveillance Act (FISA) authorizes the intelligence services of the United States to obtain "information from foreign intelligence" targeting surveillance of persons who are not U.S. citizens abroad. The law promotes important intelligence gathering, and poses serious challenges to the privacy and data protection of non-US residents.

A certain concern is the so-called CLOUD Act (Clarifying Lawful Overseas Use of Data Act) adopted in March 2018 by the US Congress, which allows the US government agencies to enter into bilateral agreements with the authorities of other countries and obtain from it companies access to personal data of citizens stored on foreign servers, without notifying users or local authorities about the request for personal data.

This law will have a negative impact on the inter-state exchange of information during investigations conducted by the law enforcement agencies. The effect of this law will also affect the case law, in particular, currently the Supreme Court of the United States (SCOTUS) is considering a case that raises the question of whether the US Department of Justice had the right to force a company to provide e-mail clients, which is stored on the company's servers in Ireland, without the permission of the Irish government (Jeong, 2018).

Technology development also means that surveillance, which would be prohibitively expensive as well as difficult to implement at the practical level, has now become relatively simple and inexpensive and, therefore, more accessible to the state. In France, in 2015, the law No. 2015-912 was adopted, or as it was called by the French themselves "big brother Le Francais", which expanded the powers of public services to collect and store metadata "for national security purposes." Similar laws have recently been adopted in Australia (in 2015 amended the Law "On telecommunications"), Sweden (2010), Belgium (2013).

A clear example of the observation is the incident that occurred in **Ukraine** in January 2014. During the protest in Kiev, a group of people whose mobile phones indicated that they were in close proximity to the venue of the rally received text messages that they were "registered as participants in the riots" (The New York Times, 2014). Surveillance via mobile phones was used to try to intimidate people into not participating in further protests. The consequences of this observation go far beyond the right to privacy, but also affect the right to freedom of Assembly and Association.

Another serious problem is the security of connected devices. In particular, in **Germany**, government authorities banned a toy named Kayla, who was answering questions of a child playing with it; through the built-in application it was looking for answers on the Internet. After serious concerns about the impact of toys on respect for the privacy of children the German authorities found that the doll was actually a hidden spy device. This doll could record and transmit the messages through the app. If doll makers had not taken adequate security measures, the doll could have been used by anyone to eavesdrop and record conversations (Walsh, 2018).

A little later, in November 2017, the German authorities called on parents to destroy the smartwatch for children with a SIM card and a limited telephony feature that is configured and controlled by the app. In October 2017, similar-

ly, the Norwegian consumer Council (NCC) reported that "some children's watches, including Gator and GPS for children, had flaws such as transmitting and storing data without encryption." This meant that strangers, using hacking techniques, could track children as they moved or force the child to be in a completely different place.

This example is a clear example of the fact that technologies that are ahead of the law do not always meet the data protection standards. What is the violation in this case? Firstly, the companies behind these toys reserve the right to share the personal data of children with third parties. Secondly, children's data can be used for analytical and research purposes not related to the toys themselves. Thirdly, the data of children is collected and used for the purposes for which you have not obtained explicit consent. Fourth, there are no clear data storage procedures.

A striking example of arbitrariness on the part of the authorities in the implementation of illegal mass surveillance are the facts set out in the report of Human Rights Watch in relation to **Ethiopia** (Human Rights Watch, 2014). The report proves how websites of opposition parties, independent media, blogs and a number of international media are regularly blocked by government censors. Radio and television stations are constantly subject to failures. Bloggers and Facebook users face harassment and threats of arrest because of their posts.

However, targeted advances in efforts to protect personal data can be seen in some developing countries. For example, in February 2018, the Moroccan data protection authority (CNDP) organized an international conference, the purpose of which was to inform numerous participants and discuss the right to privacy and data protection, its role in African economies, supporting measures that are necessary for technological advances without risk, as well as the impact of the new international and European standards on the African continent.

An interesting proposal to support the Council of Europe was the opportunity given to the Republic of Belarus to visit the French National Commission on Informatics and Liberty (CNIL) at the stages of the draft law on data protection to discuss technical aspects of data protection and draw on experience.

Data protection in Russia

Despite the undeniable, albeit not very high-profile successes, it can be said that the period of bringing the Russian legal system into line with the Convention has not yet been completed and requires action at all levels of the national legal system. One of the challenges facing many countries today is the development of mandatory international rules for the protection of personal data and their subsequent implementation in domestic legislation.

Russian law enforcement practice and national legislation in the field of personal data protection indicate that the authorities not only do not create effective legal remedies against illegal data collection, but also pursue a policy of expanding the powers of special services for the arbitrary collection and storage of personal data.

What can be done in this situation? According to the author, the main step is the introduction to the standards of the Council of Europe, as well as the manifestation of activity in the discussion of the draft additional Protocol to the Convention 108. Despite the crisis in relations between the Russian Federation and PACE, which we hope will be resolved in the near future, the national authorities need to make proposals and comments on the modernized version of the Convention 108. In the future, it is very important to sign and ratify the Protocol to Convention 108 in a timely manner, which is intended to become an upgraded version of Convention 108 that meets modern information and communication realities and standards for the protection of personal data. At the same time, the Russian Federation needs to revise national legislation in order to adapt the protection of private life to the problems associated with the technological advances that allow mass surveillance. At the national level, appropriate technical and organizational measures should be taken to ensure the protection of personal data, ensuring compliance with the principles enshrined in the practice of the ECtHR, as well as to prevent accidental or illegal data collection. The Russian authorities

should abandon the policy of requiring the organizers of the dissemination of information to keep data on millions of citizens for 6 months, without creating appropriate legal remedies against arbitrary mass surveillance, as well as mechanisms to control the activities of the security services.

Conclusion

The protection of personal data is of primary importance for the exercise of the right to privacy and family life. In this regard, covert surveillance is even more important in the context of the development of the Internet, as it is based on the creation of programmes and methods for monitoring the transmission of information online. Telecommunication companies provide a large amount of data to government services each year in response to government demands (Brown, 2010: 95). Monitoring of the use of the Internet and telephone data by national authorities may well be at the centre of further proceedings in the ECHR.

In this regard, as a hopeful signal, it is possible to consider the recent decision of the court of Appeal of the United Kingdom (Case No C1/2015/2612, 2015), which recognized the current legislation regulating surveillance as violating the right to privacy and noted the need to bring it in line with the international human rights law.

As the Council of Europe Commissioner for human rights, Dunja Mijatovic, rightly points out, "it is extremely important to find the right balance between technological development and the protection of human rights, because the future of the society in which we want to live will depend on it". It is important to recognize that this balance requires closer cooperation between public authorities (governments, parliaments, judicial and law enforcement agencies) and private enterprises, academia, NGOs, international organizations and society at large.

Because of the need to protect millions of citizens' data, IT companies must be able to engage in dialogue with governments. It is necessary to solve three urgent questions. Firstly, the states should not have the right to request and obtain absolute access to users' data from companies without a court decision, serious grounds for a suspect's involvement in a crime that, in turn, is in the interests of national security. Secondly, the process of sending a request and receiving data from telecommunication companies should be regulated in detail and transparent. Thirdly, with regard to the question of whether special courts should be established to deal with surveillance measures, the states need to find judicial means of protecting personal data. A good option is to have special procedures to deal with confidential information before the courts. The availability of specialized judges with technical expertise would be valuable.

Taking into account the constantly developing technology implementation in the national legislation the provisions of the Convention 108 and Convention on Cybercrime (Convention on Cybercrime, 2001), will provide a unique tool to promote safety and a minimum level of adequate protection of the rights and freedoms of an individual in the face of new challenges to human rights in a constantly changing digital environment. In addition to these two fundamental acts for the protection of personal data of citizens, General Data Protection Regulation (GDPR) is of particular value, which amends and improves the principles enshrined in the previous EU Directive.

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Право на неприкосновенность частной жизни и защита данных в эпоху информационных технологий

Т.Д. Оганесян
Институт законодательства и сравнительного правоведения при Правительстве Российской Федерации
Российская Федерация, Москва

Аннотация. Рассмотрена правомерность массового наблюдения и защиты персональных данных в контексте международного права прав человека, в том числе права на уважение частной жизни. Особое внимание уделяется защите данных в интернете, где хранятся личные данные миллиардов людей. Автор подчеркивает, что массовое наблюдение и технологии, позволяющие хранить и обрабатывать данные миллионов людей, представляют серьезную угрозу для права на неприкосновенность частной жизни, гарантированного статьей 8 Конвенции о защите прав человека и основных свобод 1950 г.

Немногие компании соблюдают принципы прав человека в своей деятельности, предоставляя данные о пользователях в ответ на запросы государственных служб. В этой связи государства должны доказать, что любое вмешательство в личную жизнь является необходимым и соразмерным для решения конкретной определенной угрозы безопасности. Хранение данных, когда телефонные компании и поставщики интернет-услуг обязаны хранить метаданные о сообщениях своих пользователей для последующего доступа правоохранительных и разведыватель-

ных агентств, не представляется ни необходимым, ни пропорциональным.
Авторы анализируют законодательство некоторых стран в области защиты персональных данных, а также примеры из практики. Практика во многих государствах свидетельствует об отсутствии надлежащего национального законодательства и правоприменения, о слабых процессуальных гарантиях и неэффективном надзоре, что способствует повсеместной безнаказанности за произвольное или незаконное вмешательство в право на частную жизнь.
В заключение предлагаются меры, направленные на повышение уровня защиты персональных данных в соответствии с международными стандартами. Для обеспечения гарантий и минимального уровня надлежащей защиты данных перед лицом новых вызовов к правам человека в постоянно меняющейся цифровой среде автор предлагает решить ряд насущных вопросов. Во-первых, государства не должны иметь право запрашивать у компаний и получать абсолютный доступ к данным пользователей без судебного решения. Во-вторых, процесс отправления запроса и получения данных у телекоммуникационных компаний должен быть детально регламентирован и прозрачен. Наличие специализированных судей, обладающих техническими знаниями, будет иметь определенную ценность.

Ключевые слова: Европейский суд по правам человека, Совет Европы, защита персональных данных, обработка персональных данных, массовое наблюдение, право на уважение частной жизни.

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Information Crimes in the Structure of Russian Extremist and Terrorist Criminal Practice

Georgii L. Moskalev*
Siberian Federal University
Krasnoyarsk, Russian Federation

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Abstract. The presented article is intended to determine the share of information crimes in the ʏstructure of Russian extremist and terrorist criminal practice and, as a consequence, to propose efficient methods of countering information crimes specifically for combating these crimes in general. The solution to this problem is implemented by applying statistical analysis of official data on criminality metrics supported by legal hermeneutics and sociological methods, combined with a historical approach to the subject. It is discovered that modifications in the legal regulation of information crimes in the Criminal Code have largely led to changes in the number of registered extremist and terrorist crimes in general. The article reveals a significant share of information crimes in the structure of extremist activity. Even after a decrease in 2019, it still accounts for about a third of all extremist crimes. In the structure of terrorist activity about every 10th terrorist crime is an information crime. In the extremist criminal activity and approximately in a half of all terrorist crime cases, illegal information is generally disseminated through the Internet. In approximately 75 % of cases, the extremist or terrorism-related information is disseminated in the Internet by people aged under 30 years old. The vast majority of all convicts are unemployed people without higher education. The system for preventing dissemination of extremist and terrorist information should be retargeted to improve the legal culture, including the value of each social group, as well as the Internet communication culture.

Keywords: extremism, extremist crimes, extremism-related information, illegal dissemination of information, crime registration, statistics, national security strategy, terrorism, terrorist crimes, terrorist activity.

Research area: criminal law, criminology, penal law.

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* Corresponding author E-mail address: eucaliptus@yandex.ru
ORCID: 0000-0002-0418-0227

Introduction

More than 10 years ago, the Decree of the President of Russian Federation No. 537 approved the National Security Strategy until 2020 (*hereinafter referred to as the Strategy*). Despite the urgency of the document at the time, it set some long-term tasks. The Strategy officially established a system of priorities, goals and measures in the field of domestic and foreign policy that determine the state of national security and the level of sustainable development of the state. To support the national security, the strategic national priorities were also established. The main objectives of the state and public security policy include strengthening the role of the state as a guarantor of personal security, improving the legal regulation of preventing and combating terrorism and extremism (Paragraph 38 of the Strategy). This policy should be implemented, inter alia, by improving law enforcement measures to detect, prevent, suppress and disclose the acts of terrorism and extremism (Paragraph 36 of the Strategy).

In accordance with its full title, the strategy expires this year. The results of the implementation of the Strategy can be judged, in particular, by the official statistics of the committed terrorist and extremist crimes (Legal Statistics of the General Prosecutor's Office of the Russian Federation, 2020). In the year when the document was adopted, 654 terrorist crimes and 548 extremist crimes were registered in Russia. The number of people involved in the crimes accounts for 521 and 428, respectively. For comparison, in the year 2019 1806 terrorist and 585 extremist crimes were registered in Russia, committed by 718 and 445 identified people, respectively. Thus, for both groups of crimes, the total increase in the number of registered crimes was 1189, and the number of identified people increased by 219. The problem of countering extremist and terrorist crimes in the Krasnoyarsk Territory is particularly acute. By the end of 2019, in terms of the number of registered extremist crimes, the region was ranked fifth in Russia (to compare, in 2010 it was 38th). In general, over the past five years, the number of convicts for terrorist crimes in Russia has increased more than ninefold (Statistics: There Are 9 Times More Terrorists, 2018).

At first glance, these statistics may give rise to the idea of the insufficiency of the Strategy. However, there may be another explanation for the presented data. The number of registered crimes is directly related to the scope of acts prohibited by the Special Part of the Criminal Code of Russian Federation. The broader the prohibition, the more violations would be committed, including those that potentially could be officially registered.

In addition, Strategy evaluation results depend on the qualitative characteristics of extremist and terrorist criminal activity. The overall danger of the crimes encompassed by the statistics is not equal. Extremism and terrorism are usually associated with violence, bombs and other actions that directly threaten large groups of people. However, this domain covers a share of crimes related to the dissemination of illegal information. It is necessary to determine the share of each to propose efficient methods of countering information crimes specifically for combating terrorism and extremist crimes in general.

Theoretical framework

The way of solving this issue presented in this article is based on the results of a previous research, though it was dedicated to various aspects of the object in question.

The issue of transmitting information for terrorist purposes via the Internet is studied from several positions. Firstly, active terrorist organizations use social media to transmit secret information within their networks (Li, 2015). Investigative Data Mining (IDM) toolkit and Social Network Analysis (SNA) are used to destabilize the terrorist networks and identify the people involved in dissemination of information (Hamed, 2015). However, from the point of view of criminal law regulation, the implemented techniques only change the form of communication, not the legal judgment of criminal activities.

Secondly, the "Internet is used by international insurgents, jihadists, and terrorist organizations as a tool for radicalization and recruitment" (Theohary, Rollins, 2011). In-

deed, according to the research results, terrorist organizations are finding new recruitment methods (Hofmann, 2015). As a result of analysing the process of attracting new participants by the major terrorist organizations, the researchers conclude that the highest efficiency is demonstrated by long-term and even cyclical recruitment (Bloom, 2016). Most studies point to an ideological, mainly religious, influence (Klein, 2016) on a person during recruitment (Scorgie-Porter, 2015), and the authors call the Internet the main means of involvement (Mashechkin et al., 2016). Although the described activity consists in transmitting information, it is not the nature of the information that makes it socially dangerous. Therefore, in this study such crimes cannot be classified as information-related either.

Finally, Russian Criminal Code encompasses the *actus rea* crimes that include dissemination of specific extremist and terrorist information. Their public danger consists not only in the fact of dissemination of information, but also in the specifics of its content, which is illegal in nature. Such crimes are usually referred to as information crimes (Beliakov, 2021). Despite the existence of research on information crimes in general (Beliakov, 2021) and the way they are perceived by the society (Prieto Curiel et al., 2020), the issue of their place in the structure of extremist and terrorist criminal activity has not been studied yet.

It is known that "information crime passes through several stages from initiation to execution and commitment of the crime. The crime, however, may or may not end as desired by the actor as it may be suspended at the stage of initiation and fail to achieve its goal" (Krit, 2019). That is one of the possible reasons why *corpus delicti* of information-related extremist and terrorist crimes in Russian law does not include results of a crime as a necessary element. In other words, it is enough to commit a prohibited action itself to be liable for the crime. This is another evidence that our approach to understanding information crimes is correct: as far as their threat is the specificity of the disseminated information, there is no need to wait until the criminal goal is achieved to enforce a punishment on the offender.

It is worth mentioning that the official lists of extremist and terrorist crimes are slightly different: one is provided by the Prosecutor General's Office of the Russian Federation and the Ministry of internal Affairs of Russia, and another – by the Supreme Court of Russia. Fortunately, the crimes covered by the subject of this study are present in both lists. Among the acts prohibited by criminal law, the extremist and terrorist information crimes include:

- Public calls for terrorist activities, public justification of terrorism or propaganda of terrorism (art. 205.2 of the Criminal code of Russian Federation);
- Not reporting a terrorist crime (art. 205.6);
- Public calls for extremist activities (art. 280);
- Public calls for actions aimed at violating the territorial integrity of the Russian Federation (art. 280.1);
- Inciting hatred or enmity, as well as humiliation of human dignity on the grounds of gender, race, nationality, language, origin, attitude to religion, as well as belonging to a social group (art. 282).

Methods

To fulfil the objective of this article, several investigation methods of investigation were employed. To determine the share of information crimes in the structure of extremist and terrorist criminal activity, it is necessary, first of all, to do a statistical analysis of the official data on registered crimes. In this article, we examine the data for the years 2010-2019. This is the period of implementation of the National Security Strategy of Russia mentioned above.

Importantly, during this period, the number of information crimes in the Criminal Code of Russia varied. Many of the mentioned crimes were included in the period from 2010 to 2019. The number of the acts prohibited by the specified articles of the criminal law has also changed. Of course, these legal amendments affected the statistics. Thus, the statistical method of research should be supported by special legal methods of hermeneutics, combined with a historical approach to the study.

Expert interviews, surveys, and content analysis of information concerning the activities of non-governmental patriotic organizations are used as auxiliary research methods. They demonstrate the correlation between the statistical data, criminal law regulations and actual behaviour of individuals and organizations. The results of the study appear to be clearly demonstrated.

Discussion

The study of the issue should start with the official statistics of the registered terrorist and extremist crimes, kept by the Prosecutor General's Office of the Russian Federation. Data for the period under review are shown in Table 1.

The data shows that the number of registered terrorist crimes has been growing since 2010 and peaked in 2016. In the years 2017-2018, their number decreased, but in 2019, it returned to the value of 2017. Thus, it can be stated that in the period 2017-2019, the dynamics of changes in registered terrorist crimes has stabilized.

The changes in the number of the registered extremist crimes look different. In the period of 2010-2017, their number has been consistently growing. The decrease in the number of registered extremist crimes in 2018 was insignificant. At the same time, the 2019 figure seems striking. The level of registered extremist crimes in the past year compared to 2018 dropped by more than two times to be the lowest value for the entire period under review.

These changes in the official statistics of registered crimes can be explained by the modernization of criminal legislation in 2010-2019. The broader the scope of the criminal law, the more crimes are registered. Thus, the reason for the increase in the number of crimes committed may be the process of criminalization, and the decrease in their number, on the contrary, refers to decriminalization.

Over the past few years, the Criminal Code of the Russian Federation has included many articles envisaging liability for actions accompanying extremist and terrorist activities. These new crimes have complemented the content of the extremist and terrorist crimes.

The boundaries of the criminal law prohibition established by the articles of the Criminal Code of the Russian Federation that provide for liability for committing extremist crimes did not change significantly in 2010-2017. However, new extremist crimes appeared. In 2013, Article 280.1, providing for liability for public calls for actions aimed at violating the territorial integrity of the Russian Federation, was introduced into the Code. In 2014, the Code incorporated Article 282.3 on liability for financing extremist activities. At the end of 2018, the disposition of Article 282 was modified. As a result, the least dangerous forms of incitement to hatred or enmity, as well as humiliation of human dignity, were decriminalized and transferred to the scope of administrative offences. As a consequence, the statistics of registered crimes in 2019 did not include the first committed actions aimed at inciting hatred or enmity, in 2018 and before, they were regarded as extremist crimes. At the same time, as it has been mentioned above, in 2019 only 585 extremist crimes were registered, which is 700 less than in the previous year. It is appropriate to assume that 6 out of 10 extremist crimes in 2018 were decriminalized acts, previously covered by Article 282 of the Criminal code of the Russian Federation.

Changes in the terrorist crimes look different compared to the extremist ones. The analysis of articles on liability for terrorist crimes discovers that in this branch of criminal law, no

Table 1

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Number of registered terrorist crimes	581	622	637	661	1128	1539	2227	1871	1679	1806
Number of registered extremist crimes	656	622	696	896	1034	1329	1450	1521	1265	585

decriminalization was carried out. The amendments introduced to most of the articles were intended to change the limits of possible punishment or clarify the wording, but not to establish criminal liability for the acts that had not been previously considered to be a crime. At the same time, there are acts that still fall within the scope of the criminal prohibition, mainly due to the introduction of new articles in the Criminal Code of the Russian Federation. In 2013, Article 205.3 criminalized training for terrorist activities; Article 205.4 criminalized organization of terrorist community and participation in such; Article 205.5 covered organization of terrorist organization activities and participation in such; Part 2 of Article 208 provided for liability for participation in an armed formation on the territory of a foreign state not provided for by the legislation of that state for any purposes contrary to the interests of the Russian Federation. These changes made an impact on statistics: the number of registered terrorist crimes in 2014 was almost 2 times higher than in 2013. In 2016, Article 205.6 proclaimed liability for not reporting a terrorist crime; this is the only considered information crime that envisages liability not for the dissemination of illegal information, but for malicious non-reporting of relevant information. In 2017, Article 205.2 was supplemented with a provision on propaganda of terrorism, which is one of the ways of illegal dissemination of terrorism-related information foreseen by the Code.

Thus, there is a correlation between the number of acts prohibited by the Criminal Code of the Russian Federation and changes in the statistics of registered extremist and terrorist crimes. It should be noted that among all the changes in the criminal law concerning liability for terrorist and extremist crimes, the introduction of Articles 280.1, 205.2, 205.6 in the Code, as well as the change in the boundaries of the criminal law prohibition in Article 282, relate to information crimes. It is easy to see that most of the changes to the Code mentioned are modifications of the said articles. Therefore, the value of information crimes in the structure of extremist and terrorist criminality in Russia is more than significant: modifications in the legal regulation of these crimes in the Russian Criminal Code have caused a dramatic change in the number of registered extremist and terrorist crimes.

At the same time, this preliminary conclusion does not allow us to estimate the share of the information crimes in the system of extremist and terrorist criminal activity. Unfortunately, the official statistics of registered crimes are not broken by articles of the Russian Criminal code. However, this information can be obtained from the statistics on the number of convicted people maintained by the Judicial Department of the Supreme Court of the Russian Federation. Since the current state of crime rate is of the greatest interest, we will examine the values for the period of 2017-2019. The number of people convicted of information extremist crimes is presented in Table 2.

From the data presented in the table, it may be concluded that the number of convicts under Article 280 slightly decreases every year, and public calls for actions aimed at violating the territorial integrity of the Russian Federation (Article 280.1) hardly makes any difference in the total number of convicts for information extremist crimes. The most statistically significant phenomenon was the fall in the number of convicts under Article 282 in 2019. We have previously mentioned that at the end of 2018, the disposition of Article 282 was modified by

Table 2

	2017	2018	2019
Art. 280	170	159	145
Art. 280.1	8	10	4
Art. 282	571	518	36
Total	749	648	185

decriminalization of the 1st time committed incitement to hatred or enmity, as well as humiliation of human dignity. We have just seen how this legislative manoeuvre affected the registered extremist crimes statistics. Along with the presented data, this fact proves a direct correlation between the number of registered crimes and that of convicted people. This correlation is described in the following numbers:

– in 2017, for 1521 registered extremist crimes, there were 749 people convicted of information extremist crimes (49.2 %);

– in 2018, for 1265 registered extremist crimes, there are 648 people convicted of information extremist crimes (51.2 %);

– in 2019, for 585 registered extremist crimes, there are 185 people convicted of information extremist crimes (31.6 %).

Therefore, information crimes constitute a significant share in the structure of extremist criminal activity. In 2019, it decreased due to legislative changes to Article 282, but still accounts for about a third of all extremist crimes.

Next, we will analyse the number of people convicted of information terrorist crimes, in accordance with the data presented in Table 3.

The presented data discloses the trend of a slight increase in the number of people convicted of information terrorist crimes. The correlation between the numbers of registered terrorist crimes and those of people convicted of information terrorist crimes is the following:

– in 2017, for 1871 registered terrorist crimes, there were 115 people convicted of information terrorist crimes (6.1 %);

– in 2018, for 1679 registered terrorist crimes, there were 175 people convicted of information terrorist crimes (10.4 %);

– in 2019, for 1806 registered terrorist crimes, there were 180 people convicted of information terrorist crimes (9.9 %).

Thus, in the structure of terrorist criminal activity, information crimes are not as significant, but still about every 10th terrorist crime is information-related.

Based on the objective statistic data, our hypothesis that information crimes constitute a significant part in the structure of extremist and terrorist criminality brought together is confirmed by the interviewed advocates practicing in this field. In the field, there are just a few of them. According to their personal observations, in the Krasnoyarsk Territory, a large part of committed extremist and terrorist crimes are associated with illegal dissemination of information. This explains why the Krasnoyarsk Territory which, fortunately, has never suffered a terrorist attack, consistently ranks high in terms of the number of registered extremist and terrorist crimes. In accordance with Federal State Statistics Service data, the vast majority of the local residents have access to the Internet, which allows them to exchange any information, including illegal.

Unfortunately, the statistics do not contain any objective data on how many information crimes were committed by disseminating illegal information in the Internet. However, a reasonable assumption can sometimes be made from the legal qualification of the act. For example, according to the official data, out of 170 people convicted under Article 280 in 2017, 140 were found guilty under Part 2 of this Article, which envisages liability for public calls to extremist activities distributed in the media or on the Internet. Under Part 2, 140 people out of 159 were convicted in 2018 and 132 out of 145 were convicted in 2019. Article 205.2 has a structure similar to Article 280 of the Code: in Part 2, it foresees liability for public calls for terrorist activities, public justification of terrorism or propaganda of terrorism committed

Table 3

	2017	2018	2019
Art. 205.2	96	120	126
Art. 285.6	19	55	54
Total	115	175	180

by disseminating this information in the media or on the Internet. According to the official data, under Part 2 of Article 205.2, in 2018, 52 people were convicted under the article out of 120, and in 2019, 69 out of 126. Therefore, the objective data confirm that the dissemination of illegal information during commission of information crimes is carried out through the Internet, while this mostly relates to extremist crimes.

According to the data obtained from interviewing the Antiterrorist Commission of the Krasnoyarsk Territory, 70 % of information crimes are committed by people aged under 30. This data is surprisingly confirmed by the statistics of activity in vk.com, the most popular social network in Russia. The most active authors of unique content in this social network, constituting approximately 70 % of the content writers, have not reached the age of 30. At the same time, researchers note that in 90 % of convictions of information-related extremist crimes, the information was transmitted remotely through VK.com social network. (Ivantsov et al., 2018). Consequently, there is a direct correlation between the share of extremist crimes committed by people under 30 and the share of authors of unique content in the social network that have not reached the age of 30. This means that the determinants of extremist criminal activity depend no on the age of the criminals, but their activity in Internet.

According to the report on demographic characteristics of convicts for 2019, the Judicial Department of the Supreme Court of the Russian Federation, 75.8 % of people convicted of public calls for extremist activities in the media or on the Internet are people under the age of 30. The share of people convicted of public calls for terrorist activities, public justification of terrorism or propaganda of terrorism committed by disseminating this information in the media or on the Internet aged under 30 constitutes 72.8 %. According to statistics, the vast majority of all convicts are unemployed people without higher education.

So, the reasons for the disappointing statistics of extremist activity are easier to find within the youth community, since the share of youth in the statistics is simply higher.

Firstly, people simply do not know how to distinguish between extremist and non-extremist information. A survey of 100 people aged 17-21 years old conducted by the authors in spring 2018 demonstrated that only one person out of 50 can name at least several distinctive features of extremism or extremist information. This situation is explained with several reasons.

− There is no definition of extremism in the legislation, and the distinctive features of extremist information can be found only by interpreting the provisions of the criminal law and its enforcement practice. Of course, none of the ordinary citizens do this. In addition, the extremist nature of information can often be discovered only by an expert linguist. Judges constantly turn to such experts, investigating extremist and terrorist crimes.

− Officers of Centre “E” of the Main Department of the Ministry of internal Affairs of Russia for the Krasnoyarsk Territory engaged in countering extremism, in the course of their activities in 2018, offered young citizens checking any information they were going to publish online using a corpus of extremist materials banned by the courts of Russia (Federal List of Extremist Materials). However, this recommendation does not make sense. At the present moment, the corpus contains over 5000 titles of prohibited information. But even if we learn them by heart, there will be no guarantees that extremist information would not be disseminated. The criminal law prohibits the dissemination of any information of such nature, not only the specific items previously banned by the courts.

Secondly, people do not care much about the information that can be found online. During our survey, a simple example of a text containing an insult of a small social group was presented for examination. Interestingly, the respondents found it suitable for publishing online, but considered it consider it inappropriate for broadcasting on television.

Conclusion

It is customary to believe that an efficient way of preventing such crimes is the improvement of the monitoring of the existing and

emerging Internet resources, including timely blocking and removal of extremist components (Ivantsov et al., 2018). There is no need to deny the necessity of such surveillance measures. However, in our opinion, it is not enough to combat extremist and terrorist information crimes. As we can see in the article, their determinants are different.

The measures to be taken to prevent the illegal dissemination of extremism and terrorism-related information are pretty obvious. There should be a system of classes to improve legal culture, including the value of each national, ethnic, religious, ideological or other social group, as well as online communication culture.

At the moment, there are so-called patriotic organizations try running activities to combat the extremist crimes.

In practice, this means teaching young people the skills they may need for military service: practical shooting skills, drill training, ability to serve arms, chemical protection skills, mountain training and so on. Such activities are, indeed, an important and necessary component of pre-conscription training. However, in the absence of a proper ideological base, the efforts of these organizations can benefit the opposite side. The same knowledge and skills can strengthen illegal armed groups, extremist and terrorist organizations.

In other words, this is not the speed of assembly and disassembly of the gun, the accuracy of shooting, camouflage outfit or the availability of drill training that distinguishes a patriot from a terrorist (they may have all these features in common). It is the purpose of their activity that makes them different. Unfortunately, the local patriotic organizations have not accepted this postulate yet. In particular, the official website of a large military and patriotic organization of Krasnoyarsk presents the review of the events organized for their members, including a relay race, a paintball competition, a small-calibre rifle shooting competition, multiple wrestling competitions, film sessions, climbing competitions, territory cleaning events, mountain-assault training competitions. There is no need to explain that these activities aimed at the physical development do not include any value orientation or improvement of digital communication culture.

Therefore, to prevent the dissemination of extremist and terrorist information, the approach to the system needs to be reviewed. Considering the share of information crimes in the structure of extremist and terrorist activity, the efficiency of this system can significantly reduce the number of committed crimes and people involved in the criminal world. Otherwise, the changes in the numbers of registered crimes will still depend mainly on the changes in the Russian Criminal code, and not on changes in the actual behaviour of the society.

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Информационные преступления экстремистской и террористической направленности в структуре российской преступности

Г.Л. Москалев
Сибирский федеральный университет
Российская Федерация, Красноярск

Аннотация. Целью статьи является определение доли информационных преступлений в структуре экстремистской и террористической преступности в России. Ее (цели) достижение осуществляется путем применения статистического анализа официальных данных о показателях преступности, подкрепленного методами юридической герменевтики, социологическими методами в сочетании с историческим подходом к предмету исследования. Установлено, что изменения в правовой регламентации информационных преступлений в Уголовном кодексе РФ в значительной степени привели к изменению количества зарегистрированных экстремистских и террористических преступлений в целом. В работе продемонстрировано, что в структуре экстремистской преступности доля информационных преступлений значительна. В 2019 г. она снизилась, но по-прежнему составляет около трети всех преступлений экстремистской направленности. В структуре террористической преступности примерно каждое 10-е преступление является информационным. Распространение информации осуществляется главным образом через интернет при совершении преступлений экстремистской направленности и половине случаев совершения информационных преступлений террористической направленности. Примерно в 75 % случаев распространение экстремистской или террористической информации в интернете осуществляется лицами, не достигшими 30-летнего возраста. Подавляющее большинство всех осужденных – безработные, не имеющие высшего образования. Система предупреждения распространения экстремистской и террористической информации должна быть переориентирована на повышение правовой культуры, в том числе ценности каждой социальной группы, а также на повышение культуры общения в интернете.

Ключевые слова: экстремизм, преступления экстремистской направленности, информация экстремистского содержания, незаконное распространение информации, регистрация преступлений, статистика, терроризм, преступления террористической направленности, террористическая деятельность.

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Genesis of the Norm on Criminal Liability for Hostage Taking in Domestic Law

Anna V. Serebrennikova[a] and Maksim V. Lebedev[b]*
[a]*Lomonosov Moscow State University*
Russian Federation, Moscow
[b]*Gubkin Russian State University of Oil and Gas*
(National Research University)
Russian Federation, Moscow

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Abstract. The widespread prevalence of terrorist crimes, as well as the problems of qualifying hostage taking and demarcation from related crimes, are currently relevant for scientific research. The theoretical and practical aspects contained in the norm on criminal liability for hostage taking have had a long and ambiguous history; they require studying the genesis of the norm on hostage taking and the practice of its application. The work contains only significant records of domestic jurisprudence, containing norms on criminal liability for hostage taking from origins up to the present. Methodology: deduction, induction, methods of synthesis, analysis, historical and formal logical research.

Conclusions: 1. The history of the application of the norm on criminal liability for hostage taking is fraught with qualification problems at all stages. These problems are ambiguous and are expressed by the fact that the legislator, under the influence of external and internal factors, makes mistakes in the systematization and codification of the criminal law, often losing the line between the norm and related crimes. As for external factors, in our understanding they are also the norms of international law on hostage taking, which, influencing the national law of the USSR, went through the stages of their development, creating norms by trial and error. For example, the rule did not apply if the taking occurred within the same state and the hostage and the perpetrators were its citizens.

2. The analysis of official statistics starting from the single crimes of the Soviet period, the post-perestroika mass crime boom of the 90s of the last century caused by the political crisis, ending with the statistical recession and the relatively well-coordinated work of state structures of the 2000s allows us to conclude that there are calculus flaws.

3. The introduction of the category of public safety has led to a significant decrease in statistical indicators, due to qualifications through related crimes. In this regard, according to lawyers, the reduction in hostage taking has a technical or static character. This led to a proportional increase in qualifications in related crimes.

Scientific and practical significance: The study presented in the article gives an ontological

* Corresponding author E-mail address: serebranna@hotmail.com, 3g4g@mail.ru
ORCID: 0000-0002-1064-4171 (Serebrennikova); 0000-0001-7199-5277 (Lebedev)

idea of the development of the norm, reveals the technique of law making in the design of the norm on hostage taking. The conducted research is based on the materials of judicial practice in specific criminal cases, which may be of interest to researchers of this norm. These examples show the presence of law enforcement errors in the qualification of terroristic crimes, which can be perceived by practitioners as educational material.
The article can serve as a source of scientific information for students of law schools, graduate students and applicants, as well as for researchers involved in the study of the national criminal law of the Russian Federation.

Keywords: Criminal Code, qualification problems, criminal liability, genesis of the norm, public safety, terrorist act, hostage taking, hijacking of an aircraft.

Research area: law.

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At the time of this writing, another message about the taking and killing of hostages appeared in the news agencies' feeds, this time it came from prosperous Switzerland. On 31 May 2019, in Zurich, an armed man took and held two women. Negotiations with the police failed, the criminal killed the hostages and then committed suicide[1]. In January of this year, another incident occurred at a branch of Suntrust Bank in Sebring, Florida[2]. Similar events often began to occur in other countries. At the same time, in the context of this study, we are interested in the connection between this crime and terrorism, which is carried out in legislation and can be traced in criminal law doctrinal studies, although it is not always observed in practice, as, for example, in the two recent cases mentioned above.

The criminal law literature usually uses the term "hostage" to mean an individual who is taken and further detained to compel the authorities, organizations or individuals to perform or not to perform a certain action under the threat of murder, harm, or further detention of the taken person[3]. From the standpoint of a civilizational approach, i.e. from a moral and ethical point of view, hostage taking is traditionally recognized as "one of the most unworthy crimes."[4]

In accordance with the International Convention against the Taking of Hostages[5] (hereinafter – the Convention), the taking of hostages is considered a manifestation of international terrorism. So it established that anyone who takes or holds a hostage, threatening with murder, bodily harm in order to force a third party (a state, an international organization, an individual or legal entity to perform or not to perform certain actions as a condition for the release of the hostage) commits the crime of taking a hostage.

[1] *Drei Tote in Zürcher Wohnung nach Schiesserei. SRF*. (2019). Available at: https://www.srf.ch/news/schweiz/geiselnahme-in-zuerich-drei-tote-in-zuercher-wohnung-nach-schiesserei (accessed 30 September 2019)

[2] Several people were injured while taking hostages and shooting at a bank in the USA (2019). In *REN TV* [*REN TV*]. Available at: https://ren.tv/novosti/2019-01-23/neskolko-chelovek-raneny-pri-zahvate-zalozhnikov-i-strelbe-v-banke-v-ssha (accessed 12 October 2019).

[3] International Convention against the Taking of Hostages. Adopted by UN General Assembly Resolution 34/146 of December 17, 1979. Available at: https://www.un.org/ru/documents/decl_conv/conventions/hostages.shtml (accessed 5 October 2019).

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[5] Adopted by UN General Assembly Resolution 34/146 of December 17, (1979). Available at: https://www.un.org/ru/documents/decl_conv/conventions/hostages.shtml (accessed 22 October 2019).

The Russian legislator made a similar determination in the disposition of Part 1 of Art. 206 of the Criminal Code of the Russian Federation. These actions are punishable by 5-10-year imprisonment, and in the presence of qualifying signs of the crime – by 6-year imprisonment up to life sentence. In accordance with the Note to this article, a person who voluntarily or at the request of the authorities released a hostage is exempted from criminal liability, provided that there is no other corpus delicti in his actions.

The criminalization of these acts and the sanctions stipulated in Russian criminal legislation are in accordance with international law on the basis that the UN classifies hostage taking as crimes "of serious concern to the international community."[6] In this regard, and also on the basis of the Convention in question, the person who took the hostage is liable to criminal prosecution or extradition.

This is primarily due to the fact that the right to life, health and freedom of expression are universally recognized fundamental human rights. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms proclaims the right of everyone to life, which no one can be deliberately deprived of (Part 1 of Art. 2). No one should be subjected to torture, inhuman or degrading treatment, or punishment (Art. 2). In accordance with the Convention, no one should be held in slavery or other servitude (Part 1 of Art. 3). Thus, a person has the right to freedom, which can be limited only in accordance with criminal and criminal procedure law (Part 1 of Art. 4)[7]. Part 1 of Art. 20, Part 1 of Art. 22, Part 1 of Art. 23 of the Constitution of the Russian Federation of 1993 guarantee these rights. The state undertook obligations to ensure and protect them. Taking hostages grossly violates these rights in unlawful interests. In this regard, Russian researchers are generally unanimous that "the norm on liability and punishment for hostage taking is borrowed by domestic criminal law mainly from public international law."[8]

The implementation of the analyzed norm in the domestic legislation of our country has taken place relatively recently. Note that the norms establishing criminal liability for hostage taking appeared already in the early acts of the feudal period, such as the Pskov Judgment Book, the Code of Laws of 1497, the Code of Laws of 1550, the Cathedral Code of 1649, the Military Code of Peter I of 1715, which provided for punishment for similar crimes.

In the days of the Russian Empire, criminal law doctrine first mentioned such a crime as kidnapping. In particular, the works of P.I. von Feuerbach, published in St. Petersburg in 1810 considered these crimes among others. They included the modern understanding of hostage taking[9].

The Code of Laws of the Russian Empire in 1832, as well as the Code of Criminal and Correctional Punishments of 1845 in Articles 1540-1544 provided penalties for detention, abduction and unlawful confinement, which were defined as "willful deprivation of freedom of movement through unlawful taking of the person." Abduction was understood as "physical capture ... with various purposes", which the law differentiated "by property" "into the slave trade, the concealment or change of the origin of the infant and the abduction of women."[10] The last Russian Criminal Code of 1903 in Ch. 26 "On Criminal Acts Against Personal Freedom" also provided for articles (Articles 498-512), providing for

[6] Ibid.

[7] The official text on the official website of the European Convention for the Protection of Human Rights. Available at: www.echr.ru/documents/doc/2440800/ 2440800-001.htm (accessed 5 October 2019).

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[9] Foynitsky, I.Ya. (1900). *Kurs ugolovnogo prava* [*Criminal law course*]. St. Petersburg, 86-88 p.

[10] Tagantsev, N.S. (1909). *Ulozhenie o nakazaniiakh ugolovnykh i ispravitel'nykh 1885 goda* [*The Legal Code of Criminal and Correctional Sentences (1885)*]. St. Petersburg, 881p.

criminal liability for crimes against personal freedom called kidnapping[11].

The Soviet criminal law did not contain special provisions on the taking of hostages. The Criminal Code of the RSFSR of 1922[12] (Art. 159) contained a norm on criminal liability for violent unlawful deprivation of liberty in the form of detention or retention. It also provided for punishment for imprisonment in a manner dangerous to life or health, or accompanied by torment (Art. 160 of the Criminal Code of the RSFSR). Criminal liability for kidnapping with a mercenary or other illegal purpose, concealment or substitution of a child was introduced (Art. 162).

The Criminal Code of the RSFSR of 1926 provided for punishment for violent unlawful imprisonment (Art. 147), including in a manner dangerous to life or health, or accompanied by the infliction of physical suffering. Also, the norm on the abduction, concealment or substitution of a child (Art. 149)[13] was maintained. At the same time, these norms did not contain any signs of a modern understanding of hostage taking crime. Perhaps, this is due to the fact that such crimes were not typical for the USSR and the norms on abduction were sufficient for the Soviet law enforcement officer at that period.

In addition, one cannot fail to take into account that the NKVD-GPU-NKGB bodies actually used the practice of taking hostages, arresting family members of persons accused or suspected of committing state (political) crimes, or persons who held positions of responsibility and thus seeking to prove their loyalty ... For the example, the arrest and exile (1949-1953) of P.S. Zhemchuzhina, the wife of the Deputy Chairman of the Council of People's Commissars and Minister of Foreign Affairs of the USSR V.M. Molotov, was notoriously absurd[14]. In fact, she was taken hostage, and Molotov, while continuing to remain the second person in the state, had to prove his loyalty.

The 1960 Criminal Code of the RSFSR[15] retained criminal liability for the abduction (substitution) of a child for any purpose (Art. 125 of the RSFSR Criminal Code), as well as illegal imprisonment, including with danger to life or health, accompanied by the infliction of physical suffering (Art. 126 of the Criminal Code of the RSFSR).

Russian researchers explain the absence of special criminalization of hostage taking in Soviet criminal law by the fact that this crime was then (until the mid-1980s) "quite rare"[16]. It is difficult to agree with this position. The taking of hostages, as a percentage of other common crimes, was really negligible, but the cases that took place were repeated annually, tended to grow and were the most dangerous to the public. According to our calculations, in the 1970s, the USSR annually recorded an average of 5-6 cases of hijacking, accompanied by hostage taking[17]. The already mentioned taking and hijacking of An-24B (Batumi-Sukhumi flight) to Turkey on October 15, 1970 by the father and son Brazinskas is best known[18]. This forced the Soviet legislator on January 3, 1973 to introduce criminal liability for the hijacking of an aircraft (Art. 213.2 of the RSFSR Criminal Code), which from that moment was qualified independently. Additionally, all flights were accompanied by armed police officers.

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[11] Pertli, L.F. (2011). Pravovoe regulirovanie uslovii soderzhaniia zakliuchennykh v Rossiiskoi imperii [Legal regulation of prisoners' conditions in the Russian Empire]. In *dissertatsiia kandidata iuridicheskikh nauk* [*Thesis for a PhD Degree in Law Sciences*]. Vladimir, 11 p.

[12] Criminal Code of the RSFSR. (1922). 15, Art. 153.

[13] Collection of legalizations of the RSFSR. (1926), 80. Article. 600.

[14] She was accused of "being in a criminal relationship with Jewish nationalists, she conducted enemy work against the party and the Soviet government." All her relatives were also arrested, some of whom died as a result of torture. Kostyrchenko, G.S. (2009). Stalin protiv «kosmopolitov». Vlast′ i evreiskaia intelligentsiia v SSSR [Stalin against the "cosmopolitans". Power and Jewish intelligentsia in the USSR]. In *ROSSPEN [ROSSPEN]*. Moscow, 415 p.

[15] The Criminal Code of the RSFSR. In *Vedomosti VS RSFSR*. (1960). 40. Art. 591.

[16] Kiselev, E. P., The emergence and development of the criminal law norm "hostage taking" in domestic law. In *Institute Herald: crime, punishment, correction*, 4 (36). 19-23p.

[17] 1970 – 5 hijackings (including attempts), 1971 – 5; 1976 – 3; 1977 – 5; 1978-7; 1979 – 4; 1980 – 5; 1982 – 3; 1983 – 5; 1984 – 4 etc. The record was set in 1990-31 incidents / Komissarov, V.S. (2009). Vozdushnye piraty Strany Sovetov [Air pirates of the Country of Soviets]. In *Aviatsiia i vremia* [*Aviation and time*], 5.

[18] Gubarev, O.I. (2006). Vozdushnyi terror: khronika prestuplenii [Air terror: a chronicle of crimes]. In *Veche* [*Veche*]. Moscow, 320 p.

Criminalization and additional measures did not change the situation. Already on May 18 of the same year, the Tu-104A (Irkutsk-Chita) was hijacked. An escorting policeman shot the terrorist, but a powerful improvised explosive device destroyed the plane, killing 72 passengers and 9 crew members[19].

In this regard, it is difficult to agree with the position that the taking of civilian planes and passengers as hostages "were isolated" and, due to their rarity, "did not pose a public danger on a national scale."[20] At the same time, the increase in riots in Soviet correctional institutions was almost always accompanied by the taking of hostages, after which the latter began to be recognized as dangerous[21].

Around the same time, in the late 1970s, the international community recognized hostage taking as a serious crime[22]. The UN General Assembly in 1979 adopted the International Convention on the Taking of Hostages[23], which, however (Art. 13), was not applied when the taking was committed within one state and the hostage and the perpetrators were its citizens. Thus, international law considered hostage taking as crimes provided for by both international and national criminal law.

The USSR ratified this Convention in 1987 and introduced the corresponding norm into the Criminal Code of the RSFSR – Art. 126.1.[24] The disposition of the then adopted version of the original contained an indication of the taking or retention of a person as a hostage, in the presence of a threat of murder, infliction of injury or continued detention in order to force a state, an international organization, an individual or legal entity, or a group of persons, as a condition for the release of the hostage, to perform (not perform) the action specified by the invader.

It is important that the note introduced in accordance with Art. 13 of the Convention of 1979 hindered the effective implementation of the original version. This restriction extended to cases of taking a hostage – a citizen of a foreign state, while the taking of a citizen of the USSR was not qualified as a hostage taking, but as an illegal imprisonment (Art. 126 of the RSFSR Criminal Code, 1960). In the first case, the sanction could reach 15 years in prison, while in the second – only three years. In addition, this norm could not be applied when taking hostages on the territory of the USSR, if citizens of the USSR became such, and the invaders were also Soviet citizens. In this sense, essentially identical acts had significantly different legal assessments[25], far from fully fulfilling the function of criminal law protection of the relevant relations.

At the turn of 1980-1990 the growth of phenomena that were characteristic of the socio-economic and political crisis, the prevalence of hostage taking in detention facilities, as well as the taking of hostages from among the first entrepreneurs and members of their families, with the aim of extorting ransom, forced the Russian legislator to amend the Criminal Code of the RSFSR[26]. The note was removed from Art. 126.1, which extended the effect of the corpus delicti to all types of its commission, which now did not depend on the citizenship of the hostage and the hijacker. The innovation dramatically changed the statistics. The number of registered hostage taking cases increased by 17 times. If in 1991 there were no cases at all, in 1992 there were

[19] Drozdov, S.I. (2009). Vozdushnye piraty Strany Sovetov [Air pirates of the Country of Soviets]. In *Aviatsiia i vremia* [*Aviation and time*], 3.

[20] Severin, Yu.D. (1980). *Kommentarii k Ugolovnomu kodeksu RSFSR* [*Commentary on the Criminal Code of the RSFSR*]. Moscow, 258 p.

[21] Kozlova, N.N. (1992). Ugolovnaia otvetstvennost′ za zakhvat zalozhnikov [Criminal liability for hostage taking]. In *dissertatsiia kandidata iuridicheskikh nauk* [*Thesis for a PhD Degree in Law Sciences*]. Moscow, 67 p.

[22] Ovchinnikov, S.N. (2015). Pozhiznennoe lishenie svobody v pravovykh sistemakh FRG i Rossii: sravnitel′no-pravovoi analiz [Life imprisonment in the legal systems of Germany and Russia: comparative legal analysis]. In *Bulletin of the Volgograd Academy of the Ministry of Internal Affairs of Russia,* 3 (34). 206 p.

[23] Resolutions and decisions adopted by the General Assembly at the 34th session. New York, (1980).

[24] Vedomosti of the Supreme Council of the RSFSR. (1987), 30. Article 1087.

[25] Belous V.G., Golodov P.V., Pertley L.F. (2015). Pravoprimenitel′naia sistema Rossii v sovremennoi istoriografii [The law enforcement system of Russia in modern historiography]. In *Aktual'nye voprosy obrazovaniia i nauki* [*Topical Issues of education and science*], 3-4. 42-51.

[26] The Law of the Russian Federation of February 18, (1993) 4512-1 "On Amendments and Additions to the Criminal Code of the RSFSR".

only 3 cases, in 1993 – 51 cases, in 1994 – 118 cases, then in 1995 there were already 11316 cases[27].

The article used in this case was included in Ch. 3 of the Criminal Code of the RSFSR "Crimes against life, health, freedom and dignity of the individual", respectively, the generic object was defined as relations that ensure life, health and dignity of the individual. The immediate object was personal freedom. This position was doctrinally confirmed[28]. At the same time, the totality of objective and subjective signs of hostage taking testified that this socially dangerous act gravitates towards the sphere of crimes against public safety, which was taken into account in the new Criminal Code of the Russian Federation in 1996. The norm on hostage taking (Art. 206) here was placed in Ch. 24 "Crimes Against Public Safety." Thus, the species object was defined as a public safety relationship.

According to E.P. Kiselev, this was the reason for the decrease in the number of acts classified as "hostage taking." The author refers to criminological research. So, in 1997 there were 114 registered cases, in 1998 – 69 cases, in 1999 – 64 cases, in 2000 – 49 cases, in 2001 – 32 cases. According to E.P. Kiselev, the decline was purely statistical, since the total set of similar crimes was redistributed according to similar crimes:

– kidnapping (Art. 126 of the Criminal Code of the Russian Federation) (in 1997 – 1140, in 1998 – 1415, in 1999 – 1554, in 2000 – 1291, in 2001 – 1417);

– illegal imprisonment (Art. 127 of the Criminal Code of the Russian Federation) (in 1997 – 101, in 1998 – 1278, in 1999 – 1417, in 2000 – 1365, in 2001 – 1314)[29].

According to statistics from the Judicial Department under the Supreme Court of the Russian Federation, 5-6 hostage taking cases, about 340 kidnappings and about 200 illegal imprisonment were committed annually in Russia in 2015-2018[30]. At the same time, based on the fact that according to statistics, in more than 80% of cases, hostages in Russia are taken with the use of weapons or other items[31].

In connection with the international recognition of terrorism as one of the global challenges, in the Russian literature, when discussing the issues of minimizing security threats in the form of terrorism, extremism, religious radicalism, there were proposals to adjust the structure of Section 9 of the Criminal Code of the Russian Federation, singling out "Terrorist crimes", which mean terrorist acts, hostage taking, as well as for some reason banditry, the organization of an illegal armed group[32], which may not be related to terrorism, in a separate chapter.

At the same time, taking into account the lack of a legal definition of a "crime of a terrorist nature", these proposals are criticized from the position that the hostage taking is fully covered by the components of a terrorist act. Yu.S. Gorbunov proposed here to proceed from the differentiation of crimes related to terrorism:

1) the acts themselves – Art. 205 of the Criminal Code of the Russian Federation ("Terrorist act"), Art. 206 of the Criminal Code of the Russian Federation ("Hostage taking"), Art. 211 of the Criminal Code of the Russian Federation ("Hijacking of an aircraft or water transport or railway rolling stock");

2) assistance to such acts – Art. 205.1 of the Criminal Code of the Russian Federation ("Assistance in terrorist activities"), Art. 205.2 of the Criminal Code of the Russian Federation

[27] Kiselev, E.P. Op. cit.

[28] Kozlova, N.N. (1992). Nekotorye voprosy sovershenstvovaniia ugolovno-pravovoi normy o zakhvate zalozhnikov [Some issues of improving the criminal law on hostage taking]. In *Pravovye problemy deiatel'nosti organov vnutrennikh del v sovremennykh usloviiakh* [*Legal problems of the activities of internal affairs bodies in modern conditions*]. Moscow, 78 p; Loskutov, A.G. (1992). On the issue of criminal liability for hostage taking. In *Improving the activities of internal affairs bodies in the context of legal reform*, Moscow. 2, 45 p; Lysov, M. (1994). Responsibility for illegal imprisonment, kidnapping and hostage taking. In *Russian Justice*, 5. 40-41 p.

[29] Kiselev, E.P., Op. cit.

[30] Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Council of the Russian Federation (1993), 10. Art. 362.

[31] Antsiferov, K.P. (2003). *Otvetstvennost' za zakhvat zalozhnika (ugolovno-pravovoi i kriminologicheskie aspekty)* [*Responsibility for hostage taking (criminal law and criminological aspects)*]: *thesis for a PhD Degree in Law Sciences*. Moscow, 18 p.

[32] Kashepov, V.P. (2005). Ob osobennostiakh sovremennogo ugolovno-pravovogo zakonotvorchestva [On the features of modern criminal law-making]. In *Zhurnal rossiiskogo prava* [*Journal of Russian Law*], 4. 19 p.

("Public calls for terrorist activity or public justification of terrorism")[33].

In any case, in spite of the absence of a legally fixed definition of a "crime of a terrorist nature," the doctrine suggests that hostage taking should be considered a terrorist crime[34]. S.A. Chernykh recognizes this act as "directly and indirectly related to terrorism and terrorist activities", referring to Art. 3 of the Federal Law of March 6, 2006 No. 35-FZ "On Countering Terrorism".

Russian jurisprudence contradicts these provisions. Let us give a typical example[35]. The court established that on February 8, 2015 a certain Mr. P, having previously committed several thefts and being in a state of alcoholic intoxication, came to his wife's mother Ms. B. to find out the location of her daughter Mss. I. in an aggressive manner. Fearing violence, Ms. B. tried to escape. At that moment, Mr. P. "had a direct criminal intent aimed at taking and then holding Ms. B. as a hostage" in order to compel her daughter Mss. I. to bring their common little daughter to him. The court found that Mr. P., "realizing his direct criminal intent aimed at taking and then holding the hostage," armed with a knife, "with the aim of taking and holding Ms. B. as a hostage," attacked Ms. B. and forcibly held her, compelling his wife Mss. I. to bring their common little daughter. Upon the arrival of the police officers, Mr. P. began to demand this (as well as a bottle of vodka and a machine gun) from them, making the fulfillment of the requirements a condition for the release of his wife's mother, held as a hostage, whom he threatened to kill. As a result, Ms. B. was released by the police officers, who used firearms. It is obvious that in this case, the actions of Mr. P, who was threatening his family in a state of intoxication, are far from terrorism in its international legal and simply rational understanding, which, however, did not prevent the court from proceeding precisely from this qualification, according to which Mr. P. was sentenced to 7 years of imprisonment.

Thus, the legislation of the Russian Federation against the taking of hostages has had a long history of evolution and coexistence with related (similar) offenses. At the same time, the idea of this act as a kidnapping, for which it has always been classified as a serious crime with a severe punishment for it, dominated in Russian criminal law and criminal law doctrine.

The actual hostage taking, considered as a crime until 1987, was absent in the domestic criminal legislation, which applied the norms of encroachment on freedom in the form of illegal detention, imprisonment, abduction and deprivation of liberty.

The singling out of hostage taking was the result both of a significant increase in the number of such cases and the development of international law in the field of countering international terrorism.

Today, hostage taking, along with other terrorist crimes, poses a threat both to the entire world community as a whole and to an individual state in particular. Without diminishing the importance of the individual personality of the hostage, characterized by such benefits as life and health, we emphasize that the distinguishing feature of this crime is the object-public safety. Problems of qualification of crimes encountered in practice call for an analysis of the genesis of the hostage taking norm, examining the origins of domestic legislation. This article is devoted to the study of the search for legal approaches of the Russian state on the criminalization of hostage taking.

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[33] Gorbunov, Yu. S. (2008). O nekotoryh problemah sovershenstvovaniya pravovogo regulirovaniya protivodejstviya terrorizmu [The some problems of improving the legal regulation of counteraction to terrorism]. In *Zhurnal rossiiskogo prava* [*Journal of Russian Law*], 7. 21 p.

[34] Chernykh, S.A. (2009). Bor'ba s zakhvatom zalozhnika: otechestvennyi i zarubezhnyi opyt [Countering the taking of hostages: domestic and foreign experience]. In *Probely v rossiiskom zakonodatel'stve. Iuridicheskii zhurnal* [*Gaps in Russian law. Law Journal*], 1. 212 p.

[35] Sentence of the Kasimovsky District Court of the Ryazan Region of November 10, 2015. Available at: https://advokat15ak.ru/приговор-по-статье-206-ук-рф-захват-залож.

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Генезис нормы об уголовной ответственности за захват заложника в отечественном законодательстве

А.В. Серебренникова[а], М.В. Лебедев[б]
[а]Московский государственный университет им. М.В. Ломоносова
Российская Федерация, Москва
[б]Российский государственный университет нефти и газа
(Национальный исследовательский университет имени И.М. Губкина)
Российская Федерация, Москва

Аннотация. Широкая распространенность преступлений террористической направленности, а также проблемы квалификации захвата заложников и отграничения от смежных составов являются на сегодняшний день актуальными для научного исследования. Теоретические и практические аспекты, содержащиеся в норме об уголовной ответственности за захват заложника, имеют долгую и неоднозначную историю, требуют исследования генезиса нормы о захвате заложника и практике ее применения. В работе приведены только значимые памятники отечественной юриспруденции, содержащие нормы об уголовной ответственности за захват заложников, от истоков до настоящего времени. Методология: дедукция, индукция, методы синтеза, анализа, исторического и формально-логического исследования.
Выводы: 1. История применения нормы об уголовной ответственности за захват заложников сопряжена на всех этапах с проблемами квалификации. Эти проблемы неоднозначны и выражены тем, что законодатель под воздействием внешних и внутренних факторов допускает ошибки в систематизации и кодификации уголовного закона, часто утрачивая грани между нормой и смежными составами. Под

внешними факторами можно понимать и нормы международного права о захвате заложников, которые, оказывая воздействие на национальное право СССР, также переживали этапы своего развития, создавая нормы методами «проб и ошибок». Например, норма не распространялась, если захват совершался в пределах одного государства и заложник и виновные лица были его гражданами. 2. Анализ официальной статистики: от единичных преступлений советского периода, постперестроечного бума массовой преступности 90-х годов прошлого столетия, вызванных политическим кризисом, до статистического спада и сравнительно слаженной работы государственных структур периода 2000-х годов, позволяет сделать вывод о имеющихся пороках исчисления. 3. Введения категории «общественная безопасность» привела к значительному снижению статистических показателей ввиду квалификации через смежные составы. В связи с этим, по мнению правоведов, снижение захватов заложников имеет технический или статический характер. Это способствовало пропорциональному увеличению квалификаций по смежным составам. Проведенное исследование дает онтологическое представление о развитии нормы, раскрывает технику законоискусства при конструировании нормы о захвате заложников. Оно базируется на материалах судебной практики по конкретным уголовным делам, что может представлять интерес для исследователей данной нормы. Указанные примеры демонстрируют наличие ошибок правоприменителя при квалификации преступлений террористической направленности, что может быть воспринято практическими работниками в качестве учебно-методического материала. Статья может послужить источником научной информации для студентов юридических вузов, аспирантов и соискателей, а также для научных сотрудников, занимающихся исследованием национального уголовного законодательства Российской Федерации.

Ключевые слова: Уголовный кодекс, проблемы квалификации, уголовная ответственность, генезис нормы, общественная безопасность, террористический акт, захват заложников, угон воздушного судна.

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Illegal Crossing of the Russian Federation State Border in the Siberian Federal District: Criminal Activity and Problems of Investigation

Alexander G. Volevodz[a] and Denis S. Khizhnyak[b]*
[a]*Moscow State Institute of International Relations (MGIMO University) Moscow, Russian Federation*
[b]*Saratov State Law Academy Saratov, Russian Federation*

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Abstract. The authors discuss the features of transnational criminal activity on the example of one of its varieties in the Siberian Federal District of the Russian Federation to highlight the criminal situation and criminal activity associated with illegal crossing of the Russian Federation state border. For the analysis of the specified criminal activity, sentences of courts of the District were studied and analyzed. The geographical factors influencing implementation of this criminal activity in the constituent entities of the Siberian Federal District, ways of crime concealment, combinatorics of various crimes and offences in the course of implementation of criminal activity, and also its long-term character showing in some cases are considered. Discussion of this issue can contribute to a more effective investigation of the considered category of crimes.

Keywords: transnational crimes, illegal crossing of the state border, Russian Federation, Siberian Federal District.

Research area: law.

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* Corresponding author E-mail address: a.volevodz@inno.mgimo.ru, denis_khizhnyak@mail.ru
ORCID: 0000-0003-4962-2823 (Volevodz); 0000-0002-1377-6057 (Khizhnyak)

Introduction

It is known that criminal situations in different regions can vary in their intensity and specific manifestations of criminal activities, so the interest of researchers in the specifics of crimes and criminal situations in each region of the country is only but natural. As for crimes in the Siberian Federal District, a number of books and articles published in the recent decades have been devoted to their study. They mainly relate to the issues of organized crime (Ostrovskikh, Kochedykova, 2018; Khristiuk, 2008; Shotkinov, 2004). However, no less important is the study of specific types of criminal activities, since they can reveal both common and varying features (Dubonosov et al., 2019; Rolik, 2010, etc.).

Transnational crimes represent a special category of criminal activity, the manifestations of which are also diverse. Such crimes differ not only in *corpus delicti*, but also in the characteristics of the subjects of criminal activity, transnational criminal relations, the degree of duration of implementation, etc.

Transnational criminal activity has its own "hot spots", which are the regions of the world or of a state, where transnational crimes are more frequent. The crisis conditions of national economies, the growth of unemployment, and the concentration of the unemployed in more prosperous national regions, in which, without finding a better use, they are involved in criminal activities, facilitate the development of transnational criminal activities at the national level. Having been formed in one state, criminal organizations are then able to extend their criminal activities to other states.

The significant threat caused by transnational crime to the security of states encourages theoretical debates involving the problems of transnational crimes and their classification (Albanese, 2011; Marmo, Chazal, 2016), their specific manifestations: corruption (Stefanuc, 2011), money laundering (Jderu, 2016), crimes in cyberspace (Buono, 2010, Velasco, 2015), trafficking in human organs (Francis, Francis, 2010), child trafficking (Sörensen, Nuyts, 2007), illegal migration (Spena, 2014), et al. The category of crimes related to illegal crossing of the Russian Federation state border is also important to characterize the manifestations of transnational criminal activity.

Theoretical framework

In 1995, the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders suggested a classification of crimes consisting of 18 types, the latter variety of them being designated as "other crimes" (ACONF.169.15.ADD.1). As this classification does not include illegal border crossing we may say that this classification is not exhaustive, and therefore, it can be supplemented with crimes under consideration.

The category of transnational crimes is not specified in the Criminal Code of the Russian Federation (1996), nor is the normative regulation of the place of criminal conduct. The difference between the international legal classification of transnational crimes and the classification of crimes in the Criminal Code of the Russian Federation does not facilitate a clearly structured information data base, is not helpful for a clear understanding of characteristics of such crimes and treatment of facts in investigative and judicial practice.

Another problem to be taken into account is the lack of a unified approach to the characterization of transnational crimes as a special category of crimes in jurisprudence.

Rather logical classification of crimes crossing the borders is given by M. Marmo and N. Chazal, who specify 1) domestic crimes that cross borders, 2) international crimes, 3) transnational crimes (2016: 5). Thus, the locus and vector factor is the leading one in highlighting all the main features of transnational crimes.

An important problem in identifying specific manifestations of transnational crimes is the semantic ambiguity of the terms "transnational" and "trans-boundary (cross-border)," which are often treated as synonyms. Sometimes cross-border crimes are considered as a separate category of transnational crimes (Godunov, 2008). However, it seems necessary to bring these terms into a system. Cross-border crimes are socially dangerous acts, individual episodes and stages of which are committed in the states with a common border. Thus, the concept of "cross-border

crime" is narrower than the concept of "transnational crime," *cross-border crimes* being a kind of *transnational crimes* and having their own characteristics significant for their investigation. Identification of the subcategories of "cross-border crimes" determines the necessity for the designation of transnational crimes committed in states that do not have a common border. It is logical to treat such crimes as *trans-territorial*, i.e. as crimes committed in states that do not have a common border. The term *trans-territorial* already exists in the research works, e.g., in economic geography. Thus, discussing the issue of the necessity to identify "central places" in the world, where the process of globalization is most intensive, A.M. Trofimov and M.D. Sharygin state that such centers and their networks form a space that, on the one hand, is tied to certain places, and on the other, is a trans-territorial one, because it connects places that are geographically separated, but intensively interacting with each other (2009).

The modification of transnational crime classification is both of practical and theoretical importance, since the taxonomy with only one generic and one specific type is incomplete according to the rules of logic.

The situational approach to comparing the classification of transnational crimes with that in the Criminal Code of the Russian Federation (1996) allowed us to divide the latter into two groups: 1) *unconditional transnational crimes* (those that always include a transnational element), 2) *conditional transnational crimes* (those that may acquire a transnational character or may not). Besides, in transnational crime investigation practice one can find criminal acts, in *corpus delicti* of which one can detect *emerging (optional) transnational elements*.

Statement of the problem

The purpose of this article is to consider the criminal situation and the features of criminal activity associated with illegal crossing of the Russian Federation state border on the material of the Siberian Federal District.

The category of crimes connected with illegal crossing of the state border is enshrined in Article 322 of the Criminal Code of the Russian Federation (1996). According to the contents of Parts 1 and 2 of this Article, illegal crossing of the state border is understood as an action made without valid documents granting the right of entering the territory of the Russian Federation or departure from it, or without the proper permission received in the order provided for by the law of the Russian Federation, or as crossing the Russian Federation state border by a foreign citizen or a stateless person, whose entering the Russian Federation is obviously not allowed on the grounds provided for by the Russian Federation laws. Part 3 of Article 322 of the RF Criminal Code states that illegal crossing of the Russian Federation state border may be committed by one person, or a group of persons by prior agreement, or by an organized group.

It is obvious that these crimes constitute a specific category, and their implementation may differ in the Russian Federation constituent entities, because these entities or their administrative territorial units may have or have no common border with other states. Administrative territorial units of the Siberian Federal District have different remoteness from the state border of Russia with other states. Therefore, the study of the nature of manifestation of criminal activity associated with illegal crossing of the Russian Federation state border has both practical and theoretical significance for criminology, criminal law, and forensic science.

Methods

Based on the principle of unity of theory and practice we analyze the cases considered by the courts of general jurisdiction and the Supreme Courts of the Republics in the constituent entities of the Siberian Federal District from 2011 to 2018. One may find these cases on two websites (Gcourts.ru, Sud.Praktika.ru). Although these databases of court cases are obviously incomplete, we identified 147 sentences passed under Article 322 of the RF Criminal Code. The analysis of this number of cases and their nature make it possible to achieve the outlined objectives of the article.

Discussion

The analysis of the cases shows that transnational crimes of the considered category committed in the Siberian Federal District can be both cross-border and trans-territorial. In the former case, an illegal crossing of the Russian Federation state border can be carried out using land vehicles (cars, buses, trains), or on foot in a place, which is not meant for the legal crossing of the border (as it often happens in the Omsk and Novosibirsk oblasts, the Altai Territory, and the Altai Republic), or on horseback (as in the Republic of Tuva). In the latter case, the RF state border is crossed by air.

Cross-border crimes are committed by foreign citizens, citizens of the Russian Federation, and stateless persons. The percentage of the first category of persons accounts for 88.3% of the total number of the analyzed cases. Only 7.5% of such crimes were committed by women and 5.4% – by groups of persons united by a prior conspiracy, whereas the rest of them were committed by men.

The geographical location of the Siberian Federal District determines the fact that 83.9% of illegal crossings of the state border of Russia carried out by foreign citizens and stateless persons were committed by natives of Kazakhstan and China. In other cases, the residents from Uzbekistan, Kyrgyzstan, Tajikistan and Turkmenistan entered Russia through the border of the Republic of Kazakhstan. Chinese citizens illegally entered the territory of the Siberian Federal District (Krasnoyarsk and Irkutsk) by air.

The aims of committing crimes according to their qualification by the courts were diverse. Russian citizens illegally crossed the border to purchase consumer goods in another state at a lower price (that is, with a selfish motive) or to return to the territory of Russia and continue working, to commit a theft of other people's property (usually cattle), for illegal acquisition, transportation and storage of drugs, and for the purpose of fishing or hunting (especially in Mongolia).

Foreign citizens and stateless persons illegally crossed the Russian Federation border from a foreign state for the purpose of finding better living conditions, obtaining a migration card, extending their stay in Russia, visiting relatives who are citizens of the Russian Federation, employment, evading criminal responsibility for the crimes of which they were accused of in their native countries, and illegal transportation of narcotic drugs.

Some purposes of crime commission are specific for a certain constituent entities of the Siberian Federal District. For example, illegal border crossing for the purpose of cattle theft is committed only on the territory of Mongolia by the inhabitants of Tuva.

Most of the crimes were not completed due to the circumstances beyond the control of the offenders, as their actions were stopped by border control officers or border patrol as a result of timely detection of the existing ban for a person to cross the state border of the Russian Federation. The crimes committed without valid documents for the right to enter the Russian Federation and leave its territory without proper permission obtained in accordance with the legislation of the Russian Federation are numerous. However, 12% of such crimes were detected after the crime had already been committed. Those were mainly the cases when offenders used forged or someone else's documents, or crossed the Russian Federation state border bypassing the existing checkpoints. These facts also indicate the variety of ways of crime concealment: 1) falsification – the use of forged documents, 2) disguise when a person crosses the border bypassing the checkpoints, 3) the combination of falsification with disguise when a person uses other people's documents.

Materials of the studied cases give us the reason to state that some criminal acts are characterized by some degree of duration, and also by a combination of various types of crimes and administrative offenses allowing to characterize such crimes as "criminal activity" – the category of forensic science which unlike the category of "crime" is characterized by the above manifestations (Solov'ev, Kobzeva, 2001: 240-241).

The most common crimes under Article 322 of the RF Criminal Code are accompanied by such crimes as theft (Article 158 of the RF Criminal Code), illegal acquisition, stor-

age, transportation, manufacture, processing of narcotic drugs, psychotropic substances or their analogues, as well as illegal acquisition, storage, transportation of plants containing narcotic drugs or psychotropic substances, or parts thereof containing narcotic drugs or psychotropic substances (Article 228 of the RF Criminal Code), forgery, production or turnover of forged documents, state awards, stamps, seals or forms (article 327 of the RF Criminal Code). Sometimes the illegal border crossing is accompanied by violating the Code of Administrative Offences of the Russian Federation (2001) (Article 18.2 – violation of border regime in border zone and Article 18.8 – violation of the rules of entering the Russian Federation or the regime of residence in the Russian Federation by a foreign citizen or a stateless person).

Duration of crime commission is one more characteristic feature of the category of "criminal activity", which is a rather typical phenomenon in the sphere of its implementation. This phenomenon can be exemplified by the cases tried in the Siberian Federal District.

Example 1. *In one of the cases considered by the Karasuksky district court of the Novosibirsk Oblast, 17 episodes of illegal crossing of the Russian Federation state border by the same person, a citizen of the Republic of Uzbekistan, were described. All the crimes were committed in Karasuksky district of the Novosibirsk Oblast and in the Altai Territory over an extended period. In the court decision it was stressed that every time this person had crossed the state border of the Russian Federation without proper authorization obtained in the manner prescribed by the legislation of the Russian Federation.*

Example 2. *The Supreme Court of the Republic of Altai considered the criminal case against a group of five persons who illegally crossed the state border of the Russian Federation from Russia to the Republic of Kazakhstan and back using foreign passports belonging to other citizens of the Russian Federation with the registered residence in a settlement of the border territory. According to the Agreement between the Government of the Russian Federation and the Government of the Republic of Kazakhstan this fact gives the right to those who live in the settlements adjoining the border to cross it without other permissions* (Soglashenie…, 2006).

Example 3. *The long-term nature of the crime was found in one of the sentences of the Oktyabrsky district court of Irkutsk. It describes the repeated trespassing of the state border of Russia at air checkpoints by a citizen of Tajikistan with false documents.*

Conclusion

Transnational criminal activity is diverse and specific in its manifestations in different regions of Russia. It depends on their geographical location. Thus, special consideration of each type of criminal activity in terms of its implementation in the constituent entities of the Russian Federation is important to identify the specifics of the criminal situation and the practice of crime detection and investigation.

The distinction between cross-border and trans-territorial crimes in the overall system of transnational criminal acts is not only of theoretical importance. It also contributes to a more detailed analysis of the criminal situation and the practice of investigating such crimes, which is also important for improving the statistical processing of crime data in Russia as a whole.

The analysis of cases considered by courts and related to illegal crossing of the Russian Federation state border on the example of the Siberian Federal District revealed not only the generic specifics of transnational criminal activities (combinatorics of crimes during implementation of criminal activity and its duration). The analysis also allows us to conclude that in the investigative practice there are certain problems associated with identifying the individuals, who are prohibited to enter Russia, and ways of crime concealing, as well as the identification of the most frequently used routes for bypassing the established border checkpoints of the Russian Federation by the criminals. This conclusion can contribute to the development of specific measures in this region of Russia aimed at improving the investigation practice.

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Незаконное пересечение государственной границы Российской Федерации в Сибирском федеральном округе: криминальная деятельность и проблемы расследования

А.Г. Волеводз[а], Д.С. Хижняк[б]
[а]*Московский государственный институт международных отношений*
Российская Федерация, Москва
[б]*Саратовская государственная юридическая академия*
Российская Федерация, Саратов

Аннотация. Рассмотрены особенности осуществления транснациональной криминальной деятельности на примере одной ее разновидности в Сибирском федеральном округе РФ для освещения криминогенной ситуации и криминальной деятельности, связанной с незаконным пересечением государственной границы РФ. Для анализа указанной криминальной деятельности привлечены приговоры судов региона, рассмотрены географические факторы, влияющие на осуществление рассматриваемой криминальной деятельности в разных субъектах Сибирского федерального округа, способы сокрытия преступлений, их комбинаторика в ходе осуществления криминальной деятельности, а также проявляющийся в ряде случаев ее длящийся характер. Обсуждение указанной проблемы может способствовать более эффективному расследованию рассмотренной категории преступлений.

Ключевые слова: транснациональные преступления, незаконное пересечение государственной границы, Российская Федерация, Сибирский федеральный округ.

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Punishment and Symbolic Social Exchange: The Unnecessary Victims of Criminal Justice

Oleg N. Bibik*
Dostoevsky Omsk State University
Omsk, Russian Federation

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Abstract. This article explores the essence of criminal punishment as an element of symbolic social exchange based on social exchange theory, cultural psychology, and the economics of crime using the example of the death penalty and imprisonment. The study concludes that the choice of punishment for a crime depends entirely on the cultural characteristics of society. The commodity in this exchange is the lifetime of a person, the value of which depends on standard of living and the welfare of society. That is why capital punishment and imprisonment are more often used in countries with lower standards of living. For the same reason, imprisonment rate correlates with homicide rate. The higher the homicide rate, the lower the value of a person's life in a particular country, and the more often imprisonment is used. Raising standards of living increases the marginal harmfulness of criminal punishment, which stimulates its reduction. At the same time, the deflation of criminal punishment for violent crimes is slowing due to decreased tolerance for violence in modern society.

Keywords: criminal penalty, symbolic social exchange, culturally determined behavior, standard of living, human life time, incarceration, the death penalty.

Research area: criminal law, criminology, penal law.

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* Corresponding author E-mail address: olegbibik@mail.ru
ORCID: 0000-0002-2237-7082

Introduction

The criminal justice system is often considered to be the main guarantor of retributive justice (Dignan, 2005, 32; Karmen, 2010: 20). In this regard, punishment is perceived as a formal attribute of criminal law and the logical conclusion of the criminal prosecution. This view of punishment conceals its true nature, which sometimes leads to serious misconceptions. Therefore, punishment does not bring the expected result, more scholars say that it is undergoing crisis. The failure of the United States' criminal justice rehabilitation model has prompted Martinson to point out the inefficiency of this model in the article 'What Works in Prison Reform?' (1974). Discussion of this article led the researchers' community to the more general conclusion that 'nothing works' (Garland, 2002: 58). Garland is right when he notes that the role of punishment in modern society is not at all obvious or well known. 'Punishment today is a deeply problematic and barely understood aspect of social life, the rationale for which is by no means clear' (1990: 3).

The way out of this methodological deadlock is to study punishment using a multidisciplinary approach, whereby it can be considered as a 'symbolic behavior'. Scholars have already investigated the symbolism of criminal law, in particular, such components as the symbolic function of criminal law, the way a symbolic policy that is based on public fear of crime influences criminal law, the society as 'ostensible beneficiaries' of the criminalization of acts, that is, in fact, content only with politicians' promises to the public (Beale, 2000). The symbolic functions of penal legislation were also considered. Their purpose is to symbolically condemn crimes and criminals, and manifest, in a legal form, the aversion to crimes (Zimring, 2001). The symbolism of the death penalty has also been studied (Semukhina and Galliher, 2009). The material effects of capital punishment, as far as society is concerned, are negligible compared to the number of people who are killed in traffic accidents every year. Capital punishment is important as a sign from which one can infer social attitudes and that is meant to express them (Van den Haag, 1983: 273). For this reason, capital punishment is primarily a political and cultural symbol (Garland, 2010: 234).

The symbolism of criminal law is not limited by the aspects mentioned above. Criminal punishment is viewed as a cultural agent (Garland, 1990: 249). In this regard, it can be examined using the cultural psychology and economics of crime as culturally determined behavior that is based on rational choice. In addition, studies of criminal punishment underestimate the theory of social exchange, which might consider punishment as reciprocity-based behavior meant to become a symbolic response to a crime. This article aims to fill this gap using the examples of capital punishment and imprisonment as the strictest forms of criminal repression with the highest costs to society.

The Effect of Punishment on Crime

Every year, hundreds of people around the world are subjected to the death penalty, and incarceration is widely used. The current prison population is around 11 million (Institute for Criminal Policy Research, 2019). It can be assumed that the use of these penalties is dictated by their effectiveness. But is this really the case? The answer is 'no'. Both capital punishment and imprisonment have been repeatedly criticized for their significant shortcomings, some of which are discussed below.

In the long run, the application of the death penalty has a habituation effect, where, over time, even the most cruel executions are considered by society to be an ordinary punishment and loses its former influence on people's behavior (Beccaria, 1995: 63-64; Montesquieu, 1989: 84-85). In the United States, no correlation was established between homicide rates and the number of death sentences imposed (Kvashis, 2008). Studies that used similar criminal statistics from the United Kingdom and Canada also support this conclusion (Dills et al., 2010).

Findings indicate that convicts with same characteristics (age, criminal record, type of crime) are more likely to reoffend (Von Hofer and Tham, 2013: 39). Many prisoners already have a criminal record at the time when they are convicted of a new crime (Cooter and Ulen,

2011: 502). According to one hypothesis, a high rate of recidivism is consistent with the rational choice model. If an offender's preferences are stable, the degree of criminal activity usually will not tend to decrease after a conviction. Serving time in jail will only improve an offender's criminal skills, which will be an additional incentive to commit new crimes (Eide et al., 2006: 215). Prisoners are actively involved in the criminal subculture. One Russian study notes that up to 80 percent of prisoners adhere to the norms and traditions of criminal subculture (Ol'khovik and Prozumentov, 2009: 46).

The very atmosphere of a prison is often contaminated by violence and cruelty, both between prisoners and between prisoners and the prison administration. There are frequent cases of outright bullying, where prison essentially turns into hard labor camp to exploit prisoners as slaves, accompanied by constant physical and psychological violence (Tolokonnikova, 2013). In such a situation, talking about correcting criminal behavior is simply blasphemous. Imprisonment only cripples people physically and morally, fostering cruelty and cunning in them. As it was rightly noted, a prison is an 'expensive way of making bad people worse' (Garland, 2002: 132).

The likelihood of recidivism rapidly decreases five years after an offender is released from prison. In the sixth year after their release, the likelihood of returning to prison is equal to that of conviction for those who have never been previously prosecuted. It is not the fear of punishment that keeps the criminal from relapse, but successful resocialization (Bytko, 2018: 160-161).

The lack of significant correlation between the use of punishment and the number of crimes committed has been repeatedly noted. One reason for this is the comparative rarity of punishment. Only approximately 3 percent of offenses result in either a conviction or caution, because less than 50 per cent of crimes are reported to the police; just half of these reported offenses are recorded as crimes; only around 25 per cent of these detected cases result in a conviction (Dignan, 2005: 163, 190). To that point, it should be added that potential criminals are, on average, more prone to take risks than law-abiding citizens and, when they make a decision to commit a crime, they take into account the likelihood of getting caught and the inevitability of punishment rather than its severity (Cooter and Ulen, 2011; Harel, 2012).

Most people do not commit crimes by virtue of their upbringing, not because they fear punishment (Lynch, 2007: 101). Only about 15 to 20 percent of citizens do not commit crimes for fear of punishment, while almost everyone else does not do this for various moral reasons (Lappi-Seppälä, 2012: 20; Martsev, 2005: 50-51; Shargorodskii, 2003: 270). The vast majority of people are not familiar with criminal law or possible punishment for committing a crime (Tonry, 2008: 286). Thus, in conditions of limited knowledge, the deterrent effect of punishment will be significantly distorted. Surveys conducted in different countries regarding awareness of criminal law rules among potential criminals found that about 18 percent of them had no idea what the sanctions would be, 35 percent would not pay attention to what sanction would be for committing a crime, and only 22 percent confirmed that they would take into account what the punishment would be (Cooter and Ulen, 2011: 496). Among convicts, only 15.6 percent noted that they committed a crime while fearing punishment, while 30.2 percent did not think about punishment at all, 27.5 percent did not fear punishment because they were intoxicated, and 8.1 percent thought they would avoid punishment (Bytko, 2018: 41).

It should also be added that there is no scientific justification for the types and severities of criminal punishments. They are used absolutely arbitrarily, taking into account only common sense. In different countries, sanctions for the same crimes vary significantly, which in no way correlates with the success of criminal policy. For example, in Russia, murder is punishable by imprisonment of 6 to 15 years, in Germany – from 5 to 15 years. In France, this crime is punishable by 30 years in prison, and in Texas (USA) – by the death penalty. At the same time, the murder rate per 100,000 people in 2016 in Russia is 10.8, in Germany – 1.2, in France – 1.4, in the US – 5.4 (UNODC, 2019a). If the punishment really played a decisive role in preventing murder, the picture would be

completely different. It can be assumed that the severity of punishment is determined by the mentality of the nation, its culture, the nature and degree of institutionalization of violence as a way to solve socioeconomic problems.

Numerous studies convincingly prove that criminal punishment does not have a significant impact on crime (Kury and Il'chenko, 2013). Therefore, crime rates and punishment policies are fairly independent of one another (Lappi-Seppälä, 2012; Lynch, 2007). It is not punishment that affects criminality, but rather the socioeconomic development of society and its shortcomings, including property inequality, poverty, and family dysfunction. It is no accident that the vast majority of prisoners are homeless, unemployed, mentally ill, uneducated, and raised in single-parent households (Von Hofer and Tham, 2013: 40). Moreover, in a number of countries (in Russia, for example), the number of crimes committed by unemployed people determines the overall crime dynamics (Bytko, 2018: 68-70). Therefore, it is fair to say that imprisonment is a punishment for the poor (Lynch, 2007: 108). Why then, is imprisonment so widely used and the death penalty is not abolished? An explanation should be sought in human behavior, the cornerstone of which is symbolic social exchange.

Social Exchange and Culture

Society exists only because people believe that the best way to solve problems is to combine their efforts with other people's efforts. Otherwise, like many other species, human beings would lead a solitary lifestyle or create smaller groups. People tend to live together, because in this way, they mitigate costs and have more opportunities. Reciprocity as a strategy is more successful than other behaviors (Rapoport, 1991).

Reciprocity is the exchange of certain acts and benefits between people. According to the theory of social exchange, social behavior is an interaction in order to satisfy needs, reinforced by rewards and avoidance of sanctions. It is exchange of activities leading to rewards and costs (Kultigin, 1997: 85; Ritzer, 2011: 421). The price of this way of life is mutual dependence, reflected in social exchange ('you give it to me, and I give it to you'). Social exchange suggests 'that two beings are mutually dependent upon each other because they are both incomplete, and it does no more than interpret externally this mutual dependence' (Durkheim, 1984: 22).

Crime and Punishment as Elements of Social Exchange

The use of criminal punishment in response to a crime can be considered as a special case of social exchange. The understanding of punishment as payment for a crime is repeatedly found in research. For example, punishment can be regarded as a retribution that the guilty man makes to each of his fellow citizens, for the crime that has wronged them all (Foucault, 1995: 109). Punishment in criminal law is compared to price in business (Jhering, 1913: 367). Crime and punishment can be viewed either as completely identical acts or as an equivalent exchange of one act for another act (Sorokin, 2006: 207-208, 224). 'If, therefore, the infliction of punishment can be regarded as a form of barter, it is largely of a type which one party to the exchange controls by the imposition of valid prices' (Christie, 1968: 166). Criminal punishment is understood as an exchange of the wrongs caused by the offender for the deprivations and restrictions by which he must 'pay' for the wrongs. In this sense, criminal punishment performs the same function as money (Mitskevich, 2005: 304-305).

The exchange of punishment for a crime was investigated in Pashukanis's exchange theory of law. In accordance with this theory, law arises in the presence of communication of separate isolated entities connected by equivalent exchange. Crime is a special type of exchange, in which the exchange or contractual relationship is established post factum, after an intentional act by one of the parties. Accordingly, the crime is exchanged for the equivalent wrong inflicted on the offender: punishment (Pashukanis, 1980; Shchitov, 2012). Becker described the peculiarity of the 'contract' concluded when committing a crime as follows: 'Those punished would be debtors in 'transactions' that were never agreed to by their 'creditors' ...' (1968: 196).

The Symbolism of Social Exchange

In the exchange process, one must identify the objects to be exchanged and determine its rules. In nature, there are no necessary tools for this process. To solve this problem, a person may use a system of significant symbols, as his own behavior is symbolic (Faules and Alexander, 1978). The origins of this behavior lie in the enormous impact that culture has on humans (Heine, 2015; Matsumoto and Juang, 2016). The cultural organization of behavior does not imply a simple stimulus-response relationship, but mediation by a sign. The sign is used to streamline human behavior and ensure communication (Cole, 1996; Vygotsky, 1999).

An example of symbolic social exchange is economic relations. They are carried out with the help of money, which has an artificial cultural essence as well as rules for its use. For example, metal coins and paper money are tokens. They have virtually no inherent value. The reasons for their use in social exchange are the acceptability of such an exchange (established practice, anticipation of similar actions of other people), legal tender (state support of this commodity), and the relative scarcity of money (McConnell et al., 2009: 631-634). Reciprocity of exchange and trust in the economic system are essential for the use of money as a symbolic mediator. The indicated conditions are characteristic of any type of exchange.

In order to organize the exchange of crime and punishment, people also create a symbolic space with the help of culture, since, in nature, there are no criteria for determining the balance of crime and punishment. Norms and values determine the application of punishment in response to a crime. As a result, this exchange is deeply symbolic, as evidenced by numerous examples. There are cases when criminal punishment was applied not only to people, but also to animals and even inanimate objects (Durkheim, 1984; Kantorovich, 2011). Such punishments included killing an animal or throwing inanimate objects outside the country (Plato, 1999: 873-874). Mutilation as punishment is often also symbolic. In particular, in the Code of Hammurabi, removal of the tongue was a punishment for denying one's adoptive parents. Amputation of a breast was the punishment for a wet nurse who replaced a dead child with a living one. If a son beat his father, the Code demanded that his hands be cut off (Volkov, 1914).

Punishment to an already deceased person is also symbolic. In 1661, in Tayborne, Lord Protector of England Oliver Cromwell was posthumously executed; his remains were hanged, drowned in the river, and quartered. Similar practices were common in other countries. For example, in Russia, the boyar Ivan Miloslavsky was also posthumously executed (Tagantsev, 2001: 469).

In the modern world, symbolic punishments still take place. Even if we are sure that the guilty person will not commit a new crime, he must still be punished to restore justice. Thus, even when one offender completely lost his eyesight, he continued to serve his term in prison after being convicted of especially serious crimes (Kurchenko, 2017). As of January 1, 2017, there were 20,963 disabled convicts who were serving their term in Russian prisons. Materials regarding 3,491 prisoners were sent to courts for release due to illness, and 1,683 people were released from serving sentences in connection with disease. 2,635 people died from diseases in prisons. More than half of seriously ill convicts do not live to see a court ruling or die in correctional facilities after courts rejected requests for early release (Zaborovskaya, 2018). This practice of treating prisoners is common in many countries. In the US in particular, there is also a large number of disabled people behind bars. Among them there are mentally ill, paralyzed, wheelchair-bound, completely blind, and terminally ill people (Megalli, 2015; Morgan, 2017; UN, 2009; Vallas , 2016).

The Symbolic Destruction of Crime: Punishment as a Ritual

The punishment of an animal, the execution of a deceased person, as well as the imprisonment of a person who is visually impaired or terminally ill may seem meaningless. At the same time, we sometimes perform similar acts under the influence of emotions, which are influenced mainly by the desire to even the score like when one might hit a broken

piece of equipment out of frustration. Taken alone, these actions are ineffective, as an act of aggression allows no catharsis. Aggressive behavior only fuels aggression in the future (Myers and Twenge, 2013: 386-390). But such behavior, similarly to the punishment of the 'delinquent' equipment object, enables us to control our emotions at a primitive level, partially freeing the nervous system from the tension generated by stress.

In fact, we observe the same mechanism with regard to punishments, which to a certain extent are an embodiment of our emotions and help release accumulated mental energy and satisfy the need for retribution for a crime. For example, after the verdict was released for the Norwegian killer Andreas Breivik, who killed 77 people, victims said they experienced relief (RIA Novosti, 2012). After a court decision was made in the Russian Federation in the case of the crash of the motor ship Bulgaria, in which 122 people died, relatives of the victims noted that the punishment for the guilty brought them moral satisfaction, and that they were 'relieved' after the court made a fair decision (Bakhtiyarova, 2015). In the US, the serial killer Danny Rolling was executed by lethal injection; the relatives of his victims said they finally felt relief and even inspiration, and that now they can calm down and live with the memories of their dead relatives (Garland, 2010: 1-2).

Durkheim noted that the wrong that a crime inflicts upon society is nullified by the punishment (1982a: 33). The crime as such cannot be eliminated or cancelled. That is why a substitute is needed, a symbol, in regard to which an act of destruction is carried out. The relationship between the signifier and the signified is characterized by the transfer of emotions caused by the crime. A symbol takes the place of the signified and stimulates the corresponding emotions. Ultimately, punishment embodies the symbolic destruction of a crime. The object of punishment becomes a symbolic substitution of collective emotions caused by a crime, which are transferred from the irreparable wrong done by a crime to the object of imputation (stones, children, mentally ill) (Fauconnet, 1928: 236-264; Gephard, 2006: 132-136). In this regard, Giertsen reasonably believes that punishment is a symbolic act which in its essence cannot be equivalent to a crime and does not relate to damage to the victim. Punishment is only a sign that wrong has been done to society, which must be compensated somehow (cited in Christie, 2004: 84-85).

Punishment is a ritual that is performed whenever a crime is committed. One of the main functions of the ritual is an integrating or connecting function, since with its help, the society periodically updates and affirms itself and its unity. The ritual is necessary for the realization of solidarity and the interconnectedness of society. (Baiburin, 1993: 31) Punishment plays the same role, as it is intended to calm the society frustrated by a crime. Suffering from punishment is a sign indicating that the sentiments of the collectivity are still unchanged, that the communion of minds sharing the same beliefs remains absolute, and in this way the injury that the crime has inflicted upon society is made good (Durkheim, 1984: 63). For example, as advocates of the death penalty have noted, it should be used as a sign of respect for victims of murders, affirming the importance of their lives to society (Garland, 2010: 293). Punishment is a kind of signal confirming that society as an association of people for the sake of mutually beneficial cooperation still exists. Society has no point if no one can avenge the criminal.

Rituals of belonging and exclusion are indications that you are being accepted within or excluded from the organization and/or work group (Harris and Nelson, 2008: 248). Accordingly, for victims, punishment is associated with a ritual of belonging, whereas for a criminal it is a ritual of exclusion. The ritual nature of punishment is instrumental in controlling not only human emotions, but also public opinion (Garland, 1990).

Psychological Trauma and Retaliation

Society uses punishment to appease crime victims through symbolic retribution. This reaction is typical, though not entirely effective. The punishment of the guilty does not play a significant role in the mental healing of the victims. The terrible injuries inflicted by the crime are not treated with punishment. Decades lat-

er, people can hardly endure their misfortune, and even a criminal's execution cannot comfort them (Panteleeva, 2016). To alleviate the post-traumatic stress syndrome caused by the crime, social support for the victim is necessary, from family members, friends, and loved ones. Indeed, for the victim to return to normal life, it is important to publicly acknowledge the traumatic event and to compensate for the damage and bring the perpetrator to justice, which helps to restore a sense of order and justice. At the same time, this does not imply that equivalent wrong or other severe punishment should be inflicted. On the contrary, both recognition and redress can be carried out only symbolically (Herman, 2015).

In the process of recovery, the victim usually tries to resist the experience of grief, masking it with fantasies of revenge, forgiveness, or compensation. In this fantasy, revenge is a mirror image of the traumatic memory, in which the offender and the victim change places. The revenge fantasy is a form of catharsis, and although the traumatized person imagines that revenge will bring relief, the repeated fantasies actually only increase his or her suffering. Victims are extremely disappointed, because revenge cannot change or compensate the damage. Group discussions of various revenge fantasies demonstrate that the victim is able to understand how little he or she really needs revenge. The victim must give up the fantasy of revenge for healing, but this does not require abandoning the pursuit of justice (Herman, 2015).

Thus, the victim of crime actually needs psychological assistance, which is artificially replaced by punishment. All this would not be so tragic if the price of this sinister ritual were not millions of human fates. These are unnecessary victims of criminal justice.

There is no need for severe punishment if it does not bring benefit, especially if it is possible to meet the needs for retribution differently, for example, by reconciling the victim and the offender. In the model of restorative justice, this idea is fully implemented. It is noteworthy that victims of crime who have gone through restorative justice procedures believe that they have been treated fairly. They were satisfied even with the symbolic compensation of the damage caused in the form of relatively small amounts of money (Dignan, 2005: 154, 164). Since a human being is a symbolic creature, both beheading and a fine can represent for us the 'destruction' of the same crime – the question is largely about the ability to control our emotions. It should be recalled that in ancient times, many nations punished murder by forcing the murderer to pay a monetary fine to the relatives of the victim. Thus, the problem of the choice of punishment for the crime is entirely related to the cultural characteristics of society.

In economic exchange, there is money (symbols) that is actually provided with commodities that they signify in general, and there is money (simulacra) that is not provided with the signified (for example, with an artificial increase in the money supply). The same phenomenon is observed in another area of symbolic exchange – in the sphere of criminal justice, in which there are also punishments that are not provided with the real needs of society. It is quite possible to remove them from circulation, which will make it possible to save a huge amount of resources. There are examples of the abolition of the death penalty that are not accompanied in the long term by an increase in homicide rate and crime rate in general (Dills et al., 2010; Kvashis, 2008; Mocan and Gittings, 2010). Therefore, it is worth thinking about further reduction of penalties and their severity, especially the death penalty and imprisonment. At the same time, the devaluation of punishment should be carried out only if we take into account the real level of public confidence in the criminal justice system. Otherwise, there will be attempts to solve the problem by extrajudicial means.

Commodities in the exchange of punishment for a crime

Crime and punishment are included in social exchange, which takes place only in the cultural environment. Their balance is determined by commodities. In economics, the role of the commodity is played by money, by which objects of exchange are valued. In the exchange of punishment for a crime, the role of the com-

modity is claimed by money, as well as by a person's lifetime.

Sorokin believed that punishments and rewards have a tendency to standardization. The result is a unit of exchange that is money. However, they have not yet been able to replace all types of punishments and rewards (2006: 225).

According to the exchange theory of law, a fine involves monetary compensation for a consequence, and imprisonment is subconsciously associated with the idea of an abstract person and human labor, measured by time. But in the end, all crimes are measured by an individual's lifetime, which he or she will spend paying off a fine or serving a sentence in prison (Pashukanis, 1980: 120-123; Shchitov, 2012: 44-45). Christie seems to share this approach, noting it in relation to imprisonment: 'We let the poor pay with the only commodity that is close to being equally distributed in society: time' (1982: 95). Conclusions on the exchange theory of law were in fact confirmed by Becker, who believes that the '[a person's] only scarce resource is his limited amount of time' (1976: 6).

A person's lifetime as a commodity in the social exchange of crimes and punishments fits quite naturally into the logic of the development of society, its culture and, above all, the culture of consumption. A human's lifetime is the time during which he is able to consume. The reason for choosing such value is the existence of cultural stereotypes. Time is the most important factor in our lives in light of modern cultural values. We often hear expressions that reflect this, such as 'we only live once' or 'getting the most out of life'. This principle plays a decisive role in determining the price of a crime.

The modern system of criminal penalties is obviously focused on the time of a person's life as his or her main asset when punishment is applied (for example, imprisonment, actually deprives a person of part of his life, a fine deprives a person of time spent on earning the necessary means for living). It is because of this circumstance that imprisonment has become so widespread, and the death penalty continues to be imposed. These means are used not to reduce crime rates, but rather to deprive the perpetrator of a portion or the entirety of his lifetime, to restore social justice, to ensure the reciprocity and equivalence of public relations. Human life is used as a measure not only in determining the severity of the punishment, but also to assess the seriousness of the crime. Therefore, it is no coincidence that society with its 'quality of life' is regarded by legal scholars as a collective victim (Garland, 2002).

The Wellbeing of Society and the Repressiveness of Criminal Punishment.

An increase in income that partly results from an increase in earnings raises the relative cost of time and of time-intensive commodities (Becker 1976: 113). Since a person's lifetime is the commodity in the exchange of punishments for crimes, attitudes to the risk of losing this commodity will also change as society's well-being increases. As a result, the marginal harmfulness of punishment will increase. Becker reasonably noted that the value of the term of imprisonment gets bigger as the income of the offender gets bigger: 'Indeed, if the monetary value of the punishment by, say, imprisonment were independent of income, the length of the sentence would be inversely related to income, because the value placed on a given sentence is positively related to income' (1968: 195; 1976: 65).

Increased well-being of society increases the marginal harmfulness of the anti-benefit – the criminal punishment – with its unchanged formal meaning, which ultimately stimulates the mitigation of criminal sanctions. Historical data confirm this pattern.

For example, in ancient times and much later, the death penalty was quite common, a relatively ordinary phenomenon, because people in those days sustained a miserable existence and did not value their lives. Individuals' lives were likewise not valued by society or the state. Therefore, it is no coincidence that up to the 16th-17th centuries the death penalty was widely used (Foinitskii, 2000: 130). It was not viewed as a severe punishment as it is today (Posner, 1985: 1211). In the 21st century, we see a radically different set of ideas about the permissibility of repressive punishment, because

the quality of human life has increased. Human life is considered through the prism of the current level of development of society, and therefore it is valued much more. As a result, the death penalty is not currently applied in industrialized countries (except the United States). Many developing countries, including Russia, have actually abolished capital punishment.

Incarceration and Standard of Living

If we analyze incarceration rates, we can easily see its prevalence in countries with a lower standard of living. With the exception of the United States, the list of 100 countries with the highest per capita incarceration rates does not include any of the nations in the G7. The industrialized countries of North America and Europe are predominantly in the middle or at the lower end of this ranking (Institute for Criminal Policy Research, 2019). In the United States, by contrast, the use of imprisonment is widespread (Mass Imprisonment, 2001).

The reasons the United States occupies the first place in this ranking lie in the actual value of human life in this country. It should be remembered that in the United States free circulation of firearms is allowed and that the death penalty is permitted in a number of states. The US is actively involved in armed conflicts. The country has a high homicide rate, uncommon for a developed country. In 2016, it amounted to 5.4 murders per 100,000 people. In comparison, the next G7 country in the ranking is Canada with a homicide rate of 1.7 per 100,000 people. (UNODC, 2019a) The United States has a high level of interpersonal violence, including deadly violence, which is due not only to the armed population, but also to the tradition of tolerance of private violence, which was formed in the absence of effective state control. As a result, the application of the death penalty in this country does not bring the expected results. On the contrary, the states that have abolished the death penalty have a lower murder rate than the states that have retained this penalty (Garland, 2010). Since the death penalty devalues human life for society, the application of this punishment stimulates murders.

Societal approval of violence determines the relatively low value of human life in the United States, which is naturally found in the widespread use of imprisonment. If citizens are willing to buy weapon, then they are presumably ready to use it and to kill a person. This willingness is changing the system of values. The same thing happens at war, when a soldier who takes weapon is mentally preparing to become a murderer, and it is the war that devalues human life, which opens up the possibility for a variety of atrocities.

Evidence of the link between living standards and the use of imprisonment includes the existence of an established negative correlation between social security spending and the number of prisoners in the United States. In the states where social security costs are higher, the number of prisoners is lower (Beckett and Western, 2001). Obviously, the higher the costs mentioned, the higher the living standards, the more human life is valued, the lower incarceration rates will be.

The Link Between Homicide and Incarceration

In support of the hypothesis of the impact of living standards on the severity of punishment, I conducted a study of the correlation between murder rates and the imprisoned population (UNODC, 2019a; UNODC, 2019b). The study showed that the use of this punishment correlates with murder rates.

A significant correlation between these indicators is noted in Europe. All countries in the region (29 countries and territories) were examined using the available of data for 2016 (Table 1). The results established that the linear coefficient of correlation on the Chaddock scale is 0.8, a high rate of correlation .

Data from 2003-2016 were also examined by applying the above methodology (Table 2). As you can see from the data, the number of murders is significantly correlated with the use of imprisonment.

It should be noted, however, that murders constitute a small part of the overall crime rate. For example, in Russia in 2018 they accounted for only about 1.1 percent of all convicts (Judicial Department at the Supreme Court of the Russian Federation, 2019). While murderers are not the dominant group among criminals,

Table 1. Number of prisoners and victims of homicide in Europe per 100,000 persons, 2016

Country (Territory)	Number of prisoners per 100 thousand inhabitants	Number of victims of homicide per 100 thousand inhabitants
Bulgaria	103.0	1.1
The Czech Rebuplic	211.9	0.6
Hungary	181.1	2.1
Poland	187.2	0.7
Romania	138.8	1.2
Russian Federation	438.0	10.8
Slovakia	183.7	1.0
Denmark	59.7	1.0
Finland	57.4	1.4
Iceland	37.3	0.3
Ireland	78.4	0.8
Lithuania	233.7	5.2
Sweden	60.1	1.1
Great Britain (England and Wales)	143.6	1.2
Great Britain (Northern Ireland)	75.5	1.0
Great Britain (Scotland)	139.7	1.2
Albania	206.0	2.7
Croatia	73.8	1.0
Greece	85.4	0.8
Kosovo	90.7	1.6
Montenegro	178.7	4.5
Portugal	134.1	0.6
Serbia	121.0	1.4
Slovenia	63.0	0.5
Spain	128.4	0.6
Austria	99.1	0.7
France	105.8	1.4
Germany	78.5	1.2
Switzerland	78.0	0.5

the more murders, the less valuable a person's life is in a particular country, and the more often incarceration is used. The number of murders itself cannot directly affect the number of prisoners. This indicator simply reflects the value of human life.

Data for the year 2010 were also studied for countries (territories), grouped geographically (America, Africa, Europe, Asia, Oceania). This period was chosen because statistics on the greatest number of countries (territories) were available. In all regions except Europe, the correlation of incarceration and homicide was noted as weak at 0.1.

Attempts to apply economic criteria yield a different result. Using indicators such as GDP per capita at purchasing power parity in 2010 (International Monetary Fund, 2019) and taking into account the availability of data on the number of murders and prisoners per 100

Table 2. Correlation of murders and imprisonment in Europe, 2003–2016

Year	The number of countries or territories sampled	Linear correlation coefficient for murders and imprisonment
2003	31	0.8
2004	41	0.8
2005	41	0.8
2006	40	0.9
2007	38	0.9
2008	42	0.9
2009	39	0.8
2010	43	0.6
2011	40	0.6
2012	40	0.6
2013	40	0.9
2014	42	0.9
2015	35	0.8
2016	29	0.8

thousand, people in the sample of the first 100 countries and territories (Table 3), the study reveals a moderate correlation of 0.4. A similar correlation of 0.4 is found in a sample of the first 70 countries and territories. In the sample of the first 50 countries and territories, the correlation is estimated to be salient and its indicator is 0.6. Finally, in the sample of the first 20 countries and territories, there is a high coefficient of correlation, 0.8.

Countries and territories in which the studied indicators are not correlated or moderately correlated are likely to experience economic difficulties with an increase in incarceration (for example, Brazil, Jamaica, Dominican Republic, Colombia, Namibia, South Africa, Venezuela). There are exceptions among more developed countries (territories), in which these indicators also moderately correlate. In this case, we may be dealing with an artificial restriction (for example, Finland) or an extension of the use of incarceration (for example, the USA, Singapore, Taiwan, Macau), possibly for political or cultural reasons. Thus, the greater the economic potential of the state for the use of imprisonment, the greater the correlation of murder with this punishment.

Reducing the Society's Tolerance for Violence

Raising the standard of living may decrease the severity of criminal punishment. However, there are factors that objectively inhibit its deflation. The study of the evolution of views in the juries of Great Britain from the end of the 18th century to the beginning of the 20th century showed that, during this period, the perception of violence in society changed: people became less tolerant of violent crimes due to cultural and institutional changes. This was partly the result of the recognition of the state as a subject that is exclusively entitled to use violence (Klingensteina et al., 2014).

One of the evidence of the decrease of tolerance to violence in modern society is a study conducted in Japan. The study recorded a decrease in violent crime, including murder, in the period from 1980 to 2015 and a simultaneous increase in panic among those people who believed that the country was becoming more dangerous. The number of such people increased from 50 to 85 percent. A particular trend in media coverage of murders was identified: the rarer the murders, the greater the sensational coverage in the media. To this point,

Table 3. Number of incarcerated individuals and homicide victims in the world based on the IMF's GDP per capita purchasing power parity rating, rate per 100,000 persons, 2010

Country (Territory)	Number of victims of homicide per 100 thousand inhabitants	The number of prisoners per 100,000 inhabitants
1	2	3
China, Macau	0.4	173
Luxembourg	2	134.1
Brunei Darussalam	0.3	97.5
Singapore	0.4	268.1
Kuwait	2	139.4
Norway	0.6	72.9
Switzerland	0.7	73.6
USA	4.8	738.4
China, Hong Kong	0.5	144.6
Netherlands	0.9	86.1
Ireland	1.1	93.3
Austria	0.7	104.8
Sweden	1.0	72.9
Denmark	0.8	71
Australia	1.0	134.3
Germany	1.0	87.6
Belgium	1.7	96.5
Bahrain	0.9	88.6
Canada	1.6	115.6
Iceland	0.6	52.1
Finland	2.2	62.7
China, Taiwan	0.8	282.7
France	1.3	96.1
Great Britain (England and Wales)	1.1	150.8
Great Britain (Northern Ireland)	1.3	81.2
Great Britain (Scotland)	1.9	149.3
Japan	0.4	56.8
Cyprus	0.7	57.2
Italy	0.9	116
Puerto Rico	27.4	293.1
Spain	0.9	158
New Zealand	1.0	193
Libya	3.1	214.6
Trinidad and Tobago	35.6	277.9
Bahamas	26.1	354.2
Israel	2	271.9
Greece	1.5	107.9
Malta	1.0	140.3

Continued Table 3

1	2	3
Slovenia	0.7	66.1
The Czech Rebuplic	1.0	207.9
Portugal	1.2	111.1
Slovakia	1.5	185.6
Saint Kitts and Nevis	40.8	548.2
Hungary	1.4	164.5
Estonia	5.3	254.7
Poland	1.1	214.9
Antigua and Barbuda	6.3	311.6
Lithuania	7	292.6
Malaysia	1.9	136.5
Kazakhstan	8.5	336.2
Seychelles	9.8	472.6
Croatia	1.4	119.3
Chile	3.2	354
Latvia	3.3	320
Turkey	4.2	166.2
Uruguay	6.1	257.8
Venezuela (Bolivarian Republic of)	45.1	140.6
Romania	2	138.2
Barbados	11.1	325.5
Lebanon	3.8	116.7
Azerbaijan	2.3	243.2
Belarus	4.2	418.3
Mexico	22	160.3
Bulgaria	2	126.7
Mauritius	2.6	196.2
Panama	12.6	344.3
Brazil	22	261.2
Montenegro	2.4	233.4
Thailand	5.4	313.7
Maldives	1.6	227.7
Botswana	15	347.7
Serbia	1.4	124.2
Costa Rica	11.6	231.9
Algeria	0.7	135.7
Iraq (Central Iraq)	9.7	94.9
Saint lucia	25.5	304.8
South Africa	30.8	316.6
North Macedonia	2.1	121.5

Continued Table 3

1	2	3
Dominican Republic	25	209.6
Grenada	9.6	418.4
Colombia	33.7	183.9
Dominica	21	412.9
Saint Vincent and the Grenadines	22.9	950.5
Paraguay	11.9	99.8
Bosnia and Herzegovina	1.5	73.7
Albania	4.3	158.4
Jordan	1.6	117.4
China	1.0	121.1
Ecuador	17.6	79
Namibia	14.4	195.6
Indonesia	0.4	48.6
Sri Lanka	3.8	128.8
Kosovo	6	75.1
Ukraine	4.3	336.4
Mongolia	8.8	273.6
Fiji	2.3	127.6
Georgia	4.4	559.7
Morocco	1.4	200.2
Armenia	1.9	178.7
Philippines	9.5	101.8

despite a stable homicide rate in 2004, these was increased criminal liability for murder under aggravating circumstances ('heinous murder') (Morozov, 2016: 35-37, 43).

Another proof of the above mentioned idea is revealed in a sociological survey conducted in Japan in 1977, 1997, and 2015 on the social attitudes to crimes. Its data show that public concern regarding crimes involving violent death changed little and even tended to slightly increase. At the same time, the public started to perceive crimes that did not lead to violent death, in most cases, as less dangerous (Morozov, 2016: 270).

On the one hand, criminal punishment is becoming less severe, as society is increasingly horrified and disgusted by violence. But on the other hand, the more despicable some acts seem to us, the more we may feel legitimized to inflict pain on those who perform them (Durkheim, 1982b: 38; Ruggiero, 2013: 291).

Decreased tolerance for violence has already led to significant changes in criminal policy. For example, in France, scholars note a change in the characteristics of a typical prisoner. While in 1980, he or she was most likely a thief, in 2010 he or she was most likely a rapist, murderer, or drug dealer. At the same time, for the noted period, the number of highly violent crimes did not change and remained very low. Against this background, punishment for serious violence has been made more severe (Robert, 2013). A similar situation exists in Sweden, where imprisonment is most often linked with crimes related to drugs, violence, and sexual assault. Although homicide and manslaughter have

declined slightly since the 1980s, the number of prisoners sentenced to life imprisonment has increased dramatically. (Von Hofer and Tham, 2013) In Germany, there is also an increased attention of society and media to the problem of violent crimes, as well as sexual offenses. Individuals convicted of these crimes are more likely to receive a prison sentence and tend to receive longer sentences (Dollinger and Kretschmann, 2013).

A similar trend is developing in Russia, where prisoners are mostly convicted of violent crimes, especially murder. In 2018 there were 460,923 people in adult correctional institutions, among those 91,130 people (19.8%) had been convicted of murder, deliberate serious bodily harm – 46,167 people (10%), rape or violent sexual actions – 21,465 people (4. 7%), robbery – 23,409 people (5.1%), robbery with violence – 29,547 people (6.4%) (The Federal Penitentiary Service, 2019).

On the one hand, the improvement in the living standards of country softens criminal penalties, and on the other hand, it tightens them in relation to violent crimes. As a result of increased well-being, we value our lives and health more and demand increased protection.

Conclusion

Like our ancestors, who punished inanimate objects and animals, we punish even in cases where punishment would not bring any benefits beyond short-term relief. Punishment as a way to get rid of negative emotions causes serious and unjustifiable wrong to society. There is no sense in denying that in some cases it curbs the growth of crime, for example, in the case of serial killers or professional criminals who are imprisoned for long periods of time or for life. But in general, punishment, unlike socio-economic factors, has little effect on crime.

Any punishment is an element of symbolic social exchange of the wrong caused to an offender in response to a crime. The exchange is determined by the commodity, which is a human life. Time is the most important factor in our lives, according to modern cultural values, and it plays a decisive role in shaping the price of crime. Criminal justice is obviously focused on taking into account the lost time of human life in the application of punishment. Thus, incarceration is widely used and the death penalty is still retained. With the help of these punishments, we are not trying to reduce crime, but only to restore justice, depriving the guilty of part of his or her lifetime. Since a person's lifetime is the commodity exchanged in a criminal sentence, incarceration is used more frequently in countries with a lower standard of living. For the same reason, the dynamics of imprisonment rate correlate with the dynamics of murder rate. Although murderers are not the dominant group among criminals, the higher the homicide rate, the lower the value of a person's life in a particular country, and the more often imprisonment is used in that country.

Raising the standard of living and welfare of society increases the marginal harmfulness of criminal punishment, which ultimately softens it. However, there are factors that objectively inhibit deflation of criminal punishment for violent crimes. They include decreased tolerance for violence in the modern society.

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Наказание и символический социальный обмен: ненужные жертвы уголовной юстиции

О.Н. Бибик
Омский государственный университет им. Ф.М. Достоевского
Российская Федерация, Омск

Аннотация. В данной статье исследуется сущность уголовного наказания в качестве элемента символического социального обмена на основе теории социального обмена и культурно-исторической психологии на примере смертной казни и лишения свободы. Сделан вывод, что эквивалентом при таком обмене выступает время жизни человека. В связи с этим смертная казнь и лишение свободы применяются чаще в странах с более низким уровнем жизни. По этой же причине динамика использования лишения свободы коррелирует с динамикой убийств. Чем больше убийств, тем меньше стоимость жизни человека в конкретной стране, тем чаще в ней применяется лишение свободы. Повышение уровня жизни увеличивает предельную вредность уголовного наказания, что стимулирует его смягчение. Вместе с тем процесс дефляции уголовного наказания за насильственные преступления замедляется ввиду уменьшения в современном обществе толерантности к насилию.

Ключевые слова: уголовное наказание, символический социальный обмен, культурно обусловленное поведение, уровень жизни, лишение свободы, смертная казнь, время жизни человека.

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Corruption System against Russia

Vitaly A. Nomokonov*
Far Eastern Federal University
Vladivostok, Russian Federation

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Abstract. Today the corruption has become a major threat for the national security. Not only individual corrupted officials and embezzlers turn against Russia, but also a huge and powerful corruption system. Analysis of the corruption as a negative social phenomenon shows that it implies the totality of all corruption acts, all corrupted officials, as well as an entire independent corruptogenic system. This system often lacks the attention of analysts. Corruption has now acquired a systemic character in Russia. The institutions involved in the study of the corruption phenomenon in Russia include the Law School of Far Eastern Federal University, where in June 1997 the Vladivostok Centre for the Study of Organized Crime was established as part of a wider initiative of American University's Transnational Crime and Corruption Center (TraCCC) to create and support United Research Centres on Organized Crime in Eurasia. The Centre researchers study the patterns and development of organized crime as well as methods of defeating the socially devastating manifestation of organized crime and the closely associated phenomena of corruption, money laundering, contract killings, illegal narcotics trade, etc. The Vladivostok Centre has produced a large body of research, analysis, translated international literature and popular scholarly works; it has prepared a number of books, textbooks, and academic articles, including many concerning corruption. The inefficiency of the state's efforts to combat corruption is explained by the fact that the main corruption-causing factors remain unaddressed. They include deformation of the political sphere (privatization of the state, the absence of a real separation of powers, the dominance of the executive branch of government over all others, lack of necessary rotation, irreplaceable officials, lack of transparency, the presence of "shadow" power and "shadow" law).

Keywords: corruption, causes of corruption, anti-corruption preventive measures, anti-corruption enlightenment, anti-corruption competences.

Research area: law.

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* Corresponding author E-mail address: nomokonov@rambler.ru
ORCID: 0000-0002-5154-0408

Introduction

Among those institutions that did not shy away from the study of the corruption phenomenon in Russia was the Law School of Far Eastern Federal University, where in 1997 the Vladivostok Centre for the Study of Organized Crime was established and where it functions today[1]. The Center was founded within a wider initiative of American University's Transnational Crime and Corruption Center (TraCCC) to create and support United Research Centres on Organized Crime in Eurasia. The Centre researchers study the patterns and development of organized crime as well as methods of overcoming the socially devastating manifestation of organized crime and the closely associated phenomena of corruption, money laundering, contract killings, illegal narcotics trade, etc. The Vladivostok Centre has produced a large body of research, analysis, translated international literature and popular scholarly works; moreover, it has prepared a number of books, textbooks, and academic articles, including many concerning corruption.

Today we are all witnessing an unprecedented range of publications on anti-corruption topics and the revitalization of various corresponding public forums in Russia. Contemporary Russia is characterized by an unparalleled growth in publications and rejuvenated anti-corruption activities done by numerous actors of civil society. In my opinion, this tendency is not so much a fashionable trend but rather a reflection of an appropriate reaction to the corruption phenomenon in Russia and the growth of public expectation of reduced corruption. This is seemingly not so much a tribute to market conditions but a real indicator of the seriousness of the corruption situation in Russia and, accordingly, the growth of anti-corruption expectations in society. We also see that a cardinal turning point in the fight against corruption has not occurred so far.

More than that, I personally think that despite a whole package of anti-corruption legal measures, the introduction of National Strategy and National Anti-Corruption Plans, specialized anti-corruption units in government and administration, regardless of the frequent high-profile arrests of the most senior corrupted officials, corruption continues its destructive work and increasingly weakens the state more and more. Not only individual corrupted officials and embezzlers come down on Russia but huge and powerful corruption system.

This is a result of that, first of all, major corruptogenic factors remain outside the influence of state and public institutions and these factors themselves have been neither fully realized, nor studied deep enough. Most works on anti-corruption topics suggest that all what is covered is well known but key reasons of this negative phenomenon are reduced to the greed of officials and the imperfection of laws. There is a question, why the greedy officials still continue to occupy the halls of power, why the legislation does not improve?

Theoretical framework

One should say that there is no adequate understanding of corruption, even despite the known per se legislative definition. It should be clarified that the Federal Law "On Combating Corruption" (2008) defines corruption not as a social phenomenon but as an individual corruption act. They need to be distinguished. But the definition of corruption acts comes down to listing its various forms. All of them consist, as applied to individuals, of unlawful use by a person of his/her official position possibilities contrary to the legitimate interests of society and the state in order to obtain property benefits or illegal provision of such benefits to this person by other persons.

It is noteworthy that such an interpretation is narrower than that given in the UN Convention against Corruption (2003): here the focus is on the goal of obtaining *any unlawful,* not just property, advantage. Therefore, I'd support the proposal to clarify the legislative definition of corruption as a separate act and a broader interpretation of the purpose of such an act.

As for corruption as a negative social phenomenon, it implies *the totality of all corruption acts, all corrupted officials, as well as an entire independent corruptogenic system.* This system often escapes the reasoning of analysts.

[1] Similar Centres have also been established over the years in Moscow, St. Petersburg, Ekaterinburg, Irkutsk, Saratov, in Ukraine and in Georgia.

The wide scope and deep penetration of corruption into all the tissues of the social organism requires paying attention to a system of corruptogenic relations that provoke corrupt behaviour directly.

One of the most accurate definitions of corruption was formulated by a famous Russian specialist Prof. B.V. Volzhenkin: corruption is a social phenomenon consisting in the decomposition of power, when officials and other persons, namely persons authorized to perform public functions, use their positions, status and authority for mercenary purposes, personal profiteering or for lobbying group goals (Volzenkin, 1998). I will take an advantage of this definition in the future. One would precise that in addition to the mercenary purpose, another personal interest in obtaining any illegal benefit is possible.

Statement of the problem

Official statistics does not produce the real number of corruption crimes due to their extremely high latency in our country. If you try to assess the corruption situation in the country as a whole, then the discussion should, in my opinion, revolve around reaching a critical level at which a real threat to the security of the state has already arisen. This is openly talked about by many experts, this is evidenced by special sociological studies conducted in Russia during recent years, also numerous mass media reports have appeared. No one questions the statement that corruption in Russia has currently acquired a *systemic character*.

The Primorsky Krai is not an exception. A number of vice-governors were prosecuted for corruption crimes, and not only vice-governors, but also mayors, heads of municipalities, a rector and vice-rectors of the Far East Federal University, a head of the investigation division and a head of the criminal division in the Police Department of the Primorsky Krai, a former speaker of the legislative unit, etc.

Discussion

The inefficiency of the state's anti-corruption efforts is presumably explained by the fact that essential corruptogenic factors remain intact. An effective anti-corruption strategy in Russia should be based on an adequate understanding of features of the causes of corruption. It allows one to more deeply and accurately determine the main directions of the strategy to combat it. Ignoring this circumstance may lead not to a real fight against corruption, but only to its imitation.

Corruption is seemingly rooted *in deformations of the political sphere* (primarily)*, deformations of state power,* its hypertrophy or, vice versa, underperforming. These deformations are quite substantial and it is regrettable that for various reasons they are most often somehow understated.

1) *Commercialization (privatization) of the state.* In our country, as a result of the transfer of a significant share of state ownership to private hands, our state, though declaring a commitment to common interests, was transformed, in fact, into a state of protection of a narrow layer of new wealthy owners, it has become a business project of clans fighting for power and property at all levels: federal, regional, municipal.

It should be recognized that, as a result of political confrontation in the 1990s, the ideology of the bourgeois consumer society with its priority of personal material enrichment dominated as a criterion of life success. State ideology, abolished by the new Constitution, has not gone anywhere de facto but only became indeed bourgeois, although it was not officially declared as such. The coup d'etat of the 1990s and the looting of the country following it under the cover of privatization by fraudsters and corrupt officials brought to power the most consistent and decisive carriers of the new ideology.

The political scientist V. Inozemtsev (as well as another authors) describes a system in which formal instruments of government are completely subordinate to the tasks of increasing the wealth of the country's leader, people close to him, their friends and relatives, and also all those whose political loyalty is needed by the "big boss" to maintain their power and ensure their own security. Enrichment of the political elite is the highest goal of the system and getting benefit from one's position is

its fundamental imperative (Inozemtsev, 2019; Damaskin, 2009; Rose-Ackerman, 2003).

2) Next significant corruption factor is the lack of real separation of powers proclaimed by the Constitution of the Russian Federation and the *clear dominance of the executive branch of power* over other branches. Without going into discussions about where to take the President himself with his administration, one should remark that if you put them at over all branches of government, which takes place in reality, then you get connivance of authorities in terms of checking for corruption.

3) *The lack of necessary rotation*, mainly in the highest echelons of power. The irremovability of the country's leaders for a long time is unacceptable by virtue of the obvious propensity of corruption, for "power corrupts everyone".

4) *Destruction of democratic principles of governance and persistent trends of authoritarianism,* which is a consequence of hypertrophy of one of the branches of government and the reason for the growth of corruption.

5) Lack of transparency, secrecy of power relations and decisions is not just a favorable condition or favorable background of corruption, but its independent cause.

6) *The presence of "shadow" power and "shadow" law.* It is expressed not only in the direct penetration into the power of criminals, but also in other forms. Alas, many processes in present-day Russia instead of being realized in a civilized, open form occur "under the carpet", in shadow structures and shadow ways. There is a lot of data testifying to the formation and activities of parallel shadow political power in Russia. Today, the huge growth of the shadow (criminal) component is often corollary to that formal institutions (offices of president, governors or mayors and so on participate in the informal process). In the latter case, these structures do not function at a representative or government levels, but only at informal and personal (it is main one); they are pursuing self-serving and narrow corporate goals.

The specificity of the Russian political environment is that the informal field has become almost pointedly stronger than formal relations (Nomokonov, Popova, Filippov, 2018), i.e. "shadow" law ("concepts") embraces informal regulation of public relations and is dovetailed with the hidden illegal behaviour of officials (Ilyukhin, 2011; Sulakhsin, 2018; Korhzakov, 2018).

7) Corruption of legislation. Despite the existence of an institute of anti-corruption expertise, a lot of conspicuosly corruptogenic norms can be found in the current legislation. For example, the minimum limits of punishment were removed from a number of the Criminal Code's articles, thereby vastly increasing the breadth of the discretionary powers of judges. Also, the judge received the right to change the category of gravity of the crime at his discretion, which had been previously unacceptable. Confiscation was excluded from the punishment system. It was introduced again in three years but, nevertheless, not as a measure of punishment, which causes bewilderment. The punishment of up to 8 years of imprisonment may be imposed by the court on probation, including cases of corruption (but this practice was not legalized).

8) Lack of control on the part of civil society, as well as the actual lack of civil society itself. Unfortunately, public chambers and public councils neither have the authority to control the activities of officials nor are actually perfunctory.

Unfortunately, the state counteraction to corruption *still does not practically affect its main economic reason – the shadow economy.* Neither the National Strategy nor the National Anti-Corruption Plans even mention this serious cause of the latter.

A weighty corruption factor is *the strongest stratification* of the population. It is a manifestation of social injustice and a powerful factor in the growth of social tension.

Turning to the spiritual sphere of public life, we find a kind of "corruption syndrome": everyone has become, as it were, a subject of trade in an effort to "sell out smth at a higher price". In the public mind of Russian citizens, we now observe two interconnected social opinions. One of them *is corruption dependence* when corruption is perceived as an integral attribute of the lifestyle in Russia. Such a perception and an appropriate lifestyle are often

incorrectly called the "social norm". I consider that "mass" or "massive" is not a synonym to "normality". Otherwise, we would come to the paradoxical conclusion that in Russia the Law is fighting or trying to fight normal behaviour that does not harm the individual, society or the state.

The second attitude can be described as *corruption readiness*. This means a psychological orientation to solving various problems through bribery. Perception of corruption as a "social norm" (it is not tantamount to recognizing it as such, only in the wording "everybody does it"), in turn, forms a psychological readiness to give bribes and take them. Ultimately, behind these deformations of public consciousness, it seems, there is hidden and even deeper deformation of value and regulatory system of social, group and individual consciousness. It is based on the recognition of money, capital, property as main values; hereby it leads to the alienation of the individual from society and the state and vice versa.

Conclusion

The escalation of corruption and the aggravation of its qualitative characteristics are natural for those conditions of society when at the same time, in one and the same system, firstly, the measure of everything is exclusively money, material values; spiritual values are devalued, a person's value is determined by the size of his/her personal fortune, regardless of how they have receives it. Secondly, any means for the sake of enrichment are justified. Thirdly, the Law does not even provide a minimum standard of living (Dolgova, 2003).

In my opinion, the largest anti-corruption potential lies with society, which is based on three fundamental points. First, in such a society priority shall be given to *spiritual values* over material goods. Second, the fundamental principle of social life becomes *the principle of social justice* above all, or the suitability of actions and reward for actions, the degree of service and reward for service, the degree of guilt and punishment. Third, in such a society *social liberty* presents the opportunity for the harmonious and multifaceted development of the individual, society and the state within *clearly-defined and transparent boundaries*.

On the other hand, the predominant materialism in society, the violation of the principle of social justice, the impaired liberty of some sectors of social life and the lack of transparency of social connections and actions inevitably give rise to corrupt activities.

Therefore, an additional cornerstone in the fight against corruption should be the strengthening of the state and its democratic collaboration with citizens, the division of state and personal interests, and the every possible reinforcement of the principle of social justice in society.

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Коррупционная система против России

В.А. Номоконов
Дальневосточный федеральный университет
Российская Федерация, Владивосток

Аннотация. Коррупция сегодня превратилась в главную угрозу национальной безопасности. Против России действуют уже не отдельные коррупционеры и казнокрады, а огромная и мощнейшая коррупционная система. Что касается коррупции как негативного социального явления, то в него входят: совокупность всех коррупционных деяний, все коррупционеры, а также целая самостоятельная коррупциогенная система. Вот эта система часто ускользает из поля зрения аналитиков. Коррупция в России в настоящее время приобрела системный характер. Неэффективность усилий государства по противодействию коррупции объясняется тем, что остаются нетронутыми основные коррупциогенные факторы. В их числе деформации политической сферы (приватизация государства, отсутствие реального разделения властей, доминирование исполнительной ветви власти над всеми другими, отсутствие необходимой ротации, несменяемость, отсутствие прозрачности, наличие «теневой» власти и «теневого» права), а также наличие теневой экономики, чудовищное социальное расслоение, идеология всеобщей продажности.

Ключевые слова: коррупция, причины коррупции, антикоррупционные превентивные меры, антикоррупционное просвещение, антикоррупционные компетенции.

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Counteraction to Corruption Offenses in Penitentiary System (in Memory of Doctor of Law, Professor Nikolay Shchedrin)

Natalia S. Maloletkina[a], Andrey P. Skiba[b] and Alexey V. Rodionov*[b]
[a]*Samara Law Institute of the Federal Penitentiary Service of Russia*
Samara, Russian Federation
[b]*Academy of the Federal Penitentiary Service of Russia*
Ryazan, Russian Federation

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Abstract. The subject of the research is the processes of combating corruption in the penitentiary system of Russia. The purpose of the research is to analyze the legal prerequisites for the emergence of corruption manifestations in the penitentiary system and search for promising areas of legislation improvement in this area. The work is based on the complex application of a number of general and special research methods (structural and functional analysis, comparative-legal, formal-logical, system-structural methods). Domestic and foreign regulations, official data of the Federal Penitentiary Service of Russia, the results of the Russian and foreign scholars' research serve the information base of the research. The main result of the research is in substantiation of the essential conclusions about the need for a clearer definition of the penitentiary system officials' powers in order to reduce the risks of committing acts with the signs of corruption. The most significant, regarding the risks of corruption manifestations, spheres of penitentiary system employees' activity are defined. The directions of law enforcement practice improvement in the sphere under the research are substantiated. The materials of the research can be useful for both scientists-penitentiaries, practitioners and for students, undergraduates and graduate students of the relevant areas of training and specialties in the course of mastering special disciplines.

Keywords: penitentiary system, corruption combating, correction of convicts, the regime of serving the sentence.

Research area: criminal law, criminology, penal law.

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* Corresponding author E-mail address: avrpost@bk.ru
ORCID: 0000–0002–9311–4896 (Rodionov)

Introduction

Anti-corruption issues have long been in the focus of economic and legal science. They are particularly acute at the present stage, which is explained by the emergence of new forms of corruption offenses. This kind of situation is largely due to the inroads into new technical means and active digitalization in the financial sector, which significantly increases the possibility of implementing corruption actions by the offenders.

Intentional capture of improper benefits by the officials prevents the state bodies from normal activities. The level of trust of the population and the public to the state and to its certain divisions decreases. Corruption manifestations have a negative impact on the prestige of the state in the international arena, as well as on the processes of achieving social harmony within the country.

This problem is also relevant for the penitentiary system of Russia. This is largely due to the initially high level of requirements for compliance with anti-corruption legislation in the system of bodies and institutions executing the penalties for non-compliance. The penitentiary system is a state body, which, first of all, aims at achieving the goals of correction of convicts and prevention of new crimes, which, accordingly, increases its responsibility to the society.

The relevance of this research topic is largely determined by the specifics of anti-corruption activities in the penitentiary system. It is caused by shortcomings of penal and other legislation, features of illegal actions of the corresponding officials, methods and techniques for countering the implementation of anti-corruption measures in the penitentiary system, the specifics of committing corruption offenses.

Problem statement

The theory of intersectoral security measures aimed at neutralizing various threats, including corruption, plays an important role in the area under the research. It seems that security measures against a person who has committed a crime are not directly specified in Russian legislation and insufficiently researched inter-sectoral institution, including criminal and penal law. Currently, the security measures concept that was developed at the theoretical level by N. Shchedrin attracts many other researchers' attention. In the National Security Strategy of the Russian Federation until 2020, corruption and economic crimes are named among the main sources of internal threats to public development and the rule of law.

Theoretical and empirical basis of the research

The scientific and theoretical basis of this research grounds on scientific works of the specialists in the fields of economics, philosophy, theory of state and law (Torres, Garrido, 2014), criminal (Mazza, 2019), penal (Nikolaev, 2019) and administrative law (Cleff, Naderer, Volkert, 2011), criminology (Worley, Tewksbury, Frantzen, 2010), and other legal sciences (Worley, Tewksbury, Frantzen, 2010). The logic and content of the article are largely based on the experience of foreign scholars specializing in the implementation of anti-corruption legislation in the penitentiary sphere (Woodiwiss, 2015). The normative base of the research is the provisions of the Constitution of the Russian Federation, laws and bylaws of national legislation that regulate the relations in the field of combating corruption. The substantiation of the conclusions and proposals was based on the experience in the implementation of anti-corruption policy of the European German-speaking federal countries of the Romano-Germanic legal family, as well as economically developed countries of the Anglo-American legal family (USA, UK, and Canada).

The empirical basis of the research is the results of the author's research of the problems of combating corruption, including the penetration of prohibited items into the territory of correctional institutions. This research was conducted on the basis of correctional facilities in five regions (Samara, Ryazan, Rostov, Tver, and Saratov regions) in 2017-2018. The official data of the Federal Penitentiary Service of Russia concerning the practice of suppressing the illegal actions of a corruption nature, related to the employees of the Service, or those committed on the territory of subordinate institutions were also used.

Methodological basis

The methodological basis of the work is a complex of general scientific and specific research methods. The comparative legal method was used for the analysis of the national anti-corruption legislation and the peculiarities of its application in the penitentiary sphere, taking into account the most progressive changes in the legislation of foreign countries. The structural and functional analysis was aimed at determining the compliance of the existing anti-corruption legislation with objectively existing features of the domestic penitentiary system functioning. The formal-logical method was applied to interpret basic concepts and categories, to substantiate intermediate conclusions and proposals. The systemic-structural research method was used in the analysis of the main components of corruption crimes.

Discussion

In Article 1 of the Federal law of December 25, 2008 No. 273-FZ "On combating corruption" the concept of corruption is presented in the form of abuse of official position, bribery, acceptance of bribe, abuse of power, commercial bribery or other illegal use by an individual of his/her official position contrary to the legitimate interests of the society and the state in order to obtain benefits in the form of money, valuables, other property-related services, other property rights for him/herself or for third parties or illegal provision of such benefits to the specified person by other individuals, as well as performing acts on behalf of or in the interests of a legal entity.

The researchers generally present corruption as reflection of a moral state of society, a set of official crimes (and other offenses) made by the officials (and other persons) against the state power, interests of public service and service in local self-government bodies, abuse of state power. Yet, at the same time they criticize the provisions of Federal law of December 25, 2008 No. 273-FZ "On combating corruption" (Bugaevskaya, 2016; Kabanov, 2015; Shchedrin, 2009).

By its nature, corruption is dangerous for the society due by increasing organized crime, slowing down the economic development, infringing on the citizens' constitutional rights and interests as well as undermining the foundations of state power, and threatening the rule of law.

A certain level of corruption crimes committed by the employees of the penitentiary system indicates the relevance of this problem and its practical significance. Since the Federal Penitentiary Service of Russia (hereinafter – the FPS of Russia) is an executive body, then, accordingly, the employees of the bodies and institutions of the penitentiary system act on behalf of the state itself, thereby performing a large number of functions and duties to monitor and comply with the rule of law in their professional activities. Unfortunately, it is not always that the employees of the FPS of Russia comply with the law. In this case it is necessary to dwell upon the employee's personal qualities, his/her professional characteristics. Thus, psychologists should carry out more qualitative forecasting and prevention of corruption among constant and variable stuff.

Historically, any state at different stages of its development has gone through a period of surge or decrease in crimes and other corruption-related offenses. Correctional institutions are a place of concentration of persons, a significant part of whom systematically and professionally carried out criminal activities. Being in places of deprivation of liberty with appropriate measures of isolation from the society significantly reduces the potential for this social category's criminal activity, but does not ensure their complete rejection of the desire to continue their illegal activities even while serving imprisonment.

This can be analyzed on a number of examples. In the framework of administrative law, in accordance with Article 19.12 of the Code of Administrative Offences of the Russian Federation (hereinafter – CAO of the Russian Federation), transmission or attempted transmission of prohibited objects to persons detained in prisons is one of the typical offenses committed in correctional institutions. In accordance with the norms of the Penal code of the Russian Federation (hereinafter – the PC of the Russian Federation), convicts are prohibited from carrying prohibited items within the regime in correctional institutions.

Fig. 1. The materials of criminal investigation by the Perm regional office of the FPS of Russia[1]

Prohibited items in places of deprivation of liberty are those items, means, devices, or substances, that cause or may cause a further threat to the life and health of convicts and employees of the penitentiary system, may serve as obstacles to the process of correcting the convicts, tools or methods of committing illegal acts, as well as threaten the safety of the institution as a whole. The list of items and foods that convicts are prohibited to have, to receive in parcels or purchase is specified in the Order of the Ministry of Justice of the Russian Federation dated 16.12.2016, № 295 "On Approval of the Internal Regulations in Correctional Institutions".

As per the results of our research, based on the example of the five regions, in the number of correctional institutions the ways of getting the prohibited items by the convicts are the following: throwing over the fence (most common response); carrying through a control checkpoint in disguise; concealment in parcels, letters; transportation in vehicles; hiding in the recesses, and also bribery of the staff in the protected object.

Offenders hide prohibited items in various places in the most sophisticated ways. For example, on September 17, 2019, the employees of the FPS of Russia in the Perm region stopped the attempts to deliver prohibited items to the territory of regime institutions. At the checkpoint of the institution, during the inspection of the car they found a double bottom in the oxygen cylinders intended for the production needs of the colony, the cylinders being the arsenal of prohibited means: 10 cell phones, 18 chargers, 12 headsets, 1 Bluetooth headset, 5 lighters, 72 SIM cards, and 4 bottles of eau de toilette (Fig. 1).

[1] Krupnuiu partiiu zapreshchennykh predmetov pytalis' dostavit' na territoriiu IK-10 GUFSIN Rossii po permskomu kraiu [An attempt to deliver a large batch of prohibited items

Sometimes the ones who are convicted to imprisonment keep the cell phones they illegally get. The suppression of such situations is largely related to the implementation of anti-corruption measures, as a number of cases of prohibited means of communication entering the territory of places of deprivation of liberty, bypassing regime requirements, can potentially be associated with the Commission of corruption crimes by the employees of the penitentiary system.

Corruption-related actions are usually detected by the employees of the relevant operational divisions of the FPS of Russia, who for a certain period of time often monitor and profile those who are prone to illegal actions and fall into their field of vision according to the convicts' and other persons' information. For the last two years Samara regional office of the FPS of Russia have arrested three employees in management positions and brought them to justice for the acts of corruption.

Article 9 of Federal law No. 273 of 25.12.2008 "On combating corruption" establishes a requirement that applies to all employees of the penitentiary system without exception. This requirement implies the obligation of the civil servants to promptly notify the head of appeals for the purpose of inducing to commit corruption offenses (which is stipulated in the departmental legislation). In case of concealment and failure to comply with this requirement, the employee may be dismissed or brought to other types of responsibility.

One of the main reasons for the dismissal of persons with high positions in the public service is violation of anti-corruption legislation. In the FPS of Russia, commissions on observance of requirements to office behavior and settlement of conflict of interests function on the basis of Order No. 693 of the FPS of Russia from 31.07.2015; Order No. 256 of the FPS of Russia from 29.05.2010 approves an accurate order of notifying about the facts of inciting to commit various corruption offenses; Order of the FPS of Russia No. 5 from 11.01.2012 approves the code of office conduct and ethics of employees and civil servants of penitentiary service. There is also a set of other legal acts, according to which the employees provide the information regarding their property, income, property obligations and expenses. Since the introduction of mandatory declaration on the employee's income, the number of corruption actions has decreased, as this measure is quite effective in preventing corruption.

The existing norms regulating the disciplinary responsibility of the employees of the penitentiary system prove the importance of preventive anti-corruption impact of administrative and legal norms. CAO of the Russian Federation contains several articles of direct relevance to the activities of penitentiary system. For example, Article 7.29 refers to the failure to comply with the requirements of the legislation of the Russian Federation on contract system in procurement; Article 5.59 discloses the responsibility for violating the procedure of considering the citizens' applications; Article 19.32 specifies the issues of violation of the legislation on public control over human rights in places of forced detention; Article 19.29 provides for the state's or a municipal employee's liability for illegal employment or for performance of works or rendering of services. However, for example, the administrative code of the Russian Federation lacks the rule on responsibility for receiving a gift. The judicial practice recognizes it as a minor insignificant act of receiving the illegal remuneration by the official for making use of his official position against the interests of service. In this regard, we believe that it would be appropriate to introduce an article on administrative responsibility for corruption offenses, as well as for abuse and abuse of authority into the CAO of the Russian Federation.

It is also reasonable to consider the issue of unclear assignment of powers to the heads of correctional institutions, their power leaving much to their subjective discretion. This can lead to committing corruption crimes and other offenses. It is worth while considering some of them. According to Part 2 of Article 89 of the PC of the Russian Federation, the head of the

to the territory of Correctional facility #10 of the Central Department of the FPS of Russia in the Perm region]. Available at: https://www.59.fsin.su/news/detail.php?ELEMENT_ID=474682 (accessed 15 June 2019).

correctional institution may take a decision on granting the extended visits to the convict, not only with close relatives but with other persons (without specifying them – the authors' notes); according to Part 6 of Article 97, the head of the institution may allow the convicted person to travel outside the correctional facility, "taking into account the nature and severity of the crime, the part of the served term, the convicted person's personality and behavior" (the legislative wording is used here – the authors' notes); Part 1 of Article 100 stipulates neither criteria nor forms of providing the imprisoned women an opportunity to living with children; parts 2 and 3 of Article 116 provide for two "alternatives" of possible recognition of the convicted person as a malicious violator of the established procedure for the served term (it is the former who is characterized by the subjective discretion of the head of the institution – the authors' notes), etc.

There are other examples of such a vague regulation of the powers of the penitentiary system employees, for example, while implementing the Institute of parole. According to Part 2 of Article 175 of the PC of the Russian Federation, after filing of the petition of the convicted person on parole the administration of the correctional institution directs to court the specified petition together with the characteristic on the prisoner, the characteristic containing the data on the convicted person's behavior, his/her attitude to education and work, the convict's attitude to committing the act on compensation for crime damage, and the conclusion of the administration on the advisability of parole. However, there are no clear recommendations on this matter in the law. As a result, the final conclusion may differ, the data being similar: for example, for several incentives and one penalty or, identically, for several repaid or withdrawn penalties and one incentive, etc. the convict can be characterized either positively or negatively. Consequently, a corruption-related situation has been created by law: depending on the subjective discretion, the relevant officer of the criminal investigation department can formulate radically different conclusions, which is hardly acceptable. It seems that the provisions of the penal enforcement and other legislation (having conflicts, "white spots", and other numerous shortcomings) should clearly define the powers of the relevant officials of the institutions and bodies executing sentences in order to exclude subjectivity in their application.

Conclusion

Regarding the corruption in the society as a whole and in the penitentiary system, in particular, it is necessary to simultaneously consider the issues of combating crimes and other corruption-related offenses. It seems that appropriate prevention should be carried out at a minor age at school already to disclose the negative aspects and consequences of corruption, its content, types of corruption, causes and conditions of corruption offenses, as well as to give specific examples of violations of anti-corruption and other legislation. Systematic work with young people in this area will allow future students and cadets of higher educational institutions to have primary knowledge on combating corruption (Shchedrin, 2018). Special attention should be paid to anti-corruption education of the entire personnel of the penitentiary system (N. Shchedrin, in particular, dwelt upon the importance of this area of anti-corruption prevention), including through preventive interviews with certain employees who, according to operational information, have criminal intentions and must perform duties in accordance with Article 9 of Federal law of December 25, 2008 No. 273-FZ "On combating corruption". Thus, it seems that the improvement of the penal, administrative and other legislation will increase the effectiveness of combating corruption in the penitentiary system.

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Противодействие коррупционным правонарушениям в уголовно-исполнительной системе (памяти доктора юридических наук, профессора Николая Васильевича Щедрина)

Н.С. Малолеткина[а], А.П. Скиба[б], А.В. Родионов[б]
[а]*Самарский юридический институт*
Федеральной службы исполнения наказаний России
Российская Федерация, Самара
[б]*Академия права и управления*
Федеральной службы исполнения наказаний России
Российская Федерация, Рязань

Аннотация. Предметом исследования являются процессы противодействия коррупции в уголовно-исполнительной системе России. Цель исследования состоит в анализе правовых предпосылок возникновения коррупционных проявлений в уголовно-исполнительной системе и поиске перспективных направлений совершенствования законодательства в данной сфере. Работа построена на комплексном применении ряда общих и специальных методов исследования (структурно-функциональный анализ, сравнительно-правовой, формально-логический, системно-структурный методы). Информационная база исследования представлена отечественными и зарубежными нормативными актами, официальными данными Федеральной службы исполнения наказаний России, результатами исследований российских и зарубежных авторов. Основной результат исследования состоит в обосновании выводов о необходимости более четкого определения полномочий должностных лиц уголовно-исполнительной системы с целью снижения рисков совершения действий, имеющих субъективный характер и, возможно, способствующих коррупционным проявлениям. Определены наиболее существенные с точки зрения рисков возникновения коррупционных проявлений сферы деятельности сотрудников уголовно-исполнительной системы. Обоснованы направления совершенствования правоприменительной практики в исследуемой сфере. Материалы исследования могут быть полезными для ученых-пенитенциаристов, практиков, а также в ходе изучения специальных дисциплин студентам, магистрантам и аспирантам соответствующих направлений подготовки и специальностей.

Ключевые слова: уголовно-исполнительная система, противодействие коррупции, исправление осужденных, режим отбывания наказаний.

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Expanding the Powers of a Specialist in Pre-Trial Proceedings as a Necessary Condition for Improving the Quality of Investigative Actions Aimed at Obtaining Testimony

Alexander I. Bayanov[a], Larisa P. Klimovich[a] and Nikolay G. Stoyko[b]*
[a]*Siberian Federal University*
Krasnoyarsk, Russian Federation
[b]*Saint-Petersburg State University*
Saint-Petersburg, Russian Federation

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Abstract. Based on the analysis of domestic historical experience and the current state of the legislative regulation of the involvement of a specialist to assist an investigator in investigative proceedings, as well as the survey of investigators, it is concluded that it is necessary to expand the powers of a specialist in terms of rendering assistance to an investigator during investigative actions aimed at obtaining testimony (including interrogation). In this regard, proposals to amend the wording of Articles 38 and 58 of the Criminal Procedure Code of the Russian Federation are made. The proposed changes will significantly expand the powers of a specialist in the course of all investigative actions (including verbal ones) and will correspond to the modern trends in the development of criminal proceedings, increasing its quality by attracting specific knowledge and skills from various fields of human activity.

Keywords: investigative action, investigator, specialist, collection of evidence, assistance to investigator.

Research area: criminal procedure.

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* Corresponding author E-mail address: bayanov1603@yandex.ru, klimovichl@mail.ru, nstoiko@mail.ru
ORCID: 0000-0003-0297-213X (Bayanov); 0000-0001-5044-8397 (Klimovich); 0000-0002-4523-7816 (Stoyko)

Introduction

Issues related to the participation of a specialist in criminal proceedings during investigative actions have always been and are still within the scope of interest of the legislator, legal science and practice.

The current interest in these issues can be explained by a number of objective factors. Firstly, by constant changes in the existing regulatory framework, the adoption of new and improvement of the existing legal acts regulating relations between power structures, business entities and other persons; secondly, by the presence of contradictions between regulatory prescriptions and relations between its individual subjects arising in a particular sphere of activity; thirdly, by the emergence of not only new methods, but whole technologies based on modern achievements of science and technology, aimed at the implementation of criminal intents and concealment of their consequences (when using the existing problems in the legislative framework and drawbacks in the activities of law enforcement agencies). These factors require the use of a wide variety of highly specialised knowledge, skills and abilities in the investigation process, which a modern investigator or interrogator (even with significant work experience) simply cannot master. An investigator or interrogator must be an expert in law, its interpretation and application (within the scope necessary for carrying out criminal proceedings), as well as a specialist with forensic scientific knowledge (within the scope necessary for mastering the methods of criminal investigation and the tactics of performing certain procedural and investigative actions).

As for the use of highly specialised knowledge and skills from other areas of professional activity and various fields of science and technology in the investigation process, it should be noted that it started to be carried out at a systematic (more or less organised) level in the 19th century (it was associated with the emergence of the forensic science). In the end, this led to the consolidation of the participation of the so-called "competent persons" in criminal proceedings, who have specialised information and experience in science, art, craft, or in any occupation (Article 112, Article 1160 of the SCP) in the Statute of Criminal Procedure (SCP) of the Russian State in 1864[1]. Competent persons were prototypes of modern specialists and experts and were involved into such procedural actions as inspection, examination, and search (Article 114 of the SCP), which are now commonly referred to as non-verbal investigative actions. Thus, the main emphasis in the participation of competent persons in procedural actions was aimed on the study of material sources of evidence (the scene of incident/search, human body, corpse, documents, etc.).

However, one cannot but pay attention to the explanations to the Article 692 of the SCP which concerned the participation of an expert in the process of a witness interrogation. According to these explanations, despite the absence of a corresponding "permission" in the legal norms, it was allowed for an expert to ask witnesses in the case questions when it was necessary to give a "correct opinion" (Shramchenko et al., 1911: 654).

The presence of this clarification indicates that the real needs of practical activity were beyond the frames of the formal rules of the law.

In the Soviet period (in 1966), Article 1331[1] was introduced into the Criminal Procedure Code of the RSFSR, which was later amended to clarify the role of a specialist in investigative actions. The introduction of this norm into the Criminal Procedure Code of the RSFSR was undoubtedly a step forward. But it was a half-step which did not meet the demands of investigative practice. The participation of a specialist, as it was before, was limited to assisting the investigation in the discovery, consolidation, and seizure of evidence. As for the involvement of a specialist to assist an investigator in obtaining full and truthful testimony through verbal investigative actions, this gap was not eliminated. Some participants of the All-Union Research-to-Practice Conference "Introduction of Scientific and Technical Means and Scientific Recommendations into the Practice of Investigation and Trial Proceedings of Criminal Cases" (November 1977) drew attention to this circumstance, offering to legislatively expand

[1] Statute of Criminal Procedure of November 20, 1864. Available at: http://base.garant.ru/57791498/

and propagate the use of highly specialised knowledge and skills not only for non-verbal investigative actions, but for interrogations and confrontations as well (Smyk, 1979: 35-36). It should be noted that such proposals were not included into the final document of the conference. It took several decades for the domestic legislator to secure a specialist's right to pose questions to the participants of investigative actions with the consent of an investigator, interrogator and the court (Paragraph 2, Part 3 of Article 58 of the Criminal Procedure Code of the Russian Federation) after the appearance of Article 133[1] in the Criminal Procedure Code of the RSFSR. This decision, however, is also a half-measure and does not correspond to the real needs of investigative practice.

In our opinion, the tasks solved by the modern investigative practice require the expansion of a specialist powers in conducting verbal investigative actions (first of all, interrogation) aimed at obtaining statements concerning highly specialised knowledge in cases where an investigator, for objective reasons, is not able to independently, quickly and without the help of a specialist, correctly formulate questions addressed to an interrogated person, who is also a specialist in a certain area of science and technology and surpasses an investigator in highly specialised knowledge. More significant difficulties can arise in the disclosure of material evidence, testimony of other persons, expert's opinions and assessment of the explanations received, when a quick reaction of an interrogator is required. In such situations, it is reasonable to entrust a specialist to conduct a part of the interrogation independently, without each time addressing an investigator for a permission when posing certain questions aimed at obtaining testimony regarding specific circumstances of an event under investigation.

The issue of what circumstances of an event under investigation will be clarified by an investigator during the interrogation process, and the clarification of which circumstances an investigator can entrust a specialist, is decided before the start of the investigative action and is reflected in the plan of its conduct. In this case, an investigator remains the head of the investigative action and bears personal responsibility for its course and results (as well as for the course and results of the entire preliminary investigation).

A similar independence of a specialist during non-verbal investigative actions (inspection, search, seizure, etc.) became the norm a long time ago and leads to positive results. The independence of a specialist during an inspection of the scene of an incident, a search, etc., when a specialist choses the necessary technical means and materials, uses techniques and methods of working with carriers of evidence in the process of finding, securing and seizing material objects and traces (Ugolovnyi protsess Rossii, 2005: 125-126; etc.) does not raise any questions. An investigator fully trusts a specialist to carry out this work, guided by the provision of Part 1, Article 58 of the Criminal Procedure Code of the Russian Federation and the requirement of reasonability in the distribution of duties between the investigative action participants. A similar approach should obviously be used when conducting investigative actions aimed at obtaining testimony, which purpose is not only truthful, but also complete testimony connected with the issues of highly specialised knowledge.

Legislation and judicial practice of, probably, all countries of the world distinguish (similar to Russia) two persons whose specialised knowledge is used in criminal procedure: an expert and a specialist (according to the Russian terminology). Their roles differ significantly. An expert carries out forensic examination and submits its results in the form of a written opinion (or testimony) to an investigative body (or court)[2]. A specialist provides an investigative body (or court) an assistance in investigative action (or judicial inquiry)[3].

[2] In common law countries, a written opinion of an expert does not have the value of evidence. The results of the examinations conducted on the initiative of the parties are presented to the court by giving testimony. These and other features of conducting expert examinations in criminal cases in common and continental law countries are revealed in a number of studies by Russian and foreign scientists (Beulke, 2004; Shepherd, 1993: 817-818; Nogel, 2019: 20; Friis, Åström, 2017: 64; Narang, Paul, 2017; Kurs ugolovnogo protsessa, 2017: 501-506).

[3] It should be noted that in Russia a specialist is also a person who, at the initiative of the defence, can conduct expert examinations and give written opinions or express his/her opinion on special issues in writing (opinion) or orally (testimony) to

At the same time, the target orientation of a specialist's activity, as a rule, is solely and exclusively related to the detection, consolidation and seizure of traces, objects, documents and the use of technical means during the procedural action carried out by an investigation body (see, for example, Article 84 of the Criminal Procedure Code of the Republic of Armenia, Article 62 of the Criminal Procedure Code of the Republic of Belarus, Article 80 of the Criminal Procedure Code of the Republic of Kazakhstan, Article 111.1 of the Criminal Procedure Code of the Republic of Estonia). Along with that, there is another entirely unusual approach, when a specialist is empowered to carry out the entire investigative action on his/her own. In this way, Article 205 of the Criminal Procedure Code of the Republic of Lithuania provides a specialist with an opportunity to inspect the scene of an incident.[4]

Thus, there is a problem that is expressed in the lack of certainty of the position of a specialist in investigative proceedings (non-verbal actions, mainly at the level of law, and verbal (aimed at obtaining testimony) – at the level of law and practice).

Statement of the problem

It should be noted that Article 58 of the Criminal Procedure Code of the Russian Federation, which regulates the attraction of a specialist for the participation in legal proceedings at the stages of pre-trial proceedings, is primarily focused, as indicated earlier in Article 133[1] of the Criminal Procedure Code of the RSFSR, on the use of a specialist's knowledge and skills in the process of work with material sources of evidence (objects and documents), assistance in the use of technical means in the study of a criminal case materials, as well as for putting questions to an expert (Part 1, Article 58 of the Criminal Procedure Code of the Russian Federation) and does not allow extensive interpretation of a specialist's powers. In this regard, while supporting the opinion expressed in the legal literature about the possibility of expanding the functions of a specialist during interrogation and the possibility to empower a specialist to carry out a part of the interrogation that concerns raising questions aimed at supplementing, detailing and clarifying the testimony presented in the form of a free story, we cannot agree with the statement about the legitimacy of this approach (Ishchenko et al., 2014: 384).

The formal and logical interpretation of the provisions set out in Article 58 of the Criminal Procedure Code of the Russian Federation, despite a specialist's right to ask (with the permission of an investigator) questions to the participants of an investigative action, leads to the conclusion that a specialist's right to pose questions should not contradict the purpose of his/her involvement in an investigative action, which is limited to the first part of the aforementioned article. Empowering a specialist to carry out a part of interrogation should be regarded as a violation of the established procedure for conducting an investigative action.

The necessity for an extensive use of a specialist's specialised knowledge and skills in the process of interrogation and other non-verbal investigative actions requires introduction of the corresponding changes in the content of certain norms of the Criminal Procedure Code of the Russian Federation regulating the procedure for a specialist's participation in investigative actions.

Discussion

For the factual substantiation of this proposal, let us turn to the results of our survey of investigators who investigate mainly economic crimes. The survey was conducted in 2018. 56 investigators of the Main Investigation Department of the Investigative Committee for the Krasnoyarsk Krai (hereinafter – the IC investigators), and investigators of the Central Investigation Department of the Main Department of the Ministry of Internal Affairs for the Krasnoyarsk Krai (hereinafter – the MDMIA investigators) were surveyed. The average work experience of the surveyed employees in law enforcement agencies was almost 9 years (8.9 years, including the MDMIA investiga-

an investigative body or the court (Paragraphs 3, 4 of Article 80 of the Criminal Procedure Code of the Russian Federation).

[4] On this and other procedural and forensic features of the use of specialised knowledge in Lithuanian criminal proceedings see the study by Professor Hendrik Malevski (Malevski, 2020: 414-430).

tors – 11.5 years and the IC investigators – 6.6 years), which indicates an extensive experience of investigating criminal cases of this category. At the same time, the need to apply their own specialised knowledge or a specialist (expert)'s knowledge arises almost always – for 27 percent of the respondents.

Analysing the frequency of various forms of a specialist-economist participation in criminal cases investigation, the investigators set the following priorities (from 1 to 10: 1 – I do not use this form; 10 – I use it in the investigation of each criminal case): consultation with an expert before appointing a forensic examination – 9.02; initiation and carrying out forensic economic examination – 8.87; interrogation of an expert – 7.47; obtaining a specialist's opinion – 7.23; initiation and carrying out audits – 6.79; involvement of a specialist into investigative and other procedural actions – 6.22; consultations with specialists-economists while preparing for interrogation (of a suspect, accused, etc.) – 5.97; involving a specialist to assist in assessing an expert's opinion and interrogating an expert – 4.9; initiation and carrying out audits and tax inspections – 4.72.

The survey results clearly indicate that preparation for initiation, initiation, carrying out and assessment of the results of a forensic economic examination are, as a rule, in demand in almost every criminal case in connection with economic crimes. At the same time, an analysis of an issue of in which investigative actions it is reasonable and necessary to include the participation of a specialist-economist, in the opinion of the interviewed investigators, is of scientific interest. The respondents indicated several answer options (Fig. 1). As shown in Figure 1, a specialist's assistance is in high demand and necessary for an investigator in carrying out such investigative actions as inspection of objects and documents, interrogation of a suspect and accused (manager, chief accountant), as well as a search.

If we consider the indicators obtained in Figure 1 from the point of view of the mathematical Pareto distribution, it can be stated that participation of a specialist in three aforementioned investigative actions should provide

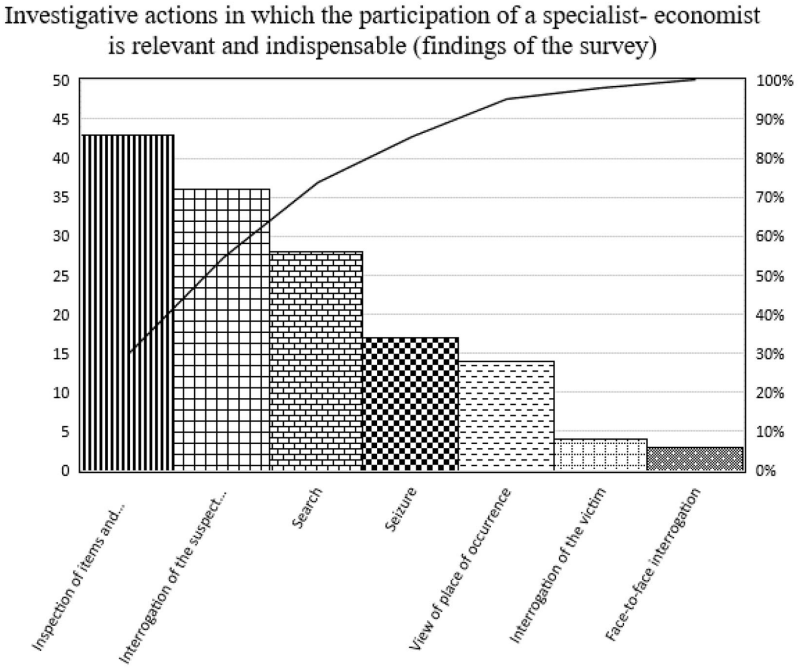

Fig. 1. Investigative actions in which the participation of a specialist-economist is reasonable and necessary (result of the survey of investigators)

80 percent of the effectiveness and efficiency (collection of the necessary evidentiary information) of all investigative actions carried out in practice, for participation in which a specialist is involved. At the same time, according to the results of the survey of investigators about the actual investigative actions carried out in practice with the participation of a specialist (Fig. 2), most often a specialist is involved in the following actions: inspection of objects and documents (frequency of occurrence – 4.34; it was required to distribute points from 1 to 10 (1 – I never resort to a specialist's assistance; 10 – I resort to the participation of a specialist in this investigative action in the process of investigation of each criminal case), search (4.32), inspection of the scene of an accident (3.56), seizure (3.38), interrogation of a suspect or accused (2.65), interrogation of the victim (1.2).

Thus, the result of the survey of investigators has shown that reasonability, necessity and the need for the interrogation of a suspect (accused) with the participation of a specialist-economist is obvious.

Any person with specialised accounting and economic, forensic accounting and other knowledge in certain areas of the economy and finance can be invited for the participation in the interrogation as a specialist. In case of the economic sphere, private auditors, auditors of the Accounts Chamber of the Russian Federation or an economic agent of the Russian Federation, inspectors of the Federal Tax Service, employees of the Federal Treasury and other supervisory departments of the Ministry of Finance of the Russian Federation, specialists of municipal control bodies, employees of financial and accounting departments of organisations of different legal forms, employees of scientific research organisations, lecturers of accounting and economic disciplines of higher educational institutions; other persons with professional experience related to the field of economic and forensic accounting knowledge and the field of their practical application can be invited as specialists. At the same time, according to the investigative practice, in most cases an employee who is on the staff of the expert subdivision of a law enforcement agency is invited as a specialist. The investigators also noted that different specialists, depending on the required level and area of knowledge are involved in the investigation each time. It is

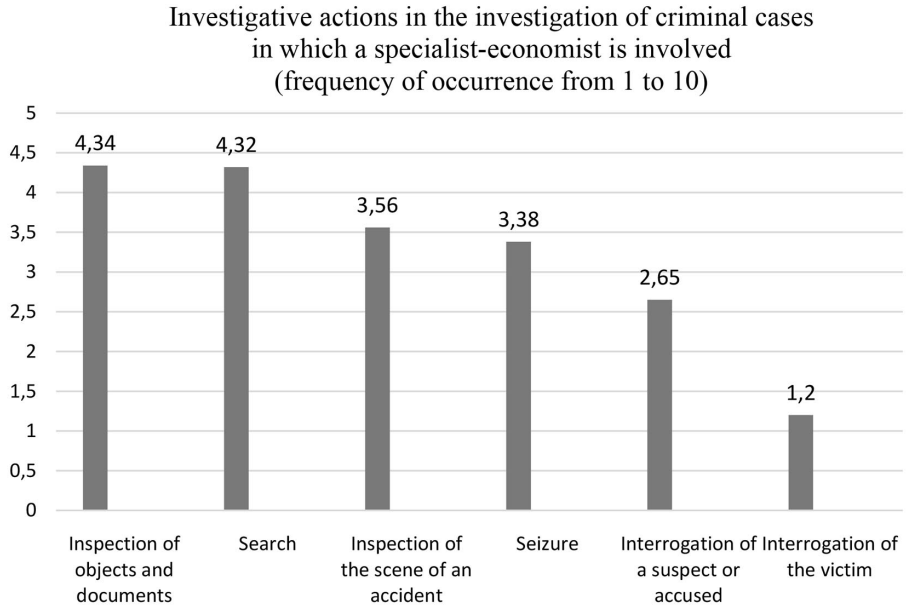

Fig. 2. Investigative actions in which a specialist-economist is involved, according to the results of the survey of investigators (frequency of occurrence from 1 to 10)

necessary to pay attention the problem, identified by investigators, which consists in the fact that the reason for the limited involvement of economists-specialists for participation in investigative actions is the lack of such specialists on the staff of a law enforcement agency and, therefore, their assistance is rarely used.

Let us consider some of the features of an interrogation carried out with the participation of a specialist in cases connected with economic crimes. The target of such an interrogation is to establish the circumstances and the mechanism of committing a crime, as well as to establish the circumstances for finding evidence or which knowledge is necessary to verify and evaluate the evidence. Such circumstances, as a rule, are associated with the content of documents and other sources of accounting and economic information on financial and economic transactions that were seized at the stage of initiating a criminal case and during its investigation. It is the participation of a specialist in interrogation that can ensure the correct use and presentation of evidence-documents in the process of interrogation, the correct formulation of questions to a suspect (accused) and the accuracy of the record of his/her answers to the questions posed in the interrogation report.

In this way, when investigating tax crimes, I.V. Aleksandrov recommends interrogating a taxpayer with the participation of specialists in economic, accounting and tax fields. In his opinion, this approach can ensure the correctness of posing questions, the accuracy of their records in the report and the answers received to the questions posed (Aleksandrov, 2019: 260). This point of view concerns not only the investigation of tax, but also other types of crimes that require the use of specialised knowledge and skills.

During the interrogation of I. as a suspect in a criminal case initiated based on Part 1, Article 145.1 of the Criminal Code of the Russian Federation, carried out with the participation of an expert who had previously conducted a forensic economic examination on this case, the incoming cash documents, based on which the agent's fee was received, were shown to the suspect and his defender, and the expert asked about the reasons for the discrepancy between the numbers indicated in the cash receipts and the numbers indicated in the cash book for the period under study. Suspect I. explained that "the number of the document in the cash receipts was manually put by me and corresponds to the date of drawing up indicated in the receipt, since I do not have the skills in formalising such documents in the software "1C: Enterprise – LLC 'K'". Later, accountant G. formalised these documents in the software with other serial numbers on the same dates, and these receipts were reflected in the cash book". Further, the expert demonstrates "1C: Enterprise – LLC 'K'" (with the databases of the organisation under investigation), submitted earlier for the examination to the interrogated I. and his defender, and the expert asks: could you, please, explain why the cash receipts shown to you earlier were not reflected in the database "1C: Enterprise – LLC 'K'"? The suspect could not answer this question, referring to the need to clarify this issue with accountants.

The similar algorithm for presenting documents and information of the software "1C: Enterprise – LLC "K" by an expert participating in the interrogation as a specialist, was applied during the interrogation of witnesses: the accountant of LLC "K" E. and the accountant of LLC "K" T. In this way, the interrogations of the suspect and witnesses conducted with the participation of a specialist made it possible to detect a number of financial transactions of the organisation aimed at withdrawing cash from the organisation, which could be used to pay off backdated salaries.

The choice of a certain sequence of the questions asked, the accuracy of the questions posed and the answers received recorded in the report are of great importance, especially in proving the intent of a guilty person. In this regard, the role of a specialist participating in such an interrogation and in preparation for it is invaluable. Firstly, presentation of documents to an interrogated person in a certain sequence allows not only to find out the circumstances of the crime committed, but to obtain the necessary evidentiary information as well. The specialist's questions, asked to an interrogated person in a certain logical order, demonstrating

a good knowledge of the specialised issues of the subject of interrogation to an interrogated person, allow an investigator to maintain contact with an interrogated person.

During the questionnaire survey, investigators were asked to substantiate the advantages of an interrogation conducted with the participation of a specialist, distributing points from 1 to 10 according to the degree of their significance (1 – this can hardly be called an advantage; 10 – I consider the participation of a specialist-economist extremely necessary for solving interrogation problems). The following results have been obtained:

1. The presentation of accounting documents by a specialist-economist during the interrogation and clarification of the circumstances of transactions in this regard reduces the possibility of false testimony by an interrogated person and allows to obtain new evidentiary information quickly – 7.77.

2. Participation of a specialist-economist in the interrogation (if an investigator has lack of knowledge in certain areas of specialised fields) reduces the possibility of false testimony regarding events and facts of economic activity by an interrogated person – 7.34.

3. By increasing a specialist's independence, an investigator does not lose his/her procedural duty to conduct interrogation. In terms of asking questions, he/she turns to a specialist only for assistance – 6.21.

4. In conditions when an investigator allows a specialist to ask questions during the interrogation, taking into account the testimony received, it becomes possible to promptly change the questions wording, specify the planned questions and add new ones – 6.14.

5. By entrusting a specialist to conduct a part of interrogation, an investigator gets an additional opportunity not only to record the question, but also an exact answer to it in the report – 5.82.

6. By entrusting a specialist to conduct a part of interrogation, an investigator gets an additional opportunity to establish and maintain the necessary contact with an interrogated person, including non-verbal one – 4.77.

It should be noted that interrogation of a suspect, an accused, or a witness, conducted with the participation of a specialist, requires careful preparation before its beginning. A written plan for such an interrogation should contain: firstly, the sequence of clarification of individual circumstances of financial and business transactions related to the crime; secondly, a list of documents presented to an interrogated person; thirdly, the necessary determination of the sequence of the questions asked, including those, asked by a specialist who takes part in the interrogation.

Tactically, it is of great importance to determine the optimal sequence of interrogations of suspects (accused) – heads of organisations and interrogations of witnesses – persons who are directly subordinate to the heads of organisations, counterparties, and officials of regulatory bodies (for instance, an inspector of the Federal Tax Service of the Russian Federation inspecting an organisation).

Conclusion

Let us formulate the main conclusions of the study:

1) an investigator cannot and should not have the entire set of specialised knowledge and skills in certain areas of activity. This gap can be filled by a specialist;

2) entrusting a specialist to conduct a part of interrogation, which involves posing questions and presenting evidence, an investigator does not lose procedural independence. In this part of interrogation, an investigator resorts to a specialist's assistance;

3) entrusting a specialist to conduct a part of interrogation, an investigator improves the quality and efficiency of an investigative action, excludes the demonstration of ignorance or misunderstanding of certain issues included in the subject of interrogation in front of an interrogated person who has specialised knowledge. Ignorance and lack of an investigator's preparation in certain issues does not contribute to the establishment and maintenance of contact interaction, which is extremely necessary and important for interrogation;

4) participation of a specialist in interrogation reduces the possibility of interested persons to give incomplete, inaccurate, as well as false testimony;

5) wording, the sequence of asking questions, and presentation of evidence must be agreed upon before the start of interrogation, taking into account the specific features of the event under investigation, personality traits of an interrogated person and his/her procedural status;

6) in the process of posing questions and presenting evidence, taking into account the testimony received, a prompt (quick) reaction to the change of the content of subsequent questions, for which a specialist is more prepared than an investigator, may be required;

7) when entrusting a specialist to conduct a part of interrogation, an investigator not only has an additional opportunity to record the exact wording of the question, answers and explanations received regarding the evidence presented, but also provides an opportunity for more careful observation of an interrogated person's behaviour and reaction;

8) expanding the powers of a specialist in the process of interrogation makes it possible to prepare for the appointment of forensic examinations more fully and thoroughly.

Based on the formulated conclusions, it is proposed to expand the powers of an investigator and a specialist in the field of verbal investigative actions, including interrogation. In this regard, it is necessary to amend the wording of Article 38 and Article 58 of the Criminal Procedure Code of the Russian Federation. Paragraph 3, Part 2 of Article 38 of the Criminal Procedure Code of the Russian Federation, which establishes the powers of investigator, should be worded as follows: "To independently direct the course of investigation, to make decisions on the conduct of investigative and other procedural actions, seeking assistance from a specialist" ... (hereinafter in the text). Delete the phrase "in detection, consolidation and seizure of objects and documents" from Part 1 of Article 58 of the Criminal Procedure Code of the Russian Federation, and replace it with the phrase "in evidence collection", which is used in Article 86 of the Criminal Procedure Code of the Russian Federation and is broader in its meaning than the phrase "detection, consolidation and seizure of objects and documents". The proposed changes, in our opinion, will significantly expand the powers of a specialist in the course of all investigative actions (including verbal ones) and will correspond to modern trends in the development of criminal proceedings, increasing its quality by attracting specialised knowledge and skills from various fields of human activity.

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Расширение полномочий специалиста в досудебном производстве – необходимое условие повышения качества производства следственных действий, направленных на получение показаний

А.И. Баянов[а], Л.П. Климович[а], Н.Г. Стойко[б]
[а]Сибирский федеральный университет
Российская Федерация, Красноярск
[б]Санкт-Петербургский государственный университет
Российская Федерация, Санкт-Петербург

Аннотация. На основе анализа отечественного исторического опыта и современного состояния законодательного регулирования привлечения специалиста для оказания содействия следователю при проведении следственных действий, а также проведенного опроса следователей сделан вывод о необходимости расширения полномочий специалиста в части оказания содействия следователю при проведении следственных действий, направленных на получение показаний (в том числе допроса). В связи с этим внесены предложения по изменению редакции статей 38 и 58 УПК РФ. Предлагаемые изменения существенно расширят полномочия специалиста при производстве всех следственных действий (в том числе вербальных) и будут соответствовать современным тенденциям в развитии уголовного судопроизводства, повышая его качество посредством привлечения специальных знаний и навыков из различных областей человеческой деятельности.

Ключевые слова: следственное действие, следователь, специалист, собирание доказательств, содействие следователю.

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Modern Directions of Forensic Experts Primary Training

Oksana G. D'iakonova*
Kutafin Moscow State University
Moscow, Russia Federation

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Abstract. No type of legal proceedings is complete without the involvement of experts for the production of expert research or specialists for consultation. In this regard, the question of determining the competence of these subjects by persons conducting the process who do not have special knowledge in the field in which the knowledgeable person specializes is very acute. The author determines the competence of the forensic expert and enumerates other requirements to the expert as a participant in the proceedings. The formation of competence is primarily influenced by the level of training, education of an expert or specialist. The main attention focuses on the disclosure of the main ways of initial training and retraining of forensic experts at the present stage: the traditional way of experts training; specialization in the specialty "Forensic examination"; master's degree in programs of expert specialties. The existing types of training and retraining of forensic experts in Russia and some foreign countries, including the member States of the Eurasian economic Union (EEU), are analyzed. The traditional way of training of forensic experts and training under the program of specialization are revealed proceeding from historical conditionality and necessity of training of specialists for implementation of forensic activity. The positive and negative features of the training areas are highlighted, taking into account their impact on the formation of the competence of the forensic expert. The author emphasizes the need to develop existing forms of initial training of forensic experts, taking into account the advantages and disadvantages of each of them. The study concludes that it is necessary to apply the subjective criterion in order to determine the effective form of training of forensic experts.

Keywords: training of experts, retraining of experts, higher education, forensic examination, use of special knowledge.

Research area: criminalistics, forensic activity, operational-search activity.

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* Corresponding author E-mail address: oxana_diakonova@mail.ru
ORCID: 0000-0002-9327-5585

Introduction

Judicial proceedings as the jurisdictional activity of the courts in the consideration and resolution of various categories (criminal, civil, administrative) cases from the moment of its inception did not do without using special knowledge, without involving knowledgeable people in the case. The use of special knowledge in various forms is now widespread, almost no criminal and rare civil cases are dispensed without a forensic examination or specialist advice. In this article, the terms "expert" and "specialist" are not understood to mean posts, but participants in legal proceedings having a procedural legal status and participating in special forms: an expert – for conducting a forensic examination, a specialist – for giving advice. Therefore, when it comes to the educational training of these persons, we mean the training of forensic experts as specialists in a certain field of science, technology, art, etc., having the right to participate in legal proceedings as a forensic expert and (or) specialist. Speaking in legal proceedings, experts and (or) specialists are able to provide serious assistance to both persons conducting legal proceedings and other participants in the process. "An expert is a participant in a process disinterested in the outcome of the process, possessing special knowledge, who is involved in order to conduct research on the objects presented and to give an opinion on the questions posed to him by the person (body) conducting the process, responsible for the conclusions drawn. A specialist is a participant in the process who has special knowledge, is not interested in the outcome of the case and is involved in legal proceedings or other jurisdictional activities to assist the person (body) conducting the process, in order to provide advice, clarifications, assist in the investigation of evidence, and provide scientific technical assistance and the use of scientific and technical means, responsible for the consultation provided " (D'iakonova, 2019: 58, 68).

Qualitatively identifying a competent expert for an examination or a specialist for consultation is really difficult. Even 20-30 years ago, the question of the appointment and conduct of forensic examination in a particular organization had a slightly different sound than now. Basically, there were state forensic institutions within specific departments that conducted forensic examinations according to their approved methods, which had the necessary material and technical support, and were responsible for the advanced training of a forensic expert and the quality of research. Now, among the array of offers available to the user for a search query on the production of a forensic examination of a particular type, it is rather difficult to figure it out on the wide expanses of the Internet. This is especially true in connection with the determination of the cost of conducting a forensic examination, because the person who pays for the study wants to save money. Therefore, the question of the quality of the research is raised whenever a user is forced to look for an expert organization or an expert who is able to conduct an appropriate study on time and at an appropriate cost. The main criterion for such an ability is, of course, the expert's competence, which is simply impossible to assess according to the website of an expert organization or a private expert. However, the decision on the issue of competence directly depends on the expert training system, on a unified approach to it, which could serve as the general criterion that distinguishes competent judicial experts from other persons who want to earn extra money due to their ignorance of other persons.

1. Competence and other requirements for the expert. The competence of a forensic expert, as well as a specialist, that is, all knowledgeable individuals as a whole, is formed first in the process of his educational preparation, and later on in his work, with the accumulation of experience. Taking into account the expert approach (which is applied within the framework of the science of forensic science), "the competence of a competent person is a subjective characteristic that reflects the amount of knowledge, practical skills, abilities, experience, personal qualities of a specific competent person obtained in the preparation process , training, professional development, in one or several areas of special knowledge and applied by him in the implementation of professional activities" (D'iakonova, 2019: 48). In contrast to competence, "the competence of an expe-

rienced person is an objective characteristic that reflects the objectively existing amount of knowledge, techniques, practical skills inherent in a particular area of special knowledge that an experienced person must acquire in the process of preparation, training, advanced training, and limited by the current level of development of this areas" (D'iakonova, 2019: 48). The competence of the knowledgeable person in the broad sense also includes his powers, defined by the procedural law, contributing to the fulfillment by him of his procedural function.

In addition to competence, the expert should be disinterested in the outcome of the case, meet the requirements of professional ethics and morality (Mailis, 2018: 52), provided that an expert in the position is called in as the leading person, as well as his involvement in the proceedings and other jurisdictional activities should be carried out in the forms specified in the relevant legislation. All of these requirements are interrelated with the requirement of expert competence, one way or another, are based on his preparation for the implementation of the function to apply special knowledge.

Among the normative legal acts defining these requirements, it should be noted: procedural codes (Code of Criminal Procedure, agribusiness of the Russian Federation, Code of Administrative Offenses of the Russian Federation, Code of Civil Procedure of the Russian Federation, Code of administrative procedure of the Russian Federation), Federal Law "On State Forensic Science Activities in the Russian Federation", Federal Law "On Education in Russian Federation" and Orders of the Ministry of Education and Science, for example, «On the approval of the federal state educational standard of higher education in the specialty 40.05.03 "Forensic examination" (level of specialty)".

2. Training of forensic experts in foreign countries and Russia. In Russia today, there are several ways and forms of obtaining knowledge that allow subjects to subsequently act in court proceedings as a competent person. So, a person who has received a basic higher education in any field of special knowledge, for example, economics, engineering, chemistry, physics, with subsequent retraining in an expert institution and obtaining a qualification certificate for the right to conduct examinations of a certain kind (type) can become a forensic expert; or by obtaining the specialty 40.05.03 "Forensic Expertise"; or through the training of forensic experts as part of master's programs.

A number of EEU participating countries have a similar system of training forensic experts. For example, in Belarus, a university graduate who has studied in the legal, medical, economic, and technical fields may become a forensic expert. Since 2003, in the Republic of Belarus, training and retraining of experts by the Institute for Advanced Studies and Retraining of Personnel of the State Committee of Forensic Expertise of the Republic of Belarus has been carried out (Grinkevich, 2017: 282). In addition, applicants can receive an education in the specialty of higher education of the first level "Forensic examinations" and qualify as "Forensic expert. Lawyer" (Lapina, 2018). In the Kyrgyz Republic, higher education in the specialty "Forensic Expertise" is carried out by universities, for example, Kyrgyz-Russian Slavic University. The Republic of Kazakhstan does not provide for obtaining a higher expert education in the specialty "Forensic Expertise" (Smol'kov, Paramonova, 2013: 265), only in the direction of training within the framework of undergraduate studies, but qualification training in the relevant expert specialty is carried out by the Center for Forensic Expertise of the Ministry of Justice of the Republic of Kazakhstan. In Lithuania, "the training of modern experts is carried out according to the programs of one of the oldest and strongest European schools, which has the deepest roots – the Russian school" (Tamoshiunaite, 2018: 117). Universities operate in the Republic of Armenia to prepare bachelors and masters in the field of "Forensics Expertise", for example, the Yerevan Institute of Forensics and Psychology.

A common feature of the training of experts in universities in the EAEU member countries is the placement of a specialty or area of study "Forensic Expertise" as part of the legal area of training. This feature is distinctive from many foreign countries, where the training of forensic experts is carried out on

the basis of other specialties, as a rule, natural sciences. So, in the United States provides multilevel education for work in various forensic laboratories. For example, "to work in a forensic laboratory in rural areas, forensic specialists need a high school diploma; to work in a forensic laboratory of a larger law enforcement agency, a bachelor's degree (college level) in forensics or science, such as biology or chemistry. At the same time, training in the police academy is being carried out in some areas of forensics" (Alyson). Further training is provided. However, in the United States there is a tendency to increase the level of education of experts, at least at the academic undergraduate level in a scientific specialty (U.S. Department of Justice…), but not within the legal framework. D. Alison predicts an increase in interest in this profession and emphasizes, "taking into account a number of reasons, for example, awareness among potential jurors of judicial evidence in criminal cases, increased competition, which will lead to professionals with a bachelor's degree in forensic science or related areas will have an advantage over graduates in employment" (Alyson). For a number of expert specialties, American universities provide training for a short period of time, including distance learning programs (Moiseeva, 2019: 424).

3. The traditional way of training forensic experts is the retraining of specialists of other specialties for the needs of forensic activities. The training of forensic experts in both pre-revolutionary Russia and the post-revolutionary period was reduced mainly to the acquisition by persons with certain knowledge in any scientific field of legal orientation, but in a very concise form, on the basis of state forensic institutions. It was not about full systemic training. As a rule, this was fragmentary information about the forms of participation in legal proceedings, the rights, duties and responsibilities of experts, the basics of forensic science. Basically, such forensic experts gained such knowledge, although training was also carried out in other specialties, for example, forensic photography and photographic equipment. It should be noted that at that time the involvement of experts of other specialties only became the rule, rather, it looked like an exception to it. Over time, the training of specialists began to be carried out as part of advanced training courses for forensic chemists, forensic specialists in criminal investigation, who come to work in bodies mainly with secondary specialized education. Since 1923, police schools began training forensic specialists in Moscow, Leningrad, Samara, Orenburg and other cities.

Subsequently, in the Soviet period, the participation of experts and specialists in criminal, and later in civil proceedings, began to take on a universal character. The need for more specialists able to provide scientific, technical and consulting assistance and expert research has increased. However, to receive a full comprehensive education was still far away. The training of experts was mainly carried out as follows: a specialist who gained knowledge in any scientific field, such as chemistry, physics, engineering, came to work in the expert service of the internal affairs bodies, underwent retraining for a certain period of time, mainly up to a year. At the end of the training, he received a qualification certificate for the right to conduct examinations of a certain kind (type). Then he started to work first under the guidance of an experienced mentor – a forensic expert, and subsequently on his own. The obvious minus of this way of training experts was the time period during which the person was qualified as a forensic expert.

In general, the traditional way of training forensic experts, in the absence of other alternatives, to some extent coped with the situation of a shortage of qualified personnel. However, a serious omission was the lack of in-depth legal knowledge of procedural law, criminalistics, forensic science, and other disciplines: criminal, civil, and labor, the knowledge of which is really necessary for a forensic expert to properly carry out his activities. As correctly writes E.R. Rossinskaya, "the training of forensic experts is not a mechanical combination of two legal and other formations, but a complex integrative education that allows you to form the necessary competencies, while separately two educations plus continuing education courses do not allow you to form the necessary professional competencies, form expert thinking"

(Rossinskaya, 2018: 79). Unfortunately, the traditional way of training forensic experts does not take into account the level of development of science, including the science of forensic science – forensic expertology.

However, one of the areas in which the traditional path was transformed was the training of specialists, both already working experts and non-experts, in the programs of further professional education. Successful experience in such training is shared by the Russian Federal Center for Forensic Expertise of the Ministry of Justice of Russia, which has developed its own strategy for implementing the DPO system for expert specialties (Toropova, 2017: 20). It seems that the system of retraining of experts may be well implemented not only in expert organizations that have received a license to provide educational services, but also by universities that train experts.

4. Specialty training "Forensic Expertise". For the first time, future experts with higher education in the RSFSR began to be trained at the Higher Investigative School of the Ministry of Internal Affairs of the USSR (now the Volgograd Academy of the Ministry of Internal Affairs of Russia) and subsequently at other universities of the Ministry of Internal Affairs system. In addition to Soviet citizens, foreigners were trained in this area of training. Trainees in this specialty received a certificate for the right to produce a number of forensic examinations. This situation lasted until 1999, when several universities of the country, in addition to the Ministry of Internal Affairs of Russia, began to train specialists with higher education in the specialty 35060 "Forensic Expertise" with the qualification of "Expert Forensic Scientist". Since 2004, after the entry into force of the educational standard of the second generation, graduates of this specialty were assigned the qualification of "Judicial Expert". Since 2013, the specialty "Forensic Expertise" has been logically integrated into the group of specialties "Jurisprudence". Without a doubt, the adoption of the Federal State Educational Standard of Higher education "Forensic Expertise" the 3rd generation is progressive, although the authors pay attention to some points (Kaverina, 2019: 185), related to the identity of the provisions of the Federal State Educational Standard of Higher education "Forensic Expertise" and Federal State Educational Standard of Higher education in the direction of preparation 38.05.01 "Economic Security".

The literature has previously formulated the positive features of training within the framework of the specialty: "1) professional educators are engaged in the preparation of a specialist on the basis of an approved standard, as well as developed programs and teaching materials; 2) for five years, a student develops a set of competencies necessary for further professional activities such as: critical understanding of information, statement of research tasks; the ability to apply natural scientific and mathematical methods in solving professional problems, apply forensic research techniques in professional activities, and many others; 3) the future expert receives knowledge not only from the field of direct professional activity, but also of a legal nature: features of legal proceedings, operational investigative activity, psychology, etc.; 4) there is modern forensic equipment for training future experts; 5) students are involved in the scientific activities of the university within the framework of their chosen training program and participate in meetings of scientific circles, conferences, develop projects and so on; 6) it is possible to give students knowledge and skills from the field of natural sciences (chemistry, physics, biology, etc.). Despite the fact that in his future practice, the expert does not use this knowledge extensively, however, they allow to form a special type of thinking" (Ivanova, D'iakonova, 2018: 88).

However, negative points also occur. Firstly, insufficient staffing of universities. It seems desirable that the teachers of special disciplines were current experts with scientific degrees, which is not always possible. Since there are not so many specialists with proper work experience as universities that want to train experts, and, in addition, not all experts have the desire and opportunity to obtain a degree. Secondly, the insufficiently equipped educational institutions with laboratories and equipment for training in accordance with the Federal State Educational Standard of Economics. Financing of universities is conducted at a low level, al-

though recently the situation has improved significantly, and students need to obtain not only theoretical knowledge, but also hone practical skills, which is impossible to do in conditions of unequipped premises. It should be noted that the universities included in the Association of Educational Institutions "Forensic Expertise" show a generally positive situation on the first two points.

Thirdly, the restriction of training in the specialty program to full-time only (clause 3.2 of the Federal State Educational Standard). It is not very clear on what basis the Federal State Educational Standard of Higher education "Forensic Expertise" forbids the preparation of forensic experts through full-time and part-time forms (evening education). It seems that this issue should be discussed and taken into account that training in the specializations indicated in the Federal State Educational Standard of Higher education "Forensic Expertise" can well be carried out using evening uniforms, provided that the university is able to provide staff and material and technical equipment for laboratories. This type of training in a number of expert specialties may well come to replace the traditional path – retraining specialists on the basis of expert institutions.

Of course, as N.S. Neretina notes, far from all specialties training is possible "within the framework of the first higher expert education. For example, the training of specialists in forensic medical, psychiatric, psychological, environmental examinations and some other types is carried out in the course of additional special training" (Neretina, 2017: 68). Although in this case, there is a need to bring the curriculum for preparing students of these specialties in line with the practical component, which implies the inclusion of a sufficient number of hours to study a number of legal, especially procedural, disciplines. Forensic experts of any specialty must understand not only the procedural foundations of a particular type of legal procedure in which they can be involved as a specialist or expert, but also clearly know the procedural legal status of these competent persons and understand how their rights and obligations are realized, what kind of guarantee implementations are established by law.

5. Master's degree in forensic specialty. It can be said that the traditional way of expert training has now transformed into this form. First, the student is trained in any direction of undergraduate level training. This is considered a basic education, as a rule, in natural sciences, technical areas, or in the field of economics, psychology, and jurisprudence. After receiving a bachelor's diploma, the student enters the magistracy under the program of training forensic experts.

One of the first educational programs for the training of experts in the framework of the magistracy appeared at the Kutafin Moscow State Law University (Moscow State Law Academy) – "Forensic expert support of law enforcement". In the subsequent "RUDN Law Institute, together with the Russian Federal center for forensic expertise of the Ministry of Justice of Russia – an educational project was prepared to implement the master's programs "Forensic Expertise in Law Enforcement"" (Usov, 2015: 23; Smirnova, 2018: 14).

As E.R. Rossinskaya writes, "the objectives of such master's programs are the fundamental training of Masters of Law in the field of professional legal activity, having professional competencies in the use of special knowledge ... In this form, it is possible to train experts only in certain separate genders, and not in forensic classes" (Rossinskaia, 2016: 15). Her opinion should be supported that "persons already qualified as a bachelor or specialist in basic maternal sciences are able to acquire the qualifications of a forensic expert in any one type of forensic examination. For 2–2.5 years of master's studies, they may well master the fundamentals of forensic science, substantive and procedural law, expert technologies, and expert research methods for this type of examination. At the same time, the possibility of training forensic experts on new types of forensic examinations in the magistracy based on undergraduate law" (Rossinskaya, 2018: 83).

In addition to the fact that this type of training is not possible in all expert specialties, there are other issues that need to be addressed. So, one of the questions is the determination of the areas of undergraduate or specialty training, after training in which it is possible to continue

training in an expert specialty in a magistracy. Is it possible to study in a magistracy in an expert specialty, for example, for a bachelor who has studied in the field of preparation 04.03.01 "Chemistry" or 40.03.01 "Jurisprudence"? Do you have to take into account the primary direction of bachelor's studies in preparing the master's program and adjust the curriculum in this regard, and will it be appropriate and in demand by students? Existing regulations do not allow a clear answer. Given the short training period in the magistracy, it is doubtful to obtain deep knowledge in the expert field and in the necessary amount of legal knowledge to carry out expert activities in the specialty.

Conclusion

Forensic science dictates the need to train qualified expert personnel. The foregoing allows us to conclude that there are several different in form, content, training methods, ways of initial training of forensic experts. None of the existing forms can be considered ideal in achieving the goal of training a competent expert. Each form has inherent disadvantages and advantages. That is why it is simply impossible to deny the existence of any of them today, because otherwise a "personnel" emptiness will form, which is unlikely to be efficiently filled in the shortest possible time.

It seems that each of the forms should be developed, emphasizing and deepening the merits, trying to eliminate the shortcomings. To determine the most optimal form of initial training for a forensic expert, the so-called "subjective" criterion should be applied, the levels and forms of education for people who want to master an expert specialty should be divided depending on the level of their training: an applicant, a bachelor in a non-expert field of training, a judicial expert who wants to receive new expert specialty. So, for persons with basic education (undergraduate) in any field, retraining in the corresponding initial education of an expert specialty on the basis of a university and (or) expert organization may be well suitable. The same form could be effective for existing experts who want to get an additional expert specialty. In addition, for the latter category, including in order to deepen knowledge within the framework of an existing specialty, a master's program in an expert specialty can be effective. For applicants, training in the specialty 40.05.03 "Judicial Expertise" within the framework of the specialty seems to be optimal.

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Современные направления первоначальной подготовки судебных экспертов

О.Г. Дьяконова
Московский государственный юридический университет им. О.Е. Кутафина
Российская Федерация, Москва

Аннотация. Практически ни один вид судопроизводства не обходится без привлечения экспертов для производства экспертного исследования или специалистов для консультации. В этой связи весьма остро встает вопрос определения компетентности этих субъектов лицами, ведущими процесс, не обладающими специальными знаниями в той области, в которой специализируется сведущее лицо. Автором определяется компетентность судебного эксперта и перечисляются иные требования к эксперту как участнику судопроизводства. На формирование компетентности в первую очередь влияет уровень подготовки, образование эксперта или специалиста. Основное внимание уделяется раскрытию основных путей первоначальной подготовки и переподготовки судебных экспертов на современном этапе: традиционный путь подготовки экспертов; специалитет по специальности «Судебная экспертиза»; магистратура по программам экспертных специальностей. Анализируются существующие виды подготовки и переподготовки судебных экспертов в России и некоторых зарубежных странах, в том числе странах – участницах Евразийского экономического союза (ЕАЭС). Традиционный путь подготовки судебных экспертов и обучение по программе специалитета раскрываются исходя из исторической обусловленности и необходимости подготовки специалистов для осуществления судебно-экспертной деятельности. Выделяются позитивные и негативные черты направлений подготовки с учетом их влияния на формирование компетентности судебного эксперта. Автор подчеркивает необходимость развития существующих форм первоначальной подготовки судебных экспертов с учетом достоинств и недостатков каждой из них. Сделан вывод о необходимости применения субъектного критерия в целях определения эффективной формы подготовки судебных экспертов.

Ключевые слова: подготовка экспертов, переподготовка экспертов, высшее образование, судебная экспертиза, использование специальных знаний.

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Strategic Regulatory Instruments in Environmental Law of Russia

Irina O. Krasnova* and Valery N. Vlasenko
Russian State University of Justice
Moscow, Russian Federation

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Abstract. At the moment, there are new types of legal acts emerging in environmental law of Russia. Despite the vague legal nature of the strategic documents, they are gaining relevance in regulating environmental relationship though the regulation by strategic documents has become an uncontrolled and unpredictable process. This article reviews strategic and political documents addressing protection of the environment, environmental security and nature use. It points out the necessity to find their place within the system of environment-related legal acts to build a clear hierarchy in the system, to raise the efficiency of laws and to create a functional enforcement mechanism. The authors suggest two options: to adopt a separate legislative act on the national environmental policy or to introduce a separate chapter into the Federal Law "On Environmental Protection", or alternatively, to carry out codification of the adopted strategic instruments.

Keywords: strategic documents, environmental law, use of natural resources, Ecological Doctrine, environmental security, national policy of ecological development, pollution fees, economic security.

Research area: law.

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* Corresponding author E-mail address: kafzem@rsuj.ru
ORCID: 0000-0003-4074-404X (Krasnova); 0000-0001-7479-2774 (Vlasenko)

The current system of environmental law of Russia witnesses the emergence of new types of legal acts that add to the traditional set of evidently mandatory statutes, governmental regulations and new instruments of administrative rules being the strategic documents that outline the environmental policies of the country.

Enactment of the documents has raised an issue of determining their legal force, their place in the hierarchy of statutes and other legal acts, and options for their implementation.

To a great extent, the socio-economic development of the society depends on the availability of natural resources forming a material basis for economic growth, on their reasonable and sustainable use, on the favourable state of the environment being a key factor in ensuring the well-being of people and sustainable development of a country. In such context, environmental law becomes especially relevant in formatting the stable long-term social structure models. Today the environmental requirements of the Russian law do not only make a direct or indirect influence on the rights and obligations of a person, but also determine them in the full variety of their relationships, including economic and social ones.

In its turn, the outcomes of economic growth produce the material values needed for tackling environmental problems, improving natural life conditions, practicing rational and sustainable use of natural wealth. Under such conditions, the continuous and complementary links between the economy and the ecology serving as a guarantee of progressive social development become especially evident. Such objective links predetermine the need for a well-coordinated development of all branches of law based on generally recognized general principles that equally incorporate public interests in economic development and conservation of nature.

Today, the environmental law of Russia is actively searching for a fundamental approach to coordinating the legal regulation of social, economic and ecological relationships in their integrity. One of such approaches is associated with enactment of political strategic documents, where the environmental problems are addressed not in isolation, but within the context of and in interconnection with the goals of socio-economic development. Such an approach corresponds to the basic position expressed at the international level. According to the World Charter for Nature (item 7) "in the planning and implementation of social and economic development activities, due account shall be taken of the fact that the conservation of nature is an integral part of those activities".

By now, many of such acts have already been adopted or approved by various governmental bodies. They comprise quite a number of environment-related policies interconnected with economic and social ones, such as the Ecological Doctrine of the RF, Fundamentals of State Policy in the Area of Ecological Development for the Period till 2030, Strategy of Ecological Security for the Period till 2025, Climate Doctrine of the RF, Water Strategy of the RF for the Period till 2020. In their legal form, these acts are from presidential decrees, governmental regulations and orders, and stand out with their different validity terms. Due to this diversity of formal characteristics it appears impossible to build a hierarchy of such acts, to determine their correlation within the system of legislative acts, to outline a circle of persons, who are to implement and comply with them. In terms of juridical technics, these documents outline the problem addressed, set the policy objective, set the operative tasks, and list the legal and practical measures to be carried out for their attainment. These texts do not mean to determine any personal rights and obligations, neither they provide an enforcement mechanism. They may not adjudicate in courts.

From the legal nature point of view, the Russian legal science regards the strategic and political acts as equal or similar to the Constitution, and referred to as political and regulatory ones. As per the criteria of their designation, contents and juridical techniques applied in their drafting, and according to the Federal Act "On Strategic Planning", the political and regulatory acts belong to the system of strategic planning documents with a unique correction procedure: unlike adoption of amendments, such correction means any operative modification of the text without changing the validity term. Political rule-making is vested with the

President or the executive bodies at the federal and regional levels, except for the legislature, the State Duma. This fact creates an unusual interconnection between the legislative and executive bodies, when the former ones, despite their primary role within the branches of public power and independence from executive and judicial power, are practically obliged to adopt the statutes that have to, at least, follow, if not to implement the national policy declared at the executive level.

The Code of Administrative Proceedings dated 3 March 2015 sets the rules for repealing ministerial acts either in full or in part upon the administrative claims of the persons to whom the act has been applied or who believe that the act violates or will violate their rights, freedoms and lawful interests (Article 208). The rule covers both mandatory ministerial acts, such like regulatory orders, decrees and decisions, and also the acts of "regulatory quality" and interpretative nature, adopted in the form of ministerial letters, national standards, or reference books. In the latter case, the legal nature of the acts of "regulatory quality" but not being regulatory documents is not clear; as per the position elaborated by the Constitutional Court of the RF, it is up to the court to decide whether the disputed act does or does not conform to the established criteria. If it is adopted by a regulatory body possessing a legislative mandate, addresses to an unlimited circle of persons, and is deemed to be applied many times, it will be recognized as a mandatory document, not an act of explanatory, informative or interpretative nature. According to the Code of Administrative Proceedings, both regulatory acts and acts of regulatory qualities or containing any legislative interpretations shall be subject to judicial review. Strategic acts do not claim to have such qualities at all, as they are not meant to establish any general mandatory rules, but outline the political priorities and general implementation framework for the relevant executive entities; they do not concern any physical or legal persons, their provisions are not that much informative or interpretative, but rather policy-making. As they may contradict with the citizens' rights, they may provoke a civil suit, but only when a certain governmental regulation is adopted to implement a strategic document. Despite certain rules concerning the adoption of strategic documents, the legislation and judicial practice remain mute about the legal force and review of the documents that combine features of the two abovementioned types of acts, regulatory acts and acts of regulatory nature, officially relegating them to neither.

Regardless of this vague legal nature of strategic documents, they are gaining an ever-growing role in regulating environmental relationship. They also have made an important first step to integrate environmental protection interests into socio-economic development policies.

Approved by the Governmental Order dated 31 August 2002, the Ecological Doctrine of the Russian Federation proclaims that the natural environment should be incorporated into the system of socio-economic relationships as the most valuable component of the national heritage. The strategy of socio-economic development and the state ecological policy should be interconnected, as health, social and environmental well-being of people present an inseparable integrated unity.

A more straightforward approach to integrating ecological, economic and social interests and comprehensive legal regulation is expressed in another strategic document adopted 10 years thereafter, the Fundamentals of the National Policy of Ecological Development for the Period till 2030 (further Ecological Development Policy), approved by the President of the RF on 30 April 2012. It requires the national ecological development policy to be strategically intended to solve the socio-economic tasks that would ensure environment-oriented economic growth. Consequently, it is not socio-economic development as an absolute value expressed in growth indicators, but the socio-economic growth that considers and guarantees the ecological interests of the society to preserve the environment for a long-term perspective that is proclaimed as the political basis for the development of the state. Even though the activities implemented to observe these interests may keep the absolute

economic growth back at certain stages, they shall remain an irreplaceable deposit to achieve long-term sustainable development of all social institutions.

To a certain extent, the Ecological Development Policy follows the Sustainable Development Concept (Our Common Future) and Sustainable Development Goals approved by the United Nations in 2015, and supports the Ecological Law and the Governance Association concept on promotion of ecological law based on the principle of ecological justice and equality among living people, present and future generations in living nature, to sustain integrity of nature, to develop ecological thinking and practice in human minds, "to subordinate our material expectations and desires to the delicate balance of our planet".

The Concept of Long-Term Socio-Economic Development of the Russian Federation for the Period till 2020 as approved by Governmental Order No. 1662-r dated 8 August 2009 similarly envisages that the economic development itinerary is planned with the environment factors taken into account. It states that an improved system of ecological regulation that meets the priorities of national development till 2020 and the new post-industrial level of social development of Russia shall become an institutional basis for a new ecological policy. The ecological policy shall be aimed at a considerable improvement of the quality of the environment and ecological conditions of human life, creating a balanced environment-oriented model of economic development and ecologically competent industries.

The political declarations mean the ecological development principle has been forming within the environment legal protection system through the official recognition and legal provision. It formed a general basic framework for the entire legal system, being a new legal principle for the national policy as a whole and ecological policy in particular. This principle forwards the law to address the socio-economic tasks intended to ensure the environment-oriented economic growth, preserve the favourable environmental conditions, biological diversity and natural resources to meet the needs of the present of future generations, input into environmental rule of law and ecological security.

The greatest challenge of formulating the ecological development model lies upon the environmental legislation that has been previously based on the dynamically and sustainably developing theory of environmental law, and comprising the legal rules that ensure tackling of environmental problems in the context of economic development. Industries are obliged to comply with ecological standards, including the traditional environment quality requirements and emission standards, practice and introduce the best available techniques. The new restrictions that prohibit the placement of certain industrial facilities within water protective zones adjacent to water bodies (Article 65 of the Water Code of the RF, Article 104 of the Forest Code of the RF), within the forest lands (Article 13 – forest infrastructure facilities, Articles 102-107 – prohibition to locate capital constructions within protected forests), within other valuable lands, force the operators to select environmentally safe areas for their economic activity. According to Article 32 of the Federal Act "On Environmental Protection", environmental impact assessment as a mechanism for adopting environmentally safe governmental decisions concerning the planned economic projects is a mandatory requirement for all legal persons engaged in economic and other activities.

At the same time, the legal principle of ecological development determines new guidelines and priorities for environmental law. Firstly, legal environmental requirements should not impede the economic development. In other words, ecological restrictions, prohibitions and prescriptions should not cut down the gross domestic product, interfere with the well-being of people and their living standards. The Ecological Development Policy points out the priority environmental problems to be solved as soon as possible. They include environment-friendly waste disposal, compensation of environmental damage, mitigation of the environmental consequences of past economic activities, introducing new approaches to environmental standard-setting based on technological standards, protecting natural

ecological systems, flora and fauna. There are some interesting and rather radical approaches to notice. The environmental standard-setting recommends giving up the "zero risk" concept (it means adjustment of the environment quality standards and emission limitations to prevent environment-related diseases) in favour of laxing the quality and emission requirements to support economic interests. According to the National Ecological Policy, industries should adhere to the technological standards that set the "acceptable risk for the environment and people's health".

Ecological development also implies reforming the pollution charge computation methodology. The Ecological Development Policy suggests to refuse from temporary emission limitations currently allowed in exceptional cases during reconstruction and modernization that would result in a higher pollution charge, and to require every facility to compensate the environmental damage in any case whenever the emission standard is exceeded. The Ecological Development Policy also promotes the ecosystem regulation mechanism, which requires, particularly, preservation of natural ecosystem functions both inside the special protected areas and beyond.

The ecological development principle extends to the regulation of economic activities that traditionally falls within civil and business laws. The Ecological Development Policy provides for creating a legal model of an effective, competitive and environment-oriented economy, a task to be integrated into economic branches of law. The priorities have been set. The priority of legal regulation is awarded to equipping the industries with innovative eco-friendly technologies, and assessing the efficiency of the economy not only through the traditional qualitative and quantitative production parameters, but also through the efficiency of natural resources involved in the process.

Civil and business law also need to be involved into addressing the problem of mitigating the previous environmental damage. The Ecological Development Policy prescribes to explore the previous damage and arrange step-by-step activities to clean the pollution from the past economic activities (sites of stocked environmental damage, abandoned landfills, heavily polluted sites), as well as to develop proper legal mechanisms to involve investors into the reclamation activity. In 2016, a long provision on eliminating stocked environmental damage was included into the Federal Act "On Environmental Protection" (Chapter XIV.1), but unfortunately many details of reclamation process were not addressed. The criteria for recognition of environmental damage as past or stocked were not formulated. As at the past pollution sites left since the Soviet times no liable persons were found, no balanced model for finding liable persons to compensate the expenses was suggested. For the time, the expensive works on identification and registration of the past polluted sites are carried out by the government and most of the expenses are covered by the federal budget.

Even though the documents that may finally bring a reform in environmental law are generally positively accepted, some criticism has been already pronounced.

The critics point at the lack of legislative basis for implementing the Ecological Doctrine, lack of mandatory legal force of the political documents that undermine the idea of strategic planning; they notice the incomplete coverage of ecological security issues in the Strategy of Ecological Security (2017) that misses problems of depletion of natural resources, water and biological resources. Lack of mechanisms for enforcing the political documents and mitigating the possible contradictions between these documents and mandatory laws and regulations undermines the significance of strategic documents. Even though the Ecological Doctrine proclaims the objective to strengthen the role of environmental expert review, the list of activities subject to such review was limited by the Federal Act "On Ecological Expertise", and the mechanism itself, therefore, lost its relevance.

This criticism may be added with the evident fact that there have already been some deviations from the national ecological policy in regulatory acts. If the Ecological Development Policy provides for switching from "the pollution charges for exceeded pollution standards to compensation of environmental dam-

age", the governmental regulation adopted on 3 March 2017 "On Calculating and Collection of Charges for the Negative Impacts on the Environment", i.e. enacted 5 years after the adoption of the Ecological Development Policy (2012), established the same excessive pollution charge collection system, thus once again legalizing the pollution that breaches the quality standards.

Besides, it should not be ignored that regulation by strategic documents has become an uncontrolled and unpredictable process, when the number of strategic documents is growing and the scope of issues they cover is expanding. Moreover, the logic in this activity is not always evident. For instance, there is a Water Strategy, but no Forest Strategy. There is a Strategy for the Conservation of Rare and Endangered Species for the period till 2030, but no strategy for the protection of wildlife or biological diversity as a whole, even though the protection of biodiversity is proclaimed as one of the objectives by the Policy of Ecological Development.

One may also notice some duplications among strategic environment-related documents. It is hard to understand, why a Strategy of Ecological Security has been adopted as a separate strategic document, if when ecological security issues are covered both by the Ecological Development Policy and the Ecological Doctrine. Besides, the objectives of the latter documents coincide to a great extent. The Ecological Development Policy is intended "to preserve favourable environmental conditions, conserve biological diversity and natural resources for the needs of the present and future generations" and comprises ecological security. The aims of the national Policy of Ecological Security are formulated as "to preserve and restore the natural environment, to maintain the environmental quality on the level needed for favourable life conditions and sustainable development, elimination of past environmental damage caused by economic activities under the conditions of economic growth and climate change". Therefore, the border between the objectives of environmental protection and those of ecological security is hardly visible.

There arise some new questions concerning interpretation and implementation of ecological policy as a separate sector in the national policy. According to the Strategy of Economic Security for the Period till 2030, "excessive limitations in ecological security, growing costs of environmentally friendly production and consumption standards" are viewed among the challenges and threats to economic security. Therefore, the ecological security policy should be implemented with the declared economic and financial challenges in mind as long as both documents are equal in their legal force.

From everything said above it becomes evident that harmonization of strategic documents is an urgent matter. There are two options to suggest. Firstly, in view of the existing law-making practice when national policy objectives are expressly formulated in the respective legislative acts or included therein as separate chapters, it seems reasonable to apply this model to environmental policy. A separate law on the national environmental policy or a chapter on environmental policy within the Federal Act "On Environmental Protection" may proclaim long-term guidelines for the development of environmental, ecological security and nature use-related legal acts through creative codification of the existing political and strategic documents. With this approach, the national environmental policy may finally acquire a fully legal, sustainable and long-term character. A policy formulated in a legislative act will obtain a clear mandatory legal force, outline a circle of persons in charge of its implementation to become a firm basis for enacting further strategic and programmed documents as tools for law implementation.

Such law-making practice is already available. For instance, there is a Federal Act "On Industrial Policy", Federal Act "On Science and National Scientific and Technological Policy". The Federal Act "On Standard-Setting" has Chapter 2 "National Policy in Standard-Setting". Separate chapters on national policies in relevant sectors are also included into the Federal Acts "On Heat Supply", "On Electric Energy Industry" (Chapter "Investment Policy in Electric Energy"), "On Gas Supply" (Chapter "Principles of the National Policy in Gas Supply Sector").

Alternatively, it would be less complicated to codify the adopted political and strategic documents through a thorough review and comparison of their provisions, withdrawal of duplicating formulations, and inclusion cross-references to make a clear link between them. The dilemma of their legal force would still remain unclear, leaving the problem of their relevance to other legislative acts.

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Стратегические инструменты регулирования в экологическом праве России

И.О. Краснова, В.Н. Власенко
Российский государственный университет правосудия
Российская Федерация, Москва

Аннотация. Экологическое право России сталкивается с появлением новых видов правовых актов. Несмотря на неопределенную юридическую природу стратегических документов, они начинают играть все большую роль в регулировании экологических отношений, хотя регулирование стратегическими документами приобрело характер неконтролируемого и непредсказуемого процесса. В этой статье рассматриваются стратегические и политические документы, касающиеся защиты окружающей среды, экологической безопасности и природопользования. Это указывает на необходимость найти свое место в системе экологических правовых актов с целью установить четкую иерархию в системе, повысить эффективность законов и создать работающий механизм реализации. Предложены две альтернативы – принять отдельный законодательный акт о национальной экологической политике или включить отдельную главу в Федеральный закон «Об охране окружающей среды» либо, в качестве альтернативы, выполнить кодификацию принятых стратегических инструментов.

Ключевые слова: стратегические документы, экологическое право, использование природных ресурсов, экологическая доктрина, экологическая безопасность, национальная политика экологического развития, плата за загрязнение, экономическая безопасность.

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On the Model of Public Entitties Participation in Civil Relations in Terms of the Legal Positions of the Constitutional Court of the Russian Federation

Inna S. Bogdanova*
Siberian Federal University
Krasnoyarsk, Russian Federation

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Abstract. The article is devoted to the problem of changing the model of participation of public legal entities in civil relations. This change is to be made by the Constitutional Court of the Russian Federation on the example of non-contractual obligations between the state and individuals. For this purpose there was made a study of legislative model of state participation in private relations, as stipulated in Articles 2 and 125 of the Civil Code of the Russian Federation, and legal positions of the Constitutional Court of the Russian Federation, enlisted in the Resolutions of the Constitutional Court of the Russian Federation No. 16-P dated 22.06.2017 and No. 39-P dated 08.12.2017. As a result, the author concludes that the current legal model of participation of public legal entities in civil relations does not provide any exceptions for non-contractual obligations between the state and individuals. On the contrary, the legislators are consistent in addressing the issue of which state bodies are able to ensure the civil legal capacity of the individuals and under what conditions. Amendment of the above model by the Constitutional Court of the Russian Federation via expanding the list of bodies capable of creating legal consequences for public entities, without taking into account the scope of their competence, as well as differences between federal bodies and bodies of state power of the subjects of the Russian Federation, is considered untimely, since the matter requires further thorough study and elaboration.

Keywords: public legal entity, government body, state authority, civil legal capacity of the state, model of participation, civil relations, registration authority, tax body.

Research area: law.

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* Corresponding author E-mail address: bogdanov_rabota@mail.ru
ORCID: 0000-0003-0732-2929

Introduction

The current Civil Code of the Russian Federation sets forth general provisions on the participation of state and other public legal entities in civil legal relations. However, over the last three years the Constitutional Court of the Russian Federation has formed such legal positions that differ from the legal provisions, which predetermined the necessity of their analysis and interpretation. The Constitutional Court of the Russian Federation actually proposed a new solution to the problem concerning the model of participation of public legal entities in civil relations on the example of non-contractual obligations with individuals.

Research description

The general rules on the model of participation of public entities in civil relations are itemized in Articles 2, 124 and 125 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code). In general, the Russian legislation has accepted the idea of recognizing public entities as independent subjects of private relations along with individuals and legal entities participating in these relations through the actions of their bodies. At the same time, the legislators have clearly defined the criteria for qualifying government authorities for implementing the legal capacity of the Russian Federation and the subjects of the Russian Federation in the relations regulated by civil legislation.

The procedure for the participation of public entities in relations governed by civil law is directly specified by Art. 125 of the Civil Code, with two different rules set out in Items 1 and 3 of this Article. Thus, by virtue of paragraph 2 Item 1 Article 2 of the Civil Code, the participants of relations governed by civil law are citizens and legal entities. The Russian Federation, the subjects of the Russian Federation and municipal entities may also participate in these relations. In this case the legislators used the wording "may participate" in counterbalance to the expression "are participants" in relation to natural persons and legal entities, which is not incidental. The reason is that state is not so active as individuals and legal entities in such relations; the role played by the state in the life of society does not imply its active involvement, on the contrary, participation in private relations for state authorities is rather an exception in special cases when the norms of the Civil Code shall be applied for the regulation of the relations. Such situations comprise non-contractual obligations, including those resulting from vindication requirements and infliction of harm.

According to Item 1 Art. 125 of the Civil Code of the Russian Federation, government bodies have the right to act on behalf of public entities: they may acquire and exercise property and personal non-property rights and obligations, appear in court within their competence, established by acts determining the status of these bodies. The above provision presumes that only state authorities may act directly on behalf of public entities, and the right of the body to act on behalf of the state must be provided for in the act defining its status and must comply with its competence.

Unlike Item 1, Item 3 of Art. 125 of the Civil Code gives a different wording: in cases and in the manner prescribed by regulatory legal acts concerning public entities (federal laws, decrees of the President of the Russian Federation, decrees of the Government of the Russian Federation, regulatory acts of the subjects of the Russian Federation) government bodies, as well as legal entities and individual citizens can act for and on the behalf of the public entities. This means that in order to participate in civil relations on behalf of public entities other than those specified in Item 1 of Art. 125 of the Civil Code of the Russian Federation, their representative must meet a number of conditions, namely, 1) the cases and order of such representation shall be fixed in regulatory acts; 2) there shall be a special assignment made in respect of these government bodies, legal entities and individuals.

Hence, in accordance with Item 1 of Art. 125 of the Civil Code of the Russian Federation, as a general rule, the participation of the Russian Federation and the subjects of the Russian Federation in civil relations is carried out through the actions of state authorities, and in special cases (defined in Item 3 of Art. 125 of the Civil Code), if there is a special assignment,

other subjects (government bodies, legal entities and individual citizens) can act on behalf of public entities.[1]

As it follows from the aforesaid, Article 125 of the Civil Code of the Russian Federation uses various terms to designate civil capacity of the Russian Federation and its subjects in civil relations: "government bodies"[2] (Item 1 of Art. 125 of the Civil Code) and "state authorities" (Item 3 of Art. 125 of the Civil Code). This circumstance, in our opinion, is of fundamental importance for the solution of the problem of the legislative model characterising state participation in civil relations.

The common feature of the concepts "government bodies" and "state authorities" is their belonging to the category of bodies/agencies, typifying the structural unit of the state apparatus. As such, they possess an array of distinctive features: 1) the body is a part of the state apparatus; 2) it acts for and on behalf of the state; 3) it enjoys state power (has its own particular competence); 4) it has an internal organizational structure; 5) it uses specific forms and methods of activity. The territorial scale of activity and declaration of the legal position of the body in regulatory acts can also be added to this list as optional features (Gabrichidze, 1982: 29; Bakhrakh, 1996: 84-84; Mitskevich, 2016: 138).

All these features of the government bodies are interconnected and interdependent, the bodies have an intrinsic set of the above mentioned distinctive features, their inherent combination. However, the main attribute among them that defines the essence of the government body, its purpose, is the presence of state powers as regards a certain range of issues, i.e. competence.

In the end, a government body is a part of the state apparatus (an element of a higher level system, i.e. the state), acting for and on behalf of the state and personifying state power.

Despite the existence of common features, the concepts of "government bodies and "state authorities" are not identical. The difference between them lies in the fact that the first embraces bodies belonging to this or that branch of state power, and the second – bodies not attributed to a particular branch of power (Chambers of Accounts, election commissions, prosecutor's office, etc.) (Mitskevich, 2016: 136-137).

As a consequence, it turns out that the legislator has demarcated the cases of implementation of the civil legal capacity of public entities by the considered bodies through the recognition of the government bodies' right to act according to Item 1 of Art. 125 of the Civil Code of the Russian Federation, i.e. generally within their competence, while the state authorities should follow Item 3 of Art. 125 of the Civil Code, in other words, in cases specifically provided for by the legislation and in the presence of a special assignment, yet, the motives of such a decision remain unclear.

In this regard, the question arises about the grounds for such a legislative approach, and the doctrine on it contains several assumptions. Most of the modern researchers are unanimous in the fact that Item 1 of Art. 125 of the Civil Code of the Russian Federation concerns the legal structure of the "body" of a public entity by analogy with the "body" of a legal entity (in the sense of Art. 53 of the Civil Code), and Item 3 of Art. 125 of the Civil Code delineates the relationship of representation, regulated by Chapter 10 of the Civil Code. On balance, it is concluded that in the first case the government bodies are not bound to have civil legal capacity, and in the second case, on the contrary, they should have the status of independent legal entities (Golubtsov, 2019: 70-71; Kravets, 2016: 36-39, etc.). To remove this contradiction, radically different solutions are proposed – from the exclusion of government bodies from Item 3 of Art. 125 of the Civil Code of the Russian Federation (Kravets, 2016: 39) to the legislative

[1] Literally: "In the cases and in conformity with the procedure, stipulated by the federal laws, by the decrees of the President of the Russian Federation and the decisions of the Government of the Russian Federation, by the normative acts of the subjects of the Russian Federation and of the municipal entities, the state bodies, the local self-government bodies, and also the legal entities and the citizens may come out on their behalf upon their special order". (see translation of the Civil Code https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf) – Translator's note.

[2] In English translation of the Civil Code this difference is not so striking, since both Items have the wording "state bodies" with the addition "state power bodies" in Item 1 (see https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf) – Translator's note.

consolidation of the features of the government bodies' status when they participate in civil relations as legal entities (Golubtsov, 2019: 72).

Having agreed with the general conclusion about the types of legal structures established in Items 1 and 3 of Article 125 of the Civil Code of the Russian Federation, I believe that the answer to the posed question lies in another sphere. Indeed, Item 1 of Art. 125 of the Civil Code of the Russian Federation is about the legal structure of the "body" of a public entity similarly to the "body" of a legal entity, and Item 3 of Art. 125 of the Civil Code classifies the relations of representation, regulated by Chapter 10 of the Civil Code.

Legal grounds for such a conclusion are written in Item 2 of Art. 124 of the Civil Code, by force of which the rules regulating the participation of legal entities in relations governed by civil law are applied to public entities, too, unless otherwise follows from the law or peculiar characteristics of these subjects. According to Item 1 of Article 53 of the Civil Code, a legal entity acquires civil rights and assumes civil obligations through its bodies acting in compliance with the law, other legal acts and charter documents. Since the content of this Item corresponds to the provisions of Item 2 of Art. 124 of the Civil Code, then Item 1 of Art. 53 of the Civil Code can be analogously applied to public entities, which is set out in Item 1 of Art. 125 of the Civil Code. This is explained by the fact that Item 1 of Art. 125 of the Civil Code of the Russian Federation sees government bodies as bodies of the Russian Federation and the subjects of the Russian Federation; it concerns such bodies which due to these circumstances cannot act as independent participants in civil relations, because it is through them the public entity itself enters into civil relations.

Accordingly, Item 3 of Art. 53 of the Civil Code and Item 3 of Art. 125 of the Civil Code refer to the representatives of legal entities and public entities. Therefore, the relations arising between a public entity and such a representative should be covered by Chapter 10 of the Civil Code. But it is necessary to make a reservation that this provision is only for individuals and legal entities, which is quite logical. As for the state authorities, mentioned in Item 3 of Article 125 of the Civil Code, those which do not have any connection with the branches of state power cannot have any relations with the public entity due to the non-autonomous nature of the state authorities. In our opinion, Item 3 of Art. 125 of the Civil Code refers to such state authorities which are not supposed to participate in civil relations and which do not have such a right in their competence, therefore, in case of such a need the state may confer special powers on such bodies by issuing a corresponding act. In this sense, there is no contradiction, so, the government bodies and state authorities do not have an independent civil legal capacity, rather they are only capable of realising the legal capacity of a public entity. In this regard, the difference between them is only in the scope of their competence: for the government bodies this eligibility is defined in the act on their status, while state authorities need special granting of power in cases established by law for their participation in civil relations. This granting of power stays within the "special assignment" formula.

Thus, the current civil legislation gives a clear structural model of public entities' participation in private relations, which can be expressed in the following aspects: 1) public legal entities can be recognized as participants of civil relations; the Russian Federation, the subjects of the Russian Federation, as well as municipal entities, are seen separately; 2) they can legally act as independent participants along with individuals and legal entities; 3) public legal entities are not equal to legal entities; 4) civil legal capacity of public legal entities is realised through the actions of government bodies within their general competence (Item 1 of Art. 125 of the Civil Code) or through the actions of the state authorities within the powers specially granted for this very purpose (Item 3 of Art. 125 of the Civil Code).

In any case, the substantial significance is displayed by the powers of a specific state authority, so the relations regulated by the civil legislation are characterized by the provision, due to which the actions of a public legal entity in the sphere of private law (the actions which are not within its competence) do not beget legal consequences for this public entity. It is for this

reason that judicial practice attaches particular importance to the evaluation of the actions of the Russian Federation bodies and bodies of the RF subjects, since the actions of the authorized body only have legal consequences (cf., for example, Item 4 of the Resolution of the Plenum of the Supreme Court of the Russian Federation "On some issues related to the application of the rules of the Civil Code of the Russian Federation on the limitations of legal claims" No. 43 dated 29.09.2015, and Item 15 of the Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application by the courts of some provisions of the first part of the first section of the Civil Code of the Russian Federation" No. 25 as of 23.06.2015, etc.).

Meanwhile, considering individual cases related to the participation of public entities and individuals in non-contractual obligations, the Constitutional Court of the Russian Federation formulated legal positions that do not fully correspond to the Russian legislative model describing participation of public entities in civil relations.

For instance, in 2017, during the case following the complaint of citizen A.N. Dubovets, the Constitutional Court of the Russian Federation adopted the widely known Decree No. 16-P of 22.06.2017, according to which there appeared a special exception to the rules of Art. 302 of the Civil Code on vindication of property in relation to the situation when the public entity claims the reclamation of property from unlawful possession of a bona fide purchaser – an individual.

During the formation of the legal conclusion for this case the Constitutional Court of the Russian Federation paid close attention (inter alia) to the assessment of a condition provided by Art. 302 of the Civil Code, namely the reclamation of property from the possession of the owner beyond one's will. In addition, the Constitutional Court of the Russian Federation essentially analyzed the procedure for participation of public entities in civil relations by the example of the institution of escheat.

In particular, it was proposed to take into account and analyze two points when settling the respective disputes: "the fact of state registration of the ownership right to the dwelling premises for the person who had no right to alienate it, and the nature of actions (inaction) of the public owner personified by the authorized bodies that are entrusted with the competence to register title to escheated property and dispose of it".

In the context of the issue under consideration, the dual position of the Constitutional Court of the Russian Federation on the powers of bodies acting on behalf of the state raises concern. On the one hand, the court states unequivocally that the loss of the escheated intangible property by public entity may be caused by "inaction of relevant bodies which have not formalized the ownership right to it within a reasonable period of time, which to a certain extent creates prerequisites for its loss, including through withdrawal of the property from the possession of the public owner as a result of unlawful actions of third parties". The RF Constitutional Court uses the term "authorized bodies" to name this type of bodies without giving any other options.

But there is a completely different situation when the court assesses the fact of state registration of ownership under forged documents as regards a third party claiming escheated dwelling premises. The Constitutional Court of the Russian Federation has already criticized the position of the courts that do not consider "expression of the will of a public legal entity aimed at withdrawal of intangible property from the possession of a public owner, the act of state registration of the right to this property (although it is this act that confirms the legality of the transaction made by the originally unauthorized alienator of intangible property with a third party) as permissive, as the basis for the alienator's registration as the owner of this property and, consequently, the justified legality of the transaction.

Hereby, the Constitutional Court of the Russian Federation comes to the conclusion that "the state, represented by legally authorized bodies and officials acting during the procedure of state registration of rights to intangible property, confirms the legality of a transaction on withdrawal of intangible property".

As a result, it turns out that, in the opinion of the RF Constitutional Court, the reg-

istration body that exercises the authority to perform registration actions within its competence, established by a regulatory legal act, and which does not have the authority to dispose of escheated property owned by a public entity, nevertheless, authorizes the transactions on withdrawal of such real estate objects. Putting it another way, the body that registered the ownership of a third party on the basis of forged documents in such a manner expressed the will of the public entity to alienate this property from the possession of the latter. In this case, there is a confusion of norms of public (registration) and private law, since it is impossible to identify the actions of a state authority to perform public functions as actions for disposal of a specific public property, especially in a situation when the state authority has not been entitled to disposal of property of a public legal entity. It is obvious that this interpretation does violate the provisions of Art. 125 of the Civil Code and the legislative model of public entities' participation in civil relations.

What is more, one should pay heed to another essential fact left without proper legal assessment by the Constitutional Court of the Russian Federation. As it follows from the analyzed resolution of the Constitutional Court of the Russian Federation, the plaintiff in the case of citizen A.N. Dubovets was Moscow itself, i.e. the subject of the Russian Federation, which had got the disputable dwelling premises as escheated property. The right of ownership of this property was registered in the Unified State Register of Property by the authorized body, which is a federal government body, i.e. a body of the Russian Federation. Eventually, the court concluded that the dwelling premises was no longer the property of the subject of the Russian Federation as a result of registration actions by the body implementing legal capacity of another public entity – the Russian Federation. The court did not provide any arguments justifying such interpretation of the law. At the same time, public entities, from the point of view of the Constitution of the Russian Federation and from the point of view of the Civil Code of the Russian Federation, are independent and equal participants of public and private relations, therefore, as a general rule, the actions of one public legal entity are not able to generate legal consequences for another public legal entity unless it is specified either in the law or in the contract. Thus, the legal position in the case considered by the Constitutional Court of the Russian Federation is controversial and requires further investigation.

The next act of the Constitutional Court of the Russian Federation, which is of interest in the context of the analysed issue, is the Resolution of the Constitutional Court of the Russian Federation No. 39-P dated 08.12.2017. When forming the legal conclusion on the possibility of civil liability of an individual for failure to fulfill tax obligations by a legal entity, the court separately considered the issue of the authority of tax bodies to apply to the court with a claim for compensation for damages in such cases.

Thereat, the RF Constitutional Court, having assessed Article 31 of the RF Tax Code and the provisions of the RF Law "On Tax Authorities of the Russian Federation", stated the absence of a direct reference to the right of tax bodies to apply to court for compensation of damages based on Article 1064 of the RF Civil Code. In other words, the court found that the tax bodies had no such authority within their competence as established by the acts determining the status of these bodies. At the same time, this circumstance did not prevent the RF Constitutional Court, which followed the RF Supreme Court in its decision, from coming to the conclusion that such right still belongs to the tax bodies, as in this case they do not hold citizens to account using their powers; they only express the will of the affected public legal entity, addressing the court with the relevant claims on its behalf.

Taking into account that the current procedural legislation unambiguously defines the prosecutorial authorities as authorized subjects with the right to apply to court with claims for protection of property interests of public entities in all categories of cases, there would be a violation of the Art. 125 of the Civil Code if the list of such authorities includes tax bodies when there are no legal grounds for such a solution.

Conclusion

The present legislative model of participation of public legal entities in civil relations does not provide any exceptions for non-contractual obligations arising between the state and individuals. On the contrary, the legislators have been consistent in addressing the issue of which bodies of the state are able to ensure the civil legal capacity of the latter and under what conditions. Amendment of the above model by the Constitutional Court of the Russian Federation via expanding the list of bodies capable of creating legal consequences for public entities, without taking into account the scope of their competence, as well as differences between federal bodies and state authorities of the subjects of the Russian Federation, is considered untimely and requires further thorough study and elaboration.

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К вопросу о модели участия публичных образований в гражданских отношениях в свете правовых позиций Конституционного суда РФ

И.С. Богданова
Сибирский федеральный университет
Российская Федерация, Красноярск

Аннотация. Статья посвящена проблеме изменения Конституционным судом РФ модели участия публично-правовых образований в гражданских отношениях на примере внедоговорных обязательств, возникающих между государством и физическими лицами. С этой целью проведено исследование законодательной модели участия государства в частных отношениях, закрепленной в ст. 2, 125 Гражданского кодекса РФ, и правовых позиций Конституционного суда РФ, сформированных в Постановлениях КС РФ от 22.06.2017 № 16-П и от 08.12.2017 № 39-П. В результате автор приходит к выводу о том, что действующая легальная модель участия публично-правовых образований в гражданских отношениях не предусматривает каких-либо исключений для внедоговорных обязательств, возникающих между государством и физическими лицами. Наоборот, законодатель последователен в решении вопроса о том, какие органы государства и при каких условиях способны реализовать гражданскую правосубъектность последнего. Изменение указанной модели Конституционным судом РФ посредством расширения перечня органов, способных создавать для публичных образований правовые последствия, без учета объема их компетенции, а также различий между федеральными органами власти и органами государственной власти субъектов РФ является преждевременным и требует тщательного изучения и проработки.

Ключевые слова: публично-правовые образования, орган государственной власти, государственный орган, гражданская правосубъектность государства, модель участия, гражданские отношения, регистрирующие органы, налоговые органы.

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Multivariance of the State Structure of Federalism (Comparative Historical and State Studies)

Aleksandr D. Gulyakov*
Penza State University
Russian Federation, Penza

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Abstract. The article justifies the need for a historical-state study approach by analyzing the models of federalism inherent in different countries. The structural elements of any model include the prerequisites and reasons that contributed to federalization, essential characteristics of federalism (including the genesis characteristics, historical typology, development vector), the main stages of the federalism development.
Using the systemic and comparative methods, as well as the example of three first settlement models inherent in the USA, Canada, Australia, one European (German) and Russian models, the author shows and explains the features of federalism in these countries. In particular, there are more favorable conditions for the formation of federations in the first settlement societies and the well-known difficulties of their establishment in Europe (on the example of Germany). The article demonstrates the ideologically innovative nature of Soviet federalism and the rational construction of Russian (post-Soviet) federalism, which has not abandoned a high degree of centralization.
The materials presented in the article allow not only to outline new features of the state structure of federalism, but also contribute to the development of the concept for reforming federative relationships.

Keywords: federalism, federalism models, first settlement federalism, European federalism, stages of federalism development, comparative federalism.

Research area: law.

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* Corresponding author E-mail address: valeriya_zinovev@mail.ru
ORCID: 0000-0002-6446-8142

Introduction

A keen interest in the problem of federal states has been observed only in the last two centuries, i.e. from the moment they actually appeared. These states did not immediately prove their effectiveness. Initially, statesmen and political philosophers of the Old World treated them with disdain and prejudice, especially in the main states of Western Europe at that time – Great Britain (Kendle, 2004: 28-31) and France (Dyugi, 2005: 171). The situation began to change only from the beginning of the 20th century, as the process of state building became more complicated. The two-level autonomy of the power organization in the center and in the subjects within the framework of a single state began to be taken for granted. As a result, currently there are about three dozen federations on different continents. Are their state structures something uniform, standard, or are there any prevailing specific features?

Conceptual basis of the research

Researchers studying federalism have traditionally focused more on theoretical issues; in particular, the divisibility or indivisibility of sovereignty or the classification of federations in terms of their legal nature. The theme of sovereignty was very popular in the 19th century and was politically short-term (Ebzeev, 2017: 14). It was used to justify centralized or, conversely, decentralized federations, as well as confederations. Ultimately, in German science, where it was most actively discussed, the approach in favor of centralization prevailed. This is evidenced by the works of the patriarchs of constitutionalism: G. Jellinek, P. Laband, R. Mohl (Geymbuh, 2009: 21-27). In modern science, it is recognized that in a federal state it should not be about the division of sovereignty between the federation and its constituent entities, but the coexistence, interdependence and interaction of two different-level sovereignties when each of them cannot successfully develop in isolation from the other (Tadevosyan, 2001: 148).

Another issue associated with the allocation of treaty and constitutional federations is also quite abstract. In fact, "the differences between treaty and constitutional federations are largely arbitrary". One and the same federation is initially established as a result of certain agreements, and then enshrined in the constitution.

"Moreover, elements of the contractual process and constitutional settlement can develop in parallel" (Sravnitelnaya politologiya, 2015: 322). Therefore, a slightly different classification is proposed: constitutional, contractual-constitutional, constitutional-contractual federations (Grachev, Ermyalieva, 2007). However, no matter which version we adhere to, it is obvious that the problem of federations, and in a broader sense of federalism, does not tolerate one-dimensional assessments, but requires a comparative approach.

Problem statement

Federalism is a much more large-scale phenomenon than federation. It is difficult to agree that federalism and federation are the elements of the same rank in the federative system as A.K. Rodionova states (Rodionova, 2011: 133-135). However, both federation and federalism require a more detailed and comprehensive study.

We should consider federation and federalism from a slightly different angle – not from the standpoint of constitutional law or political science, but from a historical and state-related perspective. This phenomenon should be viewed not as static 'pictures', but as a complex dynamic process. About two decades ago, in a fundamental collective monograph of Russian historians and lawyers, it was noted that "federalism is not a one-dimensional, but a multidimensional phenomenon, and it is not only static but also dynamic" (Federalizm, 2000: 18). Structurally, federalism includes federation as one of the forms of government, ideas, theories and principles, processes of federalization and de-federalization, and federalist culture (Farukshin, 2004: 51). However, what can the proportion between these or other elements be in relation to each other? After all, apparently, federalism is not just a set of certain elements, but their system. Moreover, we have the right to assume that different countries have their own variants or models of federalism and they should be compared with each other.

Methods

A systematic approach is of key importance in the study of the federalism models, since within its framework it is possible to consider federalism as a dynamic system.

It should certainly include "knowledge about the process of forming federations, which is called 'federalization'" (Brezgulevskaya, 2004: 46). The basis of this knowledge is made up of prerequisites (or long-term conditions for the beginning of processes) and causes (i.e. circumstances arising suddenly as a reaction to a changing historical context) (Ivshina, 2014: 98). However, this is clearly not enough. It is necessary to identify such essential characteristics as the genesis variety (i.e. federalism, from the point of view of its active or passive support by the population, could have been formed 'bottom-up', 'top-down' or in a mixed way), its historical typology (or connection with a specific era and country), vector of development (centripetal or centrifugal).

Finally, the dynamic component in the form of developmental stages is extremely important, as each of them has its own characteristics and duration (Malko, Gulyakov, Salomatin, 2018: 120-121).

The federalism model of each country with its certain set of properties, is unique in its own way. Models need to be compared using synchronous and diachronous analysis (Malko, Salomatin, 2018: 75), applying binomial and polynomial comparison. For example, it is expedient to compare the models of immigration federalism (USA, Canada, Australia) with each other. At the same time, it is interesting to compare one of the most striking models of this type, which is American, in pairs with models of other types – German and Russian.

Discussion

The analysis of the models should begin with the most classic example among them, the American one, not because it is 'the most correct' one, but simply because it is the earliest in time of its appearance.

Federalization of the former British colonies in North America had quite weighty prerequisites and reasons. The confederate structure implemented in accordance with the Articles of Confederation of 1778 after the end of the 1775-1783 War of Independence proved to be completely untenable (Filimonova, 2007: 93-94). The supreme unicameral representative body even had elementary problems with the quorum (Shiryaev, 1981: 19). The model of the federal structure developed during the constitutional convention of 1787, established an optimal presidential republic for the given situation, with a consistent division into branches of government and a classical scheme of checks and balances. It was stated that "powers not delegated to the United States by this Constitution and not prohibited for individual states are reserved, respectively, for the states or for the people" (Soedinennye Shtaty Ameriki…, 1993: 42).

The model of American federalism that was implemented later, was dynamic, migrant and hegemonic. The boundaries of the settlements were rapidly moving inland, to the west, and the number of states was increasing sharply. After overcoming the conflict between the northern (free) and southern (slave) states during the Civil War of 1861-1865 the long-term tendency towards centralization completely prevailed in the country. By the end of the 19th century the hegemonic orientation of American federalism, which relied not only on gigantic internal material resources, but also on external military-political and economic expansion, as well as the ideology of 'American exceptionalism', was fully revealed (Gulyakov, 2020: 118).

The United States went through an extremely long stage of dualistic federalism, in which the center and the constituent entities had a pronouncedly autonomous scope of powers. However, with the strengthening of state regulation since the end of the 19th century a gradual transition to cooperative federalism is observed. Now, since the middle of the 20th century, the federal center had been providing broad financial assistance to the subjects. "State and national agencies tend to perform government functions jointly rather than separately" (Dzhanda et al., 2006: 126). However, by the end of the 20th century management approaches change again: the concept of competing federalism is announced. It "focuses on

issues of competition between government levels...". Its supporters "project economic models onto the sphere of federal relations" (Lafitskiy, 2011: 182-183).

However, in the past decade, the well-being of the American state has been called into question. Against the background of an acute cultural and civilizational crisis between white conservative-minded Republicans and cosmopolitan, neoliberal-minded democrats of predominantly different ethno-racial roots, federalism becomes 'fragmented', which means a dangerously high level of political differentiation between states, as well as between states and the federal center (Bowling, Picrerill, 2013: 1-2).

In neighboring Canada, with a delay of three quarters of a century, immigration federalism is also being established, but it is not formed "bottom-up", on a broad democratic basis, as in the United States, but in a mixed way – at the initiative of individual regional elites, with the passive role of ordinary Canadians, but with an active support of the authorities of the metropolis. Without the consent and action of London, which put pressure on the governors of the two colonies who opposed the unification (Rayerson, 1970: 304), and without its help in taking huge territories from the Hudson's Bay Company and transferring them to the young state (Volodin, 2018: 89-90) Canada would not have appeared.

The British North America Act of 1867 which established a federation in the form of a dominion (i.e. a dependent territory), attracts attention by a more complex structure than the US Constitution of 1787. There is a desire to control many issues as much as possible, including those beyond the competence of the federal center. The center is endowed with 29 powers, the provinces with 15 exclusive powers. At the same time, in contrast to the Constitutions of Austria, Brazil, Germany, the Russian Federation, the sphere of joint competence is not provided (Danilov, 2012: 52).

The Founding Fathers of Canada, highly critical of the Civil War-torn US, sought a centralized (imperial-colonial) model of federalism. At the same time, Canadian federalism faced an amazing historical paradox: the degree of its centralization did not increase over time, as in other federations, but weakened. Apparently, the initial bilingual and biconfessional structure of the state, in which, along with the Anglo-Canadian majority, French Canadians lived compactly, caused difficulties for it in the implementation of the centripetal vector (Salomatin, Seidov, 2020: 70). However, there were other reasons as well. The stage of imperial-colonial federalism ended very quickly by the end of the 19th century, and the stage of classical (dualistic) federalism also did not last long, being interrupted by the Great Depression of the 1930s. At the same time, cooperative federalism which came under the conditions of intensified intergovernmental relations (late 1930s-1960s), proceeded against the background of strengthening the economic independence of the provinces. The problem of the separatist-minded French-speaking Quebec, which has exacerbated since the late 1960s, only further stimulated this independence. Central government at the turn of the 1980s-1990s nearly weakened the state critically, preparing to make unjustified concessions to Quebec. However, even after abandoning plans for universal decentralization, Canada is the most decentralized federation in the world. At the same time, there is no threat of a cultural and civilizational split similar to the one in the United States in the near future.

The Australian version of immigration federalism is distinguished by the latest start. The development of Australia began only from the very end of the 18th century and due to its exceptional remoteness up to the middle of the 19th century it was progressing extremely slowly. On the other hand, the critical labor shortage has created very favorable socio-economic conditions for workers here and contributed to the strengthening of trade unions (Skorobogatykh, 2011: 48, 34).

As in the United States and Canada, there were quite real prerequisites for federalization in Australia, but the immediate reasons were not yet fully ripe. If the joint experience of the states in the struggle for independence played a very significant role in the formation of the United States, and subsequently fears of the

intervention of European powers, if in the formation of Canada much is explained by the fear of the Canadian elite and British colonial authorities of American expansion, then the motives for unification for the regional Australian elites were rather far-fetched than real, and the interest of the metropolis turned out to be low. Therefore, the movement towards federation resembled a multi-way combination of many meetings and conventions (La Nauze, 1972), which lasted a whole decade and ended with the adoption of the Constitution of the Commonwealth of Australia in 1900.

Like the corresponding constitutional act for Canada of 1867, it built the so-called Westminster system of government, providing for the formation of a government responsible to parliament under a constitutional monarchy.

Pre-tested in the Canadian provinces in 1848 and six Australian colonies in 1855-1890 (Fieldhouse, Madden, 1990), the constitution fixed broad powers of the governor-general as the representative of the crown, including the right to dissolve both chambers of parliament and appoint members of the government. As for the parliament itself, it was more democratically organized than the supreme representative body of Canada, in which the upper house was not elected. The founding fathers of Australia turned out to be more restrained in relation to the central government than their Canadian counterparts. Here, "labor regulation, finance, taxes, insurance, banking, railway construction, maritime law, etc. were jointly administered by the federation and the states" (Skorobogatykh, 2006: 6).

Australia, unlike Canada, borrowed a lot from the constitutional practice of the United States, which it treated with great respect. It also had a gradually increasing centripetal vector of development, the main instrument of which was the financial dependence of the states on the federal center. The stage of dualistic federalism continued here until World War II, and was replaced by cooperative federalism. Against the background of adjustments to federal policy since the late 1970s the doctrine of competitive federalism is spreading here, which, unlike the US and Canada, does not make the country weaker.

The rise of federalism in Europe was significantly different from the advancement of first settlement federalism beyond its borders. First of all, there were very active opposing forces associated with the high population density and long-standing conflicts of neighboring states, as well as feudal-bureaucratic vestiges that hindered the organization of more complex, democratic forms of the state. The Holy Roman Empire of the German nation weakly bound by a confederation (Yaschenko, 1912: 653), had been accumulating the prerequisites for a closer unification of Germany over a millennium, but weighty reasons (economic, military, foreign policy) for the implementation of the latter appear only in the 1860s. The unification of Germany within the framework of the imperial federation took place only in 1871 by 'top-down' efforts, at the initiative of the most powerful state, which does not have the ability to carry out many administrative functions with the help of the central apparatus. Administrative federalism here not only replaced dualistic federalism, but also retained its influence later, during the Weimar Republic in 1919-1933 and after 1945.

At the same time, German federalism at the turn of the 19th-20th centuries was monarchic and hegemonic (Kastel, 1995: 10), since it provided not only the hegemony of Prussia within Germany, but also the desire for expansion to the European continent.

After World War II, cooperative federalism with a moderate degree of centralization prevailed in Germany. Its territorial and administrative structure was formed anew, without taking into account age-old traditions (Hesse, 1981: 116).

Germany is a parliamentary republic with a proper and at the same time flexible level of representation of the subjects. Preserving the tradition of respectful attitude towards the authorities of the lands of the German Empire times, the Bundesrat is not just an ordinary second, upper house of the parliament, but a completely autonomous body with delegates from the state governments. Its position is weaker than the position of the lower house – the Bundestag, "but at the same time its constitutional and legal position is stronger than that of many

other second houses in England and France) ..." (Zonthaymer, 1996: 260).

In contrast to the countries of the first settlement federalism, Germany is more active in the implementation of constitutional and legal reforms. They were held repeatedly: in the 1960s, in 1994 – after the accession of the GDR, in 2006 and 2009. The concept of competitive federalism launched in the 1990s has not yet received a priority: it has both supporters (primarily among the rich lands and in the CDU/CSU parties) and opponents (among the poor lands and social democrats). However, once again in Germany, unlike in the United States, there is no dangerous fragmentation in society. German federalism is quite viable.

Our Russian federalism is also viable. It became the heir to Soviet federalism, which in turn was able to rely on the powerful centuries-old prerequisites of the complex Russian empire (Gulyakov, Salomatin, 2019). In turn, after the collapse of the autocracy and the end of the Civil War, specific reasons were formed that favored rapid federalization. The landmarks of proto-federalization were: 1) the organization of a complex, nationally structured RSFSR and its consolidation in the Constitution of 1918; 2) the conclusion of bilateral union treaties with Soviet republics outside the RSFSR; 3) discussion of the final legitimation of allied relations and the victory of the Leninist version over the Stalinist one. The constitutional consolidation of the developed federalization plan was accomplished quickly – in the period from December 1922 (signing of the Treaty on the establishment of the USSR) to January 1924 (adoption of the Constitution of the USSR). As in Germany in 1871, federalization in our country was carried out 'top-down', i.e. through the efforts of the ruling Marxist-Leninist party.

The Soviet model of federalism was characterized by a consistent centripetal vector and it went through several stages. In the 1920s there was dualistic-centralized federalism: the country's leadership could not and did not want to sharply strengthen the powers of the center, especially since until the end of the 1920s there was an acute ideological and political struggle in the leadership of the state party. However, in the face of the beginning industrialization and collectivization the USSR in the early 1930s transfers to authoritarian-mobilization federalism, which lasts until the 1960s including. This period is accompanied by bureaucratic centralization and often voluntaristic decisions. The promotion of slogans about the Soviet people as a new historical community of people in the 1970s marks the transition to ideological-bureaucratic federalism. However, unfortunately, noisy propaganda campaigns about the achieved success of interethnic integration cannot replace solving real problems. Due to a complex set of objective reasons and subjective circumstances (Gulyakov, 2020: 311), the USSR collapsed, and within the Russian Federation in the 1990s there is a movement towards confederal federalism. The 'parade of sovereignties' brings Russia to a dangerous line (Andrichenko, Yurtaeva, 2013: 5). The stage of strengthening the positions of the federal center at the beginning of the 21st century leads to the construction of a rigid vertical of power. At the same time, as globalization processes unfold in the world and global instability intensifies after the financial and economic crisis of 2008, it becomes more and more urgent to adapt federal relations to new realities.

Conclusion

Considering only a few models of federalism on the example of 5 countries justifies their undoubted originality. Most researchers have traditionally studied the general features of federalism with greater scrutiny, but have not paid attention to its features in different countries. Meanwhile, the features turn out to be much more interesting and important. They prompt us to see the historical possibilities and limitations of the federal state, the achievements and failures of the federal state-legal policy. We cannot talk about the ideal version of the state structure of federalism, but a comparative analysis helps us to understand that, for example, federalization was easier to carry out in the first settlement societies, but this does not mean that these models themselves were more effective. In any case, the concept of competitive federalism would be hardly worth applying in Russia or Germany. The high level of centralization of Russian federalism is its

undoubted historical benefit, but, apparently, it also needs some restoration of the balance in the direction of a targeted expansion of the independence of the regions. Perhaps the German, but not the American, and not the Canadian experience, could be useful here. Such an analysis is especially relevant if we strive to improve federal relations (Gulyakov, 2020). This task is far from trivial, and it requires both new approaches and extensive factual material.

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Многовариантность государственной конструкции федерализма (сравнительное историко-государствоведческое исследование)

А.Д. Гуляков
Пензенский государственный университет
Российская Федерация, Пенза

Аннотация. Статья обосновывает необходимость историко-государствоведческого подхода с помощью анализа моделей федерализма, присущих разным странам. К структурным элементам любой модели относятся предпосылки и причины, способствовавшие федерализации, сущностные характеристики федерализма (в том числе генезисная характеристика, историческая типология, вектор развития), основные этапы развития федерализма.
Используя системный и сравнительный методы, на примере рассмотрения трех первопоселенческих моделей, присущих США, Канаде, Австралии, одной европейской (германской) и российской моделей, автор показывает и объясняет особенности федерализма в упомянутых странах. В частности, отмечаются более благоприятные условия становления федераций в первопоселенческих социумах и известные трудности их утверждения в Европе (на примере Германии). Демонстрируется идеологически новаторский характер советского федерализма и рациональное построение российского (постсоветского) федерализма, не отказавшегося от высокой степени централизации.
Представленные материалы, по мнению автора, не только помогают увидеть новые оттенки в государственной конструкции федерализма, но и способствуют разработке концепции реформирования федеративных отношений.

Ключевые слова: федерализм, модели федерализма, первопоселенческий федерализм, европейский федерализм, этапы развития федерализма, сравнительный федерализм.

Научная специальность: 12.00.00 – юридические науки.