

COMPARATIVE ANALYSIS OF CRIME COMPOSITION FROM CHAPTER 21 AND 23 OF RUSSIAN FEDERATION CRIMINAL CODE

Idris M. Gilmanov¹, Muhamat M. Gilmanov², Damir I. Fayzrakhmanov³

¹Kazan Federal University, Naberezhnochelninsky Institute, e-mail: muhamat74@yandex.ru тел. 89027186336

²Kazan Federal University, Naberezhnochelninsky Institute

³ Naberezhnochelninsky Institute (branch) «Kazan Federal University»

ABSTRACT

A Russian legislator pays close attention to the issues of jurisdiction, also due to international documents: the International Covenant on Civil and Political Rights, in particular, cl. 1 art. 14, and the Convention for the Protection of Human Rights and Fundamental Freedoms, cl. 1, art. 6. The contents of these documents provide the guarantees of the right to a fair public hearing of a case (within a reasonable time) without any delay by a competent court.

In Russia, the issues of criminal case jurisdiction are regulated in the Article 31 of Criminal Procedure Code. The violation of this article requirements leads to an unconditional cancellation of a sentence, as it falls into the category of gross procedural violations. It follows from the same international documents that a national legislator has no right to adopt legal norms that would allow the transfer of cases from court to court. At the same time, part 1, article 47 of Russian Federation Constitution provides for the guarantee that no one can be deprived of the right to consider his case only by the court whose jurisdiction is attributed by law. The current criminal procedural legislation does not provide for an arbitrary variation of jurisdiction.

Keywords: composition of crimes, magistrate jurisdiction, competent court, crimes against property, crimes against the interests of service in commercial and other organizations, abuse of authority.

INTRODUCTION

A legislator always paid a close attention to the issues of jurisdiction in Russia. So, in 1864, when the Statutes were adopted, the maximum punishment of 1 year in prison was set, to which a justice of peace could sentence. This upper "threshold" was increased by the legislator to 1 year 6 months. From this the tendency to the expansion of world judge competence is visible. Hence, a huge number of crimes shall be transferred to the jurisdiction of magistrates from district judges. The jurisdiction of the world judges of the modern period was the same. Indeed, the maximum punishment of Russian magistrates was 2 years of imprisonment. However, in 2003, the legislator raised the "threshold" to 3 years of imprisonment. Thus, many crimes were transferred to the jurisdiction of world judges. At the same time, the magistrates, who had a heavy burden during that period, "dreamed" of an upper threshold of imprisonment decrease to 1 year and 6 months, i.e. as during the Russian empire period. Thus, the official burden would decrease and the situation would be normalized. However, the legislator followed the path of the upper "threshold" increase. Of course, there was another way - to decrease the upper limits of article sanctions from 3 years to 2 years of imprisonment. However, the legislator did not do this reasonably and quite correctly. Consequently, the legislator chose an easier way. However, in our opinion, this is so at first glance. In fact, the situation began to worsen over time. The legislator was forced to correct the shortcomings in the procedural legislation. In this regard, let's turn our attention to chapters 21 and 23 of RF Criminal Code and, using the comparative method, we will give our proposals to the Russian legislator.

MATERIALS AND METHODS

The empirical material of this comparative analysis is the contents of the articles from the current RF Criminal Procedure Code, the Criminal Code of Russian Federation, as well as the requirements of international documents. Let's take the content of Article 31 "Jurisdiction of criminal cases" of RF Criminal Procedure Code [1], the articles 158-168 of Chapter 21 of RF Criminal Code "Crimes against property", the articles 201-204.2 "Crimes against interests of service in commercial and other organizations" [2] as the basis for the analysis.

They used a concrete historical and comparative legal methods of investigation in the work. Taking into account the legislation of the tsarist period compels us to turn to the requirements of the article 232, 304, 1647, 1648, 1649, 1659, 1660 of the Criminal Code of 1845, the Criminal Code of 1857, the Criminal Code of 1866 and the Criminal Code of 1882. (The collection of Laws of 1882, No. 334), the article 1, 169, 170, 170.1, 171, 173, 181 of the Charter on punishments imposed by magistrates, 1888, the articles 29-35 "On Jurisdiction" of the Criminal Procedure Charter [3, 6].

The articles 89-96 of Chapter 4 "Crimes against socialist property", which are the analogues of embezzlement against property, were analyzed. These compositions of crimes acted on the territory of the Soviet Union [4].

Also, the method of comparative jurisprudence and the analysis of theoretical sources and regulatory sources were used in the work. After the creation of Russian Federation the Criminal and Criminal Procedural Codes of Russian Federation were adopted in 1996. Chapter 2 "Jurisdiction", in particular, Article 35 "Criminal cases subject to the district (city) people's court" and the art. 126 of Criminal Procedure Code "Mandatory preliminary investigation and investigative jurisdiction" were analyzed from the contents of the last code [5]. The commentary to the Criminal Code of Russian Federation, published in 2001, indicated that the Article 15 of the Criminal Code was amended to reduce the upper "threshold" of minor crimes from 3 to 2 years of imprisonment, which entered into legal force since 5.11.2002

RESULTS AND DISCUSSION

In 1864, when the Statutes were adopted, the maximum punishment was set for one year in prison, which should be taken as the starting point. The Penal Code of 1845 and 1857 provided the maximum amount of punishment for burglary which "exceeded the penalty for a simple theft six times". Regarding the reasons for the introduction of these changes, the Ministry of Justice indicated that "an editorial change" of four paragraphs of the Art. 33 and Art. 1 concerning the "Statutes of Penalties" was performed. This justification does not reflect clearly the current situation developed at that time, which is presented as a normal state of affairs.

The law on May 18, 1882 increased the upper "threshold" from one year to 1 year, 6 months in prison by the Article 33 of the Charter. Thus the tendency to the magistrate competence expansion of that period became obvious.

The articles 89-96 of the Chapter 4 "The crimes against socialist property" acted on the territory of the Soviet Union which were the analogues of thefts against property. Let's analyze some of these crimes. Thus, part 1 of the Article 89 "The secret theft of state or public property (theft)" provided for a maximum penalty of 3 years imprisonment; Part 2 "Theft committed repeatedly, or with a prior conspiracy by a group of persons" - up to 6 years of imprisonment; Part 3. "Theft with the penetration into premises or other storage" - from 3 to 8 years of imprisonment. Now let's turn to the article 144 (Chapter 5. Crimes against personal property of citizens) part 1. "The secret theft of personal property of citizens (theft)" had a maximum penalty of 2 years in prison; Part 2. "Theft committed repeatedly or with a prior agreement by a group of persons or which caused a significant damage to a victim" - up to 5 years of imprisonment; Part 3. "Theft with the penetration into a home" - from 2 to 7 years of imprisonment [4].

Then we covered the offenses of the last RSFSR codes. Thus, Chapter 2 of RSFSR Criminal Procedure Code was called "Jurisdiction" and the Article 35 in it was named "Criminal cases subject to the district (city) people's court". "A judge examines solely the cases of crimes provided in articles 112, 116 part 1, 122 ... - the list consists of 75 articles, which included 85 crimes. And this list has no articles 89 and 144 of the Criminal Code. Part 2, Art. 35 of RSFSR Criminal Procedure Code provided for the situations where a judge could handle the cases of crimes with a maximum sanction of up to 5 years of imprisonment individually with the consent of an accused one.

The article 126 "An obligatory preliminary investigation and investigative jurisdiction" of the same code provided the following by part 1: "A preliminary investigation is mandatory in all cases, except for the crimes provisioned by the articles 112, 115.1, 116 part 1 ... - these cases require an inquiry. The articles 89 and 144 of the Criminal Code were not included in the List. Thus, a preliminary investigation was carried out by the investigators of law-enforcement bodies concerning these cases. The List of Part 4, Art. 126 of RSFSR Criminal Procedure Code included 100 crimes for the investigative jurisdiction of the internal affairs agency investigators.

Let's carry out the comparative analysis of jurisdiction issues according to the VIIIth section of RF Criminal Code. In our opinion, the proposed reduction of offense number attributed to the jurisdiction of a world judge can be attributed to the number of objective ones and applicable to the use in the practice of the Russian legislator.

So, in RF Criminal Code the section VIII "Crimes in the field of economics" consists of three chapters (chapters 21-23) - from Article 158 to 204.2, i.e. it contains 73 articles (17 + 50 + 6 articles respectively) and 199 crimes (57 + 122 + 20 articles respectively), of which 71 crimes (35.7% out of 199 crimes) have the maximum sanction up to 3 years of imprisonment [2]. 40 offenses (56% of 71 crimes) fall under the jurisdiction of a magistrate out of the total number of sentences with the imprisonment term up to 3 years. If the average burden of a world judge is taken as a basis - 20% of the total number of offenses considered by general jurisdiction courts, then the specified volume (which is slightly over a half) is significantly overestimated. Thus we conclude that it is necessary to reduce the scope of competence almost by half and bring their number down to about 30%. It is also necessary to take into account that since 2013 three articles were included in these two chapters (articles 158.1, 204.1, 204.2 of RF Criminal Code), which contained 4 crimes with maximum punishment term of 3 years of imprisonment. At the same time, 2 articles were lost (Article 159.4 part 1-3 of which the first two were related to the jurisdiction of a magistrate, and also the articles 204, part 1 and 3 of RF Criminal Code (the maximum punishment term was increased from 3 to 7 years of imprisonment) consisting of 5 crimes, 4 of which four have the maximum term of imprisonment, i.e. 3 years.

According to Article 15 "Categories of Crimes" the minor crimes were the crimes the punishment of which could not exceed 2 years of imprisonment. Proceeding from this, Chapter 21, consisting of the articles 158-168, has 31 crimes or 11 articles. Chapter 23 includes the articles 201-204, i.e. 4 articles, which included 10 crimes (one crime meant 2 years of imprisonment - Part 1 of the Article 204 "Commercial bribery"). The last composition is listed in the List of exceptions, therefore, it was examined by the jurisdiction of federal judges.

Now let us turn to the description of this section chapters taken by us directly. Thus, chapter 21 "Crimes against property" consists of 17 articles and 57 crimes, 12 of which have the maximum punishment of 3 years in prison and all of them fall within the competence of a magistrate without an exception. Let's provide the list of 12 crimes that are within the jurisdiction of a magistrate:

- 1) 158 p. 1. Theft (up to 2 years of imprisonment);

- 2) 158.1. Small theft (up to 1 year of imprisonment);
- 3) 159 p.1. Fraud (up to 2 years of imprisonment);
- 4) 159.1 p. 1. Fraud in the sphere of crediting (up to 2 years of correctional labor);
- 5) 159.2 p. 1. Fraud during payments (up to 2 years of correctional labor);
- 6) 159.3 p. 1. Fraud with the use of payment cards (up to 2 years of correctional labor);
- 7) 159.5 p. 1. Fraud in the sphere of insurance (up to 2 years of correctional labor);
- 8) 159.6 p. 1. Fraud in the field of computer information (up to 2 years of correctional labor);
- 9) 160 p. 1. Embezzlement (up to 2 years of correctional labor);
- 10) 165 p. 1. Property damage by deception or abuse of trust (up to 2 years of imprisonment);
- 11) 167 p. 1. Deliberate property destruction or damage (up to 2 years of imprisonment);
- 12) 168 p. 1. Property destruction or damage through negligence (up to 1 year of imprisonment) [2].

As we mentioned above, the article 159.4, part 1, 2. "Fraud in the field of entrepreneurial activity" (up to 1 and 3 years of imprisonment, respectively) with three crimes ceased to be valid under the Federal Law No. 325-FL issued on 3 July 2016.

In order to obtain material for comparison with the jurisdiction of a magistrate, let's refer to paragraph 1 part 3 Art. 150 of RF Criminal Code, which also provides the list of crimes for which an inquiry is performed. There are only 38 crimes (19.1% out of 199 crimes) from the VIIIth section covering the crimes in the economic sphere from the entire list [1]. These include: Chapter 21 of RF Criminal Code (15 crimes): 158, part 1, 158.1, 159 part one, 159.1 part one, 159.2 part one, 159.3 part one, 159.5 part one, 159.6 part one, 160 part one, 161 part one, 163 part one, 165 part one, 166 part one, 167 part one, 168.

Chapter 23 of RF CC (4 crimes): 203 part 1, 2, 204.2 part 1, 2.

It is important to note that the list almost coincides with the composition of crimes attributed to the competence of a magistrate according to two analyzed chapters of RF Criminal Code. However, we found one discrepancy, which should be noted. The list given in paragraph 1 part 3 Art. 150 of RF CCP had no part 2, Art. 159.4 of RF Criminal Code "Fraud in the field of entrepreneurial activity" (up to 3 years of imprisonment), which for unknown reasons (i.e. it was difficult to find the basis for such a decision) was included in the jurisdiction of a magistrate. However, let's note a similar situation with Part 2 Art. 159 of RF CC, which is mentioned in the List until the loss of power by the Federal Law No. 325-FL issued on 3.07.2016, one of which was corrected by the legislator by taking the decision on the loss of power.

The logic in this case is conditioned by the fact that the list of crimes that are within the jurisdiction of a world judge, and for which an inquiry is made, should coincide without an exception in our opinion. Even the presence of the previously mentioned deficiency can cause both serious confusion and lead to the errors in the judicial practice. At least, this can create the conditions for the "mechanical" assumption of these errors. Ultimately, this can lead to the judicial power authority decrease, which is unacceptable.

Now let's give a list of 114 crimes, reflected in clause 3, part 2, Article 151 of RF CC, for which an investigation is envisaged: Chapter 21 of RF Criminal Code (42 crimes, 73.7% out of 57 crimes):

158 part 2-4, 159 part 2-4, 159.1 part 2-4, 159.2 part 2-4, 159.3 part 2-4, 159.5 part 2-4, 159.6 part 2-4, 160 part 2-4, 161 part 2-3, 162 parts 2-4, 163 parts 2-3, 164 part 1-2, 165 part 2, 166 part 2-4 and 167 part 2.

Chapter 23 of RF CC (4 crimes or 50% out of 8 crimes): 201 part 1 and 2, 202 part 1 and 2.

Indeed, it would be easier to work if a world judge accepted criminal cases only in the field of inquiry. The use of such a rule by a legislator would simplify the law enforcement practice. Such conditions would make it possible not to make mistakes in the issues of criminal case jurisdiction.

Thus, from the list set out in paragraph 3, part 2 Art. 151 of RF CC, for which an investigation is carried out, the criminal cases of 9 crimes, if we apply incomparably successful rule, should be sent to federal judges.

After more than thirty years of the world justice functioning during the tsarist period, scientific research confirms that a legislator was constantly worried about the issue of the world judge jurisdiction. "Let us give some provisions of the Minister of Justice report to the tsar on April 7, 1894: - "Simplification and more correct delineation of court place jurisdiction ..." [6, 7]. However, these 9 crimes are considered by magistrates, which complicates the procedure of criminal case transfer to the courts of general jurisdiction.

One of the smallest chapters is Chapter 23 "Crimes against the interests of service in commercial and other organizations" which includes only four articles. The structure of these articles consists of 10 crimes. And there are 2 crimes with maximum sanctions up to 4 and 7 years of imprisonment which appear as exceptions in Part 1, Art. 31 of CPC: this is part 1 Art. 201 of CC "Abuse of powers ..." and Part 3 Art. 204 of the Criminal Code "Commercial bribery". In the presence of such an explicit excess in sanctions, the legislator included them in the list of exceptions for unknown reasons, which has an obligatory upper "threshold".

For comparison, let us now turn to foreign experience and practice. So, France consists of 26 regions, 100 departments and, approximately, 37 thousand communes. With the abolition of world judges in 1958, the courts of small jurisdiction began to function [13,14,15]. Their jurisdiction includes all claims, as well as the disputes in respect of real estate up to 7 thousand euros. The courts of first instance are the police courts (articles 521-549 of CPC and the articles 131-12 of the Criminal Code of France) [16,17], which are the branches of minor jurisdiction courts, which consider minor offenses with the maximum fine up to 3 thousand euros. Besides, let's note that judges can consider minor offenses relating to the cases of the first four categories alone. The maximum penalty for such offenses is 700 euros [10,11,12].

Article 484 of the Criminal Code of Belgium (1867) provides the punishment in the form of imprisonment (3 years at least) for the commission of a theft. However, this punishment was reduced to placement in a strait house for the period of 5 to 10 years. In Germany, § 243, clause 2 provided the punishment from 3 to 10 years in prison for the commission of a theft. However, the Criminal Code of 1871-1872 determined the punishment in the form of a placement in *zuchtgaus* during 1-10 years for a burglary [18,19].

CONCLUSIONS

Summarizing our study, let's note that, despite the constant reduction in the sanctions of Western Europe code articles, the punishment for a theft with burglary involves more severe penalties in judicial practice, i.e. up to one year or one and a half years of imprisonment. In addition, the presented codes provide a considerable space for a court in the issue of punishment mitigation. For example, the court with the presence of mitigating circumstances could sentence for burglary: up to 6 months in a correctional

institution (Hungary); three months of imprisonment in Belgium and Germany; 1 day of imprisonment in Holland. However, with the aggravating circumstances the art. 401 of the Criminal Code of France provides for 1 - 5 years of imprisonment; Art. 463 of the Criminal Code of Belgium provides 1 month - 5 years of imprisonment; § 242 of the Criminal Code of Germany provides the detention in prison during 1 day - 5 years. The legislation of the Russian Empire was almost entirely like their Western models.

SUMMARY

Thus, it is important to note that with offensive sanctions (over 3 years of imprisonment) the crimes should not be listed in Part 1 Art. 31 of RF CPC, i.e. they are subject to automatic seizure. According to the current legislation, they are automatically related to the jurisdiction of federal courts. If they got on the list with maximum sanctions up to 3 years of imprisonment accidentally, then a legislator should correct this oversight by the withdrawal from the list, which would necessarily exclude any misunderstandings in judicial practice.

ACKNOWLEDGEMENTS

The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University.

REFERENCES

- Criminal Procedure Code of Russian Federation. Moscow: Prospect, 2016. pp. 23-25.*
Criminal Procedure Code of Russian Federation. Moscow: Prospect, 2017. pp. 84-96, pp. 131-137.
Tagantsev N.S. Explanations to the Law "On the modification of punishment rules for burglary" issued on May 18, 1882. St. Petersburg: Printing House of the Governing Senate, 1882. pp. 3-11.
RSFSR criminal code: With article-by-article materials. M.: Juridlit. 1985. pp. 45-49, 60-62.
RSFSR CPC with amendments and additions issued on August 22, 1994 Perm: OJSC "Publisher". pp. 13-14.
The Higher Constituent Commission. Explanatory note of judicial institutions. - Appendix 1. - pp. 72-74.
Gilmanov I.M. The World Court of Tsarist Russia: periods of development. Monograph / I.M. Gilmanov. - Naberezhnye Chelny: Publishing house of Kam. State Ing-econ. Acad., 2009. pp. 134-135.
Gerichtsverfassungsgesetz (GVG) in der Fassung der Bekanntmachung vom 9. Mai 1975 (Auszug)//Zivilprozessordnung, Munchen, 2010.
Strafprozeßordnung (StPO) in der Fassung der Bekanntmachung vom 7 April 1987. Munchen, 2009. S. 1-198.
Chazal J. Les magistrats. P., 2005. P. 6.
Ordonnance №58-1270 du 22 decembre 1958//Journal d'official de la Republique Francaise du 23 decembre 1958.
Code de l'organisation judiciaire. Dalloz. P. 2005.
Renoux Th. Le pouvoir judiciaire en France et Europe continentale, approche comparative. P., 1999. P. 965.
La Documentation francaise. P., 2005.
Bouloc A. Procedure penal. P., 2010.
F. Helie. Theorie du code penal, V, №1892;
Rolland de Villargues, Les codes criminels, 1875, I, P.702.
Mercel in Holtzendorfs Handbuch. III, P.24;
Hugo Meyer, Lehrbuch, P.105.