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ROLE OF THE PLENUM OF RUSSIAN SUPREME COURT IN THE JUDICIAL PRACTICE FORMATION

Yulia S. Pestereva, Irina G. Ragozina, Elena I. Chekmezova
Siberian Law University, Omsk, Russia

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The subject. The article considers the role of the Plenum of Russian Supreme in forming judicial practice on the example of giving qualification to the crimes committed against sexual freedom and inviolability, as well as against property and public health.

The objective of the article is to conduct a complex analysis of the function of the decisions, taken by the Plenum of Russian Supreme Court, in the formation of a unified vector of judicial practice. The authors dare to refute the hypothesis hat judicial practice can be recognized as a source of law.

The methodological basis of the research is the dialectical theory of development and interrelation of phenomena. Historical, formal-logical, systematic methods of knowledge have been identified as relevant to the topic of the study.

The main results, scope of application. The authors draw attention to the problem of evaluative features used in the process of law enforcement when interpreting the norms of the Special Part of the Criminal Code of the Russian Federation. A norm with such signs acquires an unformalized essence from the point of view of the boundaries of criminalization of a particular phenomenon. On the other hand, the nature of crimes is so diverse that without the flexibility of criminal law regulation (allowing the use of evaluative features), the application of the norm taking into account specific circumstances in a particular case may not be possible. The authors also consider issues related to the characteristics of the objective side, the end time of these crimes, the application of the formula of a single ongoing crime and its separation from related compounds. The process of law enforcement is based on such guidelines as the norms of law, judicial discretion, established judicial practice, the position of the Plenum of Russian Supreme Court. Attributing an explanatory role to the decisions of the Plenum of Russian Supreme Court does not completely eliminate the shortcomings inherent in legal technology. Correcting the current situation with the help of judicial discretion is not always justified, since this is possible only if there is a legitimate alternative. Assigning the status of a precedent to a judicial decision may lead to the substitution of the law by decisions taken in a particular case.

Conclusions. The judicial practice concerning these issues is completely different. Despite the existence of similar situations, courts, as a rule, qualify an offense using various norms of the law, which negatively affects compliance with the principle of legality. The issue related to the function of the decisions of the Plenum of Russian Supreme Court in the formation of a single vector of judicial practice has been and remains debatable. The continued addition of new articles to criminal legislation, on the one hand, indicates the desire of the legislator to bring it to perfection, but, on the other hand, forms a mechanism for clarifying the rules of its application, which sometimes leads to their contradictory interpretation. At the same time, crime and punishment should be determined only by legislation.

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1. Introduction. Rulings of the Plenum of the Supreme Court of the Russian Federation as a source of judicial practice

In accordance with the principle of legality enshrined in Art. 3 of the Criminal Code of the Russian Federation, crime and punishable nature of the act and other criminal legal consequences are determined only by the Criminal Code of the Russian Federation (hereinafter referred to as the CrC RF).

Article 14 of the CrC RF contains the legal concept of a crime, which indicates its general features. Among these features, the legislator considers public danger, illegality, guilt and punishability. Signs of specific criminal behavior are revealed and specified in the norms of the General and Special parts of the CrC RF.

It follows that it is undeniable that the criminal legal assessment of a person's behavior should be based on the features of a crime provided for in criminal law. The application of law in strict accordance with the letter of the law is a guarantee of the principle of legality.

Unfortunately, the criminal law cannot be recognized as perfect one. This is evidenced by the endless amendments that have already become traditional. Scientists rightly point out that not all articles of the CrC RF have a sufficient degree of certainty, which causes the need for their interpretation. At the same time, one should not create illusions that the law can be perfect. There have always been gaps and conflicts in the criminal law, and this is difficult to deny. The chronic turbulence of the criminal law is alarming, which cannot but affect its application.

The imperfection of the law, the vagueness of certain formulations leads to the fact that legal professionals independently try to find a way out of the current situation. The Supreme Court of the Russian Federation, which forms its legal position on the most contentious issues, has a special role in ensuring uniform law enforcement practice. The legal position of the Supreme Court of the Russian Federation in criminal cases in the theory of law is understood to mean the opinion expressed/supported by it on the understanding and application of criminal law norms in the process of criminal justice [1, p. 213].

The Court forms its position in at least three ways. The first one is the rulings of the Plenum of the Supreme Court of the Russian Federation, the second one is reviews of judicial practice, and the third one is judgements on specific criminal cases.

There has long been a discussion in the scientific literature about whether judicial practice can be attributed to the sources of law. P.A. Guk means by judicial practice a certain result, the outcome of the trial in a particular case or a certain category of cases, based on experience and judicial discretion, enshrined in the court decision, the interpretation of the rule of law, which serve as a model for application [2, p. 141]. A. Naumov, justifying the proposal to recognize the judicial decision of the Supreme Court of the Russian Federation as a source of criminal law, notes that such a decision may have a kind of "case law" character [3, p. 213]. The importance of judicial practice in establishing a uniform approach to the application of the law is difficult to overestimate. At the same time, we are critical of the view that it can be recognized as a source of law.

The position of E. M. Tsyganova that the court cannot wait for the legislator to adopt all the necessary laws, thereby eliminating gaps and contradictions in law, seems controversial. Otherwise, the court will simply not be able to fulfill its constitutional obligations in full [4, p. 69-71]. In our opinion, we should not forget the words of an English philosopher, historian and politician Francis Bacon: "Judges ought to remember that their office is *jus dicere,* and not *jus dare;* to interpret law, and not to make law, or give law".

The mandatory rules of qualification, in our opinion, can be recognized only those that are enshrined in the law.

An analysis of the rulings of the Plenum of the Supreme Court of the Russian Federation shows that situations where the Plenum is not always consistent in its explanations are not excluded, and sometimes it is not the legislation that changes, but the approach to its assessment, which invariably entails a change in the vector of judicial practice.

In the article we will address the interpretation of certain characteristics of crimes

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against sexual freedom, property and public health.

2. Forming of law enforcement practice by the rulings of the Plenum of the Supreme Court of the Russian Federation and the USSR on the example of crimes against sexual inviolability and sexual freedom

The first thing we would like to dwell on is the interpretation of the evaluative features of crimes against sexual inviolability and sexual freedom using the examples of the following rulings: Rulings of the Plenum of the Supreme Court of the Russian Federation "On judicial practice in cases of crimes against sexual inviolability and sexual freedom of the individual" of December 4, 2014 No. 16 (hereinafter - Ruling 2014 No. 16); Rulings of the Plenum of the Supreme Court of the Russian Federation "On Judicial Practice in Rape Cases" of December 13, 2004 No. 11 (hereinafter - Ruling 2004 No. 11); Rulings of the Plenum of the Supreme Court of the Russian Federation "On Judicial Practice in Rape Cases" of April 22, 1992 No. 4 (hereinafter - Ruling 1992 No. 4); Rulings of the Plenum of the Supreme Court of the USSR "On Judicial Practice in Rape Cases" of March 25, 1964 No. 2 (hereinafter - Ruling 1964 No. 2); Rulings of the Plenum of the Supreme Court of the USSR "On Judicial Practice in Rape Cases" of December 2, 1960 No. 8 (hereinafter - Ruling 1960 No. 8)[1].

The use of evaluative features when designing the norms of the Special Part of the CrC RF has a diametrically opposite assessment in the doctrine of criminal law. This is primarily due to the fact that the norm with such features takes on an unformalized form from the point of view of the boundaries of the criminalization of a phenomenon. On the other hand, the nature of crimes is so diverse that without the flexibility of criminal law regulation (which provides evaluative features), the application of the norm, taking into account specific circumstances, may be impossible. The content of evaluative features is usually not legally interpreted and is determined by the legal knowledge of an enforcer. A. Hooke rightly remarks that law enforcement is always associated with such properties of law as certainty and uncertainty, which are manifested throughout the existence of law [5, p. 36].

Due to the above-mentioned specifics of evaluative features, the role of rulings of the Plenum of the Supreme Court of the Russian Federation is of decisive importance in their interpretation, since changes in their interpretation can significantly expand or narrow the field of law enforcement practice or retain inertial influence after the adoption of a new criminal law. In addition, judicial practice can shape new trends if necessary [6, p. 24].

Now we are going to consider the most illustrative examples.

Part 4 of Art. 117 of the Criminal Code of the RSFSR (hereinafter referred to as the CrC RSFSR) stipulated as one of the aggravating circumstances especially grave consequences of a rape. The Ruling 1992 No. 4 indicated that these include, for example, death or suicide of a victim, mental illness resulting from rape, her infection with AIDS by a person who knew that he had this disease, as well as the infliction of bodily damage that entailed the consequences provided for by Art. 108 of the CrC RSFSR.

In paragraph "b" Part 3 of Art. 131 of the CrC RF instead of the phrase "especially grave consequences" the legislator has applied the construction "other grave consequences". At the same time, those circumstances that were previously included by the Supreme Court in the general group of evaluative features of Part 4 of Art. 117 of the CrC RSFSR, were consolidated as independent qualifying features, and after the changes introduced by Federal Law No. 377-FZ of December 27, 2009[2], appeared in different parts of the article: in paragraph "b", part 3 of Art. 131 of the CrC RF - the infliction of serious harm to health by negligence, infection with HIV; in paragraph "a" part 4 of Art. 131 of the CrC RF - causing death by negligence. Despite the fact that the new edition of

[1] Access from "ConsultantPlus".

[2] On amendments to certain legislative acts of the Russian Federation in connection with the enactment of the provisions of the Criminal Code of the Russian Federation and the Criminal Executive Code of the Russian Federation on punishment in the form of restriction of freedom: Feder. law of 27 December 2009 No. 377-FZ. Rossiyskaya gazeta. 2009, 30 Dec.

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the norm, providing for liability for rape, used a different evaluative terminological apparatus - “other grave consequences”, its interpretation for a long time had an inertial (static) character. Thus, Ruling 2004 No. 11, in fact, reproduces the old interpretation, adjusted for the consequences that have received independent legal confirmation. To "other grave consequences" of rape or violent acts of a sexual nature, provided for in paragraph "b" of Part 3 of Art. 131 and paragraph "b" part 3 of Art. 132 of the CrC RF, it is necessary to include the consequences that are not associated with the infliction of serious harm to the health of the victim by negligence or his infection with HIV. This may be, for example, the suicide of the victim.

Such inertia of the higher authority artificially narrowed the field of law enforcement practice. In particular, in the science of criminal law, questions about attribution to other grave consequences of the onset of pregnancy and the attempted suicide of the victim have been repeatedly raised. Proponents of a broader approach believed that the onset of pregnancy as a result of rape is an additional trauma for the victim [7, p. 51], opponents insisted that pregnancy is a natural consequence of sexual intercourse and does not require additional legal assessment [8, p. 44]. We believe that the opinion of the latter deserves criticism, since there is no need to talk about any naturalness during forced sexual intercourse. A suicide of a victim after a rape was traditionally considered by the Supreme Court to be especially grave and later to other grave consequences of rape. The situation was different in the case of incomplete suicide. Until 2014, attempted suicide was legally assessed as an aggravating circumstance only in the event of grievous bodily harm. Thus, we can conclude that at present the Supreme Court of the Russian Federation demonstrates a more flexible and broader understanding of the category of "other grave consequences" than it was before (starting with the Ruling of 1964 No. 2).

Rulings of the Plenum of the Supreme Court sometimes fulfill the role that is not intended for them to correct the legal technique and gaps in the criminal legislation. Now we are going to consider some examples.

The original version of paragraph "a", part 3 and paragraph "b", part 4. Of Art. 131 of the CrC RF provided for a feature of knowingness (awareness of a real age of a victim), not familiar to the previously existing legislation.

The inclusion of the feature of knowingness in the article of the current Criminal Code should have accentuated the impossibility of objectively imputing such aggravating circumstances as a rape of a minor. Moreover, this practice has been taking place since the adoption of Ruling of 1964 No. 2, which stated that according to Part 3 of Art. 117 of the CrC RF, a person who knew or admitted that he was committing a violent sexual act with a minor, or could and should have foreseen it, is a subject to criminal liability. Thus, the Supreme Court allowed an imprudent form of guilt in relation to the assessment of the victim's age. This position aroused well-founded criticism and was disavowed by Ruling of 1992 No. 4, and the new criminal legislation consolidated knowingness as an obligatory constructive feature.

This feature was interpreted identically by the Rulings of 1992 No. 4 and 2004 No. 11. They indicated that liability for qualified rape is possible only if a perpetrator knew or admitted that he was committing violent sexual intercourse with a minor.

However, in 2009, to strengthen the fight against crimes against sexual freedom and the inviolability of minors, there were made changes both in terms of forming the features of Art. 131 of the CrC RF, and in the sanction of this article. In particular, knowingness was excluded. In this regard, a discussion arose in the scientific community on the need to establish knowledge about the age of a victim. Logically speaking, the exclusion of a constructive feature presupposes its legal leveling, however, the principle of subjective imputation in the criminal law of Russia has not been canceled [9, p. 66; 10, p. 22-23].

In this situation, in 2014, the Supreme Court of the Russian Federation, in fact, took over the functions of a legislator, indicating that it is necessary to establish awareness of the age of a victim, and thus brought legislative changes to zero.

An interesting question is the interpretation by the Supreme Court of the Russian Federation of

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the concept provided for in Part 5 of Art. 131 of the CrC RF: a person who has a criminal record for a previously committed crime against the sexual inviolability of a minor. Here we can observe two interesting aspects: the first is the narrowing of the list of persons falling under the concept under study; the second is a broad interpretation of the recidivism of the crime under Art. 18 of the CrC RF. Paragraph 14 of the Ruling of 2014 No. 16 explains that such persons include those who have an outstanding or not cleared conviction for any of the crimes committed against minors under the pp. 3-5 Art. 131, pp. 3-5 Art. 132, part 2 of Art. 133, Art. 134, 135 of the CrC RF. If we turn to the footnote of Art. 73 of the CrC RF, we will see that the legislator classifies a broader group of crimes as crimes against the sexual inviolability of minors under the age of fourteen. In addition to the above, these are also crimes under Art. 240, 241, 242.1 and 242.2 of the CrC RF, in relation to persons under the age of fourteen. It is not entirely clear why supreme judicial authority used a narrow interpretation, given the close relationship of these groups of crimes. For example, Art. 242.2 of the CrC RF is inextricably linked with Art. 135 of the CrC RF and forms an ideal combination with it.

The Supreme Court of the Russian Federation also refers to the analyzed category of persons those whose convictions for crimes against sexual inviolability were under the age of eighteen. Thus, a specific type of relapse is constructed, which, by virtue of paragraph "b" of Part 4 of Art. 18 of the CrC RF, cannot be. But if recidivism is a formalized concept, focusing on the number of crimes committed and their severity, then the concept formulated by the legislator in Part 5 of Art. 131, part 5 132 of the CrC RF is personal. Apparently, it was this fact that prompted the Supreme Court of the Russian Federation to such a non-standard interpretation.

The lack of criminal legislation and terminological imprecision was the reason that in some cases the Supreme Court did not give unambiguous clarifications on controversial issues and did not interfere with the formation of law enforcement practice that contradicted the principles of criminal law. The most striking example is the interpretation of the phrase "sexual intercourse". Articles 117, 118, 119 of the 1960 Criminal Code of the RSFSR use the following alternative concepts: "sexual relations", "sexual passion in perverted forms", "sexual intercourse in other form". These concepts were not disclosed in the Rulings of 1960, 1964 and 1992. The dominant point of view in the doctrine of criminal law of that time was the understanding of sexual intercourse as not only natural, but also unnatural sexual intercourse, which was largely due to a defect in criminal legislation.

A systematic interpretation of the above articles allows us to conclude that sexual intercourse according to Art. 117 of the Criminal Code of the RSFSR could include only a normal (physiological) act between a man and a woman. However, the absence in the Criminal Code of the RSFSR and a number of union republics (with the exception of the Ukrainian, Estonian, Moldavian and Armenian SSR) of crimes for the violent satisfaction of sexual passion in a perverted form forced the judicial authorities to apply a broad interpretation of Art. 117 of the Criminal Code of the RSFSR and, in fact, use the analogy in criminal law. The highest court turned a blind eye to this situation.

It should be noted that this problem was resolved by the inclusion of Article 132 in the CrC RF, however, the Ruling of 2014 No. 16 does not provide an explanation of what exactly is meant by sexual intercourse. The scope of this category can be determined by analyzing paragraph 1 of the current ruling of the Plenum of the Supreme Court of the Russian Federation, based on the content of which we can conclude that sexual intercourse is something that is not sodomy, lesbianism and other actions of a sexual nature (the nature of the latter is also not disclosed).

The last question that needs to be addressed is the assessment by the Supreme Court of the motives for crimes against sexual freedom and sexual inviolability. Previously existing and modern criminal legislation does not fix the motive as an obligatory constructive feature of the subjective side of crimes against sexual freedom. It should be noted that the Rulings of the Plenum of the Supreme Court (up to 2014) also did not assess these motives.

However, A.I. Rarog noted that there are

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two possible legal and technical ways of introducing motive and goals into a crime. The first one is a direct indication of the motive and goals when defining a generic concept or when describing the crime itself. The second one is that the legislator does not directly formulate the motives and goals of the act, but implies their obligation [11, p. 51]. The second approach sometimes took place in law enforcement practice, when acts of violent sodomy were considered as harm to health or hooliganism, and not as an encroachment on sexual freedom due to the absence of a sexual motive. Ruling of 2014 No. 16 reasonably, in our opinion, indicated that the motive for qualifying acts under Art. 131 and 132 of the CrC RF does not matter, but for some reason secured three obligatory motives for lecherous actions (satisfaction of the sexual desire of the culprit, induction of sexual arousal in a victim, prompting a victim to have an interest in sexual relations). Considering that currently Art. 135 of the CrC RF qualifies actions of a sexual nature that are not reflected in the disposition of Art. 134 of the CrC RF it turns out a very strange situation when these actions, committed, for example, for the purpose of humiliation or punishment, are proposed not to be considered as an encroachment on the sexual integrity of minors [12, p. 129; 13, pp. 182-186].

3. Forming of law enforcement practice by rulings of the Plenum of the Supreme Court of the Russian Federation on the example of crimes against property

Since property is the economic basis for the existence of any society, its protection is recognized as the main task of the state. At the same time, despite the fact that the state attaches great importance to criminal legal measures for the protection of property rights, crimes against property consistently occupy a significant place in the structure of crime.

Criminal liability for theft of someone else's property is known from the first sources of criminal law. There is no doubt that with the change in the economic foundations of the state, the rapid development of information technologies, new and more sophisticated ways of committing these crimes appear, but their essence remains the same. Such encroachments on property as theft, robbery, which constitute the main share among crimes against property, remain unchanged.

Despite the formal certainty of criminal law norms establishing responsibility for theft, both in the doctrine of criminal law and in law enforcement practice, different points of view are expressed regarding the assessment of legally significant signs of these offenses and the assessment of complex qualification issues for crimes of this category**.** We share the position that the correct qualification guarantees the legitimacy of criminal law impact, most fully reveals its preventive and punitive potential [14, p. 30].

The Supreme Court of the Russian Federation has repeatedly expressed its position on the most controversial issues of qualification of this category of crimes. Much attention is paid to this issue in its reviews. It would seem that, given the vast experience accumulated in combating these crimes, there should have been no unresolved issues, but the study of judicial practice eloquently testifies to the opposite. We believe that the instability in qualifications is to a certain extent due to the position of the Supreme Court of the Russian Federation itself. Let us dwell on the most pressing, in our opinion, problems, having examined them through the prism of a rather typical situation: the perpetrator, having entered into a criminal conspiracy, committed theft with penetration into the home in front of his friend's eyes.

Theft is a secret stealing of someone else's property. The method in this case is a constituent feature or its general feature. It is the method of taking possession of property that is the starting point in the qualification process in relation to the differentiation of theft, allowing to distinguish this crime from related norms [15, p. 79]. The Supreme Court of the Russian Federation has repeatedly drawn the attention of the courts to the prevention of errors associated with misinterpretation of the concepts of secret and open theft of someone else's property. A textbook rule is that the qualification should use general and specific signs of crimes contained directly in the criminal law [16, p. 104].

The law does not contain a legal concept and does not disclose the criteria for secrecy. They are usually distinguished on the basis of an analysis

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of the Ruling of the Plenum of the Supreme Court of the Russian Federation of December 27, 2002 No. 29 "On judicial practice in cases of theft and robbery" [3] (hereinafter - Ruling No. 29).

In theory, the criteria for secrecy are usually divided into objective and subjective. Objective criteria include the following:

1) the seizure is made in the absence of the owner or other owner of this property, or unauthorized persons;

2) the specified actions are performed in the presence of the specified persons, but unnoticed by them;

3) the person present at the illegal seizure of someone else's property is not aware of the unlawfulness of these actions.

The subjective criterion is revealed through the mental attitude of the perpetrator to the action being taken and lies in the fact that these persons watched the actions of the perpetrator, but the latter, based on the environment, believed that he was acting secretly.

The Supreme Court of the Russian Federation in paragraph 4 of Ruling No. 29 emphasized that the act will be considered committed in secret if the person present at the illegal seizure of someone else's property is a close relative of the perpetrator, who, in this regard, expects that during the seizure property, he will not meet opposition from him.

In the Ruling of the Plenum of the Supreme Court of the RSFSR dated March 22, 1966, No. 31 "On judicial practice in cases of robbery"[4] (hereinafter - Ruling No. 31) there was no explanation of the secrecy criteria, but there was an indication of what is meant by “open abduction”. According to paragraph 3 of Resolution No. 31, it was proposed to consider such an abduction, which is committed in the presence of the victim, persons in charge of or under whose protection the property is, or in the presence of strangers, as open abduction, which provides for liability for robbery, when the perpetrator realizes that these persons understand the nature of his criminal actions, but ignores this circumstance.

Plenum of the Supreme Court of the USSR in the resolution of September 5, 1986 No. 11 "On judicial practice in cases of crimes against personal property"[5] explained that the theft of property should be considered secret (a theft) if it was committed in the absence of the victim or unauthorized persons, or although in their presence, but unnoticed by them. If the victim or unauthorized persons saw that the abduction was taking place, but the perpetrator, based on the environment, believed that he was acting in secret, the deed should also be qualified as a theft.

This vague wording, accordingly, raised controversial questions in its application, and most importantly, who are these outsiders, acting in the presence of which, the guilty person believes that he is acting secretly?

The jurisprudence followed the path of a broad interpretation of this position. The Supreme Court of the Russian Federation expressed its point of view on this issue in the ruling on the Zakharishchev case[6]. The actions of the specified person, who committed the theft from Lyapina's room, where he was with her permission, a radio tape recorder and four cassettes in the presence of a friend Makeeva, were qualified as a robbery by the South Ural City People's Court of the Chelyabinsk Region. The Supreme Court of the Russian Federation, satisfying the protest about the re-qualification of actions for secret theft, proceeded from the fact that Makeeva was Zakharishchev's acquaintance. Together they came to Lyapina's room to drink alcohol and stayed there overnight. Zakharishchev, seeing a radio tape recorder under the bed, suggested Makeeva commit the theft, but the latter refused and was indifferent to this. The Supreme Court of the Russian Federation came to the conclusion that the concept of "an outsider or another person" in whose presence the theft was committed does not apply to Makeeva. Zakharishchev was aware that Makeeva was a close person to him, and was confident in the safety of the secrets of the abduction.

[3] Rossiyskaya gazeta. 2003, 18 Jan.

[4] Bulletin of the Supreme Court of the RSFSR. 1966. № 6.

[5] The document has not been published. URL: https://www.garant.ru/products/ipo/prime/doc/1205239/#:~:text (accessed: 18.08.2021).

[6] Bulletin of the Supreme Court of the Russian Federation. 1995. № 2. P. 6.

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Further, the rule of casual interpretation, carried out when applying the rule of law when resolving a specific case, worked, and the district courts went along the path they proposed. It should be borne in mind that casual interpretation is not limited to direct explanations and can be done in a hidden form, for example, in a court decision [17, p. 311].

The Solombala District Court of the Arkhangelsk Region re-qualified Nemanov's actions from paragraph "d", part 2 of Art. 161 to Part 2 of Art. 158 of the Criminal Code of the Russian Federation. The latter was accused of the fact that on May 19, 2001, at a bus stop in the presence of three witnesses, he openly stole a household bag with property in the amount of 5,855 rubles from Zhitnik. The court reasoned its decision by the fact that those present at the abduction were friends of the defendant and he did not perceive them as outsiders, therefore his actions should be qualified as a secret theft of someone else's property.

Here is another example. The Presidium of the Stavropol Regional Court changed the verdict against Shmelkov, convicted by the Budennovsky City Court under Part 1 of Art. 161 of the CrC RF, reclassifying its actions to Part 1 of Art. 158 of the CrC RF. Shmelkov was charged with the fact that on November 19, 2000, while in the Okhotnik-Rybolov store, taking advantage of the absence of the seller in the trading floor, in the presence of M., he thrust his hand under the glass of the counter, from where he stole a gas pistol. Changing the verdict, the Presidium of the Stavropol Regional Court noted that the arguments of the district court that M.'s legal position was as an outsider in relation to the fact of theft by Shmelkov of someone else's property were not based on the law. Shmelkov explained at the hearing that he had entered the store with his acquaintance M., having seen a pistol under the glass window, he decided to steal it. He offered to do this to M., but he refused. Taking advantage of the absence of the seller, he stole the pistol and together with M. left the store, in which, except for them, there was no one else. From the materials of the criminal case, it appears that M. is a friend of Shmelkov[7].

[7] Bulletin of the Supreme Court of the Russian Federation. 2003. № 4. p. 21

In its new ruling, the Supreme Court of the Russian Federation drew attention to the indicated problematic situation and tried to clarify it, but it remains a mystery why it limited secrecy only to the presence of a close relative. In addition, criminal and criminal procedural legislation have different attitudes towards the question of who should be considered close relatives. Based on the interpretation of the notes to Art. 308 of the CrC RF, in which the legislator, when developing the rules for exemption from criminal liability for refusing to testify, uses the wording “against himself, his spouse or his close relatives”, it can be concluded that the criminal law does not include a spouse. The same follows from the analysis of the footnote to Art. 316 of the CrC RF. In article 5 of the Criminal Procedure Code of the Russian Federation, a spouse, a wife, parents, children, adoptive parents, adopted children, siblings, a grandfather, a grandmother, grandchildren are classified as close relatives. However, the same article will clarify that we are talking about the concepts used in criminal procedure legislation.

Thus, if we follow the direct orders of the Supreme Court of the Russian Federation, then the conclusion is: if an offender commits a theft in front of a wife, a groom, a bride, a cohabitant, friends and persons with whom he previously committed crimes or served a sentence, etc., then it is no longer a theft, but a robbery, the degree of public danger of which is considered to be higher than a theft, since public danger in the criminal legal sense is usually associated with a feature of a crime [18, p. 124].

In our case, the degree of public danger is determined by the way the crime was committed.

Today, in our opinion, the issue of distinguishing between a theft and a fraud, when a culprit uses someone else's bank card, is relevant.

The Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation in the determination of September 29 , 2020 No. 12-UDP20-5-K6[8] in the criminal case against Kaktan indicated the following. The latter was convicted by the verdict of the Yoshkar-Ola City Court of the

[8] URL: https://ukrfkod.ru/pract/opredelenie-sudebnoi-kollegii-po-ugolovnym-delam-verkhovnogo-suda-rossiiskoi-federatsii-ot-29092020-n-12-udp20-5-k6/ (accessed: 18.08.2021).

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Republic of Mari El under Part 3 of Art. 30, paragraph "g" part 3 of Art. 158 of the CrC RF. The essence of the matter is as follows: on May 13, 2019, in the courtyard of a residential building on a footpath, he found a bank card on which he paid for goods on May 13 and 14, 2019, thus stealing money in the amount of 3,026 rubles 54 kopecks. Criminal actions could not be completed due to circumstances beyond his control, since the card with the balance of funds in the account was blocked. The Sixth General Jurisdiction Court of Cassation changed the sentence, re-qualifying the actions of the convicted person to Part 3 of Art. 30, part 1 of Art. 159.3 of the CrC RF. At the same time, arguing its decision, the cassation instance referred to paragraph 17 of the ruling of the Plenum of the Supreme Court of the Russian Federation of November 30, 2017 No. 48 "On judicial practice in cases of fraud, misappropriation and embezzlement"[9].

The Judicial Collegium for Criminal Cases canceled the ruling of the cassation instance, considering that such a link was unfounded and indicated that the re-qualification of Kaktan's actions from theft to fraud was questionable. The collegium motivated its decision by the fact that the explanations specified in paragraph 17 were given in relation to the previously valid version of Art. 159.3 of the CrC RF, in which the Federal Law of April 23, 2018 No. 111-FZ[10] amendments were made and from the disposition of this article the indication that such fraud is understood as “theft of someone else's property committed using a counterfeit or belonging to another person credit, payment or other payment card by deceiving an authorized employee of a credit, trade or other organizations". The same law established criminal liability under paragraph "g" of Part 3 of Art. 158 of the CrC RF for theft from a bank account.

We believe that this position of the ruling of the court of cassation is also far from indisputable, but not even in terms of the qualification of Kaktan's actions, but in terms of its argumentation. Indeed, the disposition of Art. 159.3 of the CrC RF has changed and now sounds like this: "fraud using electronic means of payment". In our opinion, it covers a wider range of actions of a perpetrator than it was envisaged in the original version, this was the meaning of the changes in the legislation. But a payment card is undoubtedly also a means of payment, and we do not exclude a situation when fraud can be committed with its use. The key point in distinguishing between theft and fraud in this case should remain the way the theft is committed. The Supreme Court of the Russian Federation tried to correct the position of the Plenum at its own discretion.

We agree with the position of scientists that when solving complex issues of qualification, first of all, one should be guided by the letter of the law, and then refer to the assumptions and intentions of the legislator. It is impossible to correct the error of the legislator, which contradicts the doctrinal rules [14, p. 33].

An interesting fact is that the Plenum of the Supreme Court of the Russian Federation in the ruling of June 29, 2021 No. 22 "On Amending Certain Rulings of the Plenum of the Supreme Court of the Russian Federation on Criminal Cases"[11] also drew attention to this situation and tried to correct it, but what happened as a result is unlikely to contribute to the distinction between theft and fraud.

Sub-paragraph 1 was excluded from the analyzed paragraph 17, which contained an indication that the person's actions should be qualified under Art. 159.3 of the CrC RF in cases where the theft of property was carried out using a fake or belonging to another person credit, settlement or other payment card by informing an authorized employee of a credit, trade or other organization of knowingly false information about the ownership of such a card by the specified person on legal grounds or by omitting illegal possession of a payment card. Sub-paragraph 2, which described the situation with the theft of funds, when they were issued by means of an ATM (which, we note, did not cause any disputes among law enforcement officers), was also excluded from paragraph 17, but

[9] Access from SPS "ConsultantPlus".

[10] On amendments to the Criminal Code of the Russian Federation: Feder. law of 23 Apr. 2018 No. 111-FZ. Rossiyskaya gazeta. 2018, 25 Apr.

[11] https://www.vsrf.ru/documents/own/30189/ (accessed 18.08.2021).

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it disappeared not without a trace, but practically in of the same edition was transformed into Ruling No. 29. The question of how to qualify actions when a stolen card is presented to an employee of a credit, trade or other organization remained open. R. A. Sabitov rightly points out that the qualification of the offense should not be arbitrary, when one and the same act is defined in different ways, and all eligibility decisions will be valid [19, p. 91]. Judicial discretion assumes a certain choice of one of several possible solutions, but on the condition that each of them meets the requirements of legality, validity and fairness.

The next important idea from the point of view of qualifying a crime is the correct setting of the time of the end of the crime. Among other things, the imposition of punishment on the guilty person also depends on the solution of this issue. If, according to the definition of the moment of the end of the robbery attack, the courts do not have problems, and the judicial practice on this issue has long been established, then there is a discussion regarding robbery and theft. Based on paragraph 16 of Ruling No. 31, it was proposed to consider the robbery completed from the moment of taking possession of the property. The courts followed the same path, determining the time of the end of the theft.

Taking into account the fact that the judicial practice was developing contradictory, and this gave rise to errors in the qualification of the offense, in paragraph 6 of Ruling No. 29 it was explained that theft and robbery will be considered completed crimes when the property is not simply confiscated, but the perpetrator will have a real ability to use or dispose of the stolen property at their own discretion (for example, to turn the stolen property in their favor or to the benefit of other persons, to dispose of it with a mercenary purpose in a different way). Previously, this approach was indicated in the Ruling of the Plenum of the Supreme Court of the USSR of July 11, 1972 No. 4 "On judicial practice in cases of embezzlement of state and public property"[12]. The same position became dominant in the theory of criminal law [20, p. 267-269].

We believe that such an approach to the end of the theft contradicts its legislative definition. Based on the notes to Art. 158 of the CrC RF, embezzlement is the seizure of someone else's property. Disposal of stolen property is outside the scope of completed criminal behavior. Such a change in the approach to the moment of termination entails a decrease in the punishment based on the rules for imposing punishment for an unfinished crime by one quarter of the maximum term or amount of punishment provided for this crime. We should note that the moment of the end of theft and robbery in the interpretation of its modern vision causes difficulties in law enforcement. Our opinion is that the right moment for the end of the theft and robbery was determined by the Plenum of the Supreme Court of the RSFSR in Ruling No. 31.

For theft, liability for which is provided for in paragraph "g" of Part 3 of Art. 158 of the CrC RF, the Plenum of the Supreme Court of the Russian Federation made an exception, adding paragraph 25.2 to Ruling No. 29 and indicating that it should be considered completed from the moment the funds were withdrawn from the bank account of their owner or electronic funds, as a result of which the owner of these funds was damage. That is a rather strange situation: if the money is stolen from the pocket, then it is necessary to find out whether the guilty person got the opportunity to dispose of them, and if the money is stolen from an ATM, then it is unnecessary.

For theft, the liability for which is provided for in paragraph "g" of Part 3 of Art. 158 of the Criminal Code, the Plenum of the Supreme Court of the Russian Federation made an exception, adding paragraph 25.2 to the Ruling No. 29 and indicating that it should be considered completed from the moment of withdrawal of funds from the bank account of their owner or electronic funds, as a result of which the owner of these funds caused damage. That seems to be a rather strange situation: if the money is stolen from the pocket, then it is necessary to find out whether the perpetrator received the opportunity to dispose of them, and if from the ATM, then not.

In the article, we have identified only two key points related to the interpretation by the Supreme Court of the Russian Federation of the

[12] Access from SPS "Garant".

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issues of qualification of embezzlement, which clearly show the instability of the formation of judicial practice on these issues.

4. Forming of law enforcement practice by rulings of the Plenum of the Supreme Court of the Russian Federation on the example of crimes related to narcotic drugs, psychotropic, potent and poisonous substances

Drug trafficking in Russia is increasing every year, changing and acquiring new forms, adjusting to modern realities [21].

All crimes directly related to drug trafficking and consumption, based on the characteristics of objective signs, can be divided into two groups: acts consisting of trafficking in drugs, their precursors, potent, poisonous and new potentially dangerous psychoactive substances (Articles 228–229.1, 231, 234–234.1 of the CrC RF), and acts that create conditions for illegal drug use (Articles 230, 232–233 of the CrC RF) [22].

We are going to consider the crimes belonging to the first group. We agree with the opinion of E. S. Minsadykova that in law enforcement when qualifying offenses related to illicit trafficking in narcotic drugs, psychotropic substances and their analogues, as well as their parts and plants containing narcotic drugs and psychotropic substances, there are a number of problematic aspects related to the definition of the subject of the crime and the delimitation of criminal and administrative liability in the designated area. The problems of the correct qualification of the designated acts are also caused by gaps in the theoretical nature and legal regulation of the fight against this type of crime [23].

The Plenum of the Supreme Court of the Russian Federation, explaining to the courts its position on the qualification of actions related to the illegal circulation of narcotic drugs, psychotropic substances or their analogues, repeatedly changing its approach to the application of the relevant norms, compensates for these defects.

In the article it is not possible to analyze each paragraph of the Ruling of the Plenum of the Supreme Court of the Russian Federation of June 15, 2006 No. 14 (as amended on May 16, 2017) "On judicial practice in cases of crimes related to narcotic drugs, psychotropic, strong and poisonous substances"[13] (hereinafter - Ruling No. 14). Therefore, we would like to consider the most controversial explanations in our opinion.

First, the clarification contained in paragraph 9 of Resolution No. 14, according to which the illegal manufacture of the relevant items without the purpose of sale should be understood precisely as intentional actions, that result in one or more ready-to-use narcotic drugs, psychotropic substances or their analogues.

The difference between manufacturing and processing is that during manufacturing, as a result, a new chemical substance is created, classified as narcotic or psychotropic, and during processing, the creation of a new substance does not occur, the effect of enhancing the effect of the active substance is achieved [24].

According to D. V. Tokmantsev, readiness should not be considered as one of the conditions for recognizing the illegal manufacture of such means or substances as a completed crime. The criminal law does not explicitly state that a manufactured narcotic drug, psychotropic substance or their analogue must be ready for consumption. D. V. Tokmantsev notes that in practice the issue of availability of drugs manufactured for use and consumption, as a rule, is not investigated, the case file states it as a fact only on the basis that it is included in the appropriate List of Drugs [25, p. 58-59].

For example, a substance was found and seized from Y., which, according to the expert's conclusion, is a narcotic drug - cannabis oil (hash oil), weighing 6.5 g, 13.3 g (in terms of the dried substance), with a total weight of 19.8 g. According to the decree of the Government of the Russian Federation of October 1, 2012 No. 1002, it is a big amount, which Y. illegally manufactured and stored without the purpose of sale[14].

Agreeing with this opinion, we note that while explaining the concept of "illegal

[13] Rossiyskaya gazeta. 2006, 28 June; 2017, 24 May.

[14] The verdict of the Chernomorsky District Court of the Republic of Crimea of May 27, 2020 in case No. 1-41 / 2020. https://sudact.ru/regular/doc/00j5XjQBcWb/ (accessed 18.08.2021).

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production" in paragraph 12 of Ruling No. 14, the Plenum of the Supreme Court of the Russian Federation no longer indicates the readiness to use and consume such substances or analogs.

Secondly, attention is drawn to the problem of qualifying the actions of a person who, wishing to acquire a narcotic drug, turns to another person for help in this matter.

Until 2015, paragraph 13 of Ruling No. 14 contained a clarification according to which the actions of the intermediary should be qualified as complicity in the sale or acquisition, depending on whose interests (a distributor or an acquirer) the intermediary is acting.

The Plenum of the Supreme Court of the Russian Federation mentions in Ruling No. 14 about the mediator, but the CrC RF does not provide for this type of accomplice. The appearance of Article 291.1 of the CrC RF "Mediation in bribery" does not mean the emergence of a new type of accomplice. We are talking about the exact textual designation of a special case of complicity, in which the mediator contributes, as noted in the text of the named article, the achievement or implementation of an agreement on the receipt and giving of a bribe, and in a significant amount. In other words, such a person should be considered as an accomplice, who, based on the list of actions characterizing the criminal role, named in part 5 of Art. 33 of the CrC RF, facilitates by providing information regarding the conditions for giving and receiving a bribe. Judicial practice, taking into account paragraph 15.1 of Ruling No. 14, recognizes the so-called cashiers, operators and couriers as accomplices in the illegal sale of narcotic drugs and their analogues, and not as intermediaries [26]. The analysis of criminal cases in this category allows us to come to the conclusion that a mediator should be understood as an accomplice.

M. was convicted under Part 5 of Art. 33 and part 2 of Art. 228 of the CrC RF and was found guilty of the fact that during an operational-search activity - a test purchase - at the request of K., an embedded operational officer who acted during the ORM, and with his money illegally acquired from an unidentified person at least 5.1 g of narcotic drug - heroin. Later M. gave K. two packages of polymeric material containing a narcotic drug - heroin - in the amount of 5.1 g.

According to the subsequent court decisions, the verdict in terms of qualifications was upheld. The Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation, having considered the criminal case on the supervisory appeal of the lawyer, changed the court decisions in connection with the incorrect application of the criminal law, indicating the following. According to the verdict of the court, a test purchase was carried out in this case, during which the drug was withdrawn from circulation. By implication of law, in cases where the transfer of a narcotic drug is carried out during a test purchase conducted by representatives of law enforcement agencies in accordance with the Federal Law of August 12, 1995 No. 144-FZ "On Operational Investigative Activities"[15], the offence should be qualified under Part 3 of Art. 30 and the relevant part of Art. 228 of the CrC RF, since in these cases there is the withdrawal of a narcotic drug or psychotropic substance from circulation.

Consequently, M.'s actions should be re-qualified from Part 5 of Art. 33, part 2 of Art. 228 of the CrC RF to part 5 of Art. 33, part 3 of Art. 30 and part 2 of Art. 228 of the CrC RF as complicity in an attempt to acquire a narcotic drug of an especially large amount[16].

On June 30, 2015, paragraph 13 of Ruling No. 14 was revised and the clarification about the rules for qualifying the actions of a person acquiring a narcotic drug for another person was excluded from it.

In paragraph 15.1 of Ruling No. 14, a clarification appeared, according to which, in the event that a person transfers the relevant items to the acquirer at the request (instruction) of another person to whom they belong, his actions should be qualified as co-execution in the illegal sale of these substances, plants.

This document does not say anything about

[15] Corpus of Legislation of the Russian Federation. 1995. No. 33, Art. 3349.

[16] https://www.garant.ru/products/ipo/prime/doc/70097832/ (accessed18.08.2021).

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the purchaser of the narcotic drugs. According to A.K. Anikanov, the Supreme Court of the Russian Federation reasonably focuses on the fact that the so-called mediator performs the role of the perpetrator of the crime, and at the same time draws attention to the fact that the legal significance is not in whose interests the mediator acts, but on whose behalf. A. K. Anikanov believes that the person who acquires narcotic drug for another, is a person who acquired the drugs without intent to sell, and their actions must be qualified under the relevant part of Art. 228 of the CrC RF without reference to Art. 33 of the CrC RF and without an indication of the commission of a crime in complicity [27, p. 11-15].

Thirdly, the question of the possibility of qualifying the sale of narcotic drugs using the formula of a single ongoing crime remains open for discussion. Traditionally, unity of intent and common goal has been recognized as features of continued crime. This idea was largely facilitated by the clarification given by the Plenum of the Supreme Court of the USSR in the ruling of March 4, 1929 "On the conditions for the application of limitation and amnesty to continuing crimes," that continuing crimes are crimes that consist of a number of identical criminal acts, directed towards a common goal and constituting in their totality a single crime [28].

In the previously valid version of Ruling No. 14, it was clarified that if a person sold narcotic drugs, psychotropic substances or their analogues in several steps, having sold only a part of the indicated substances that did not form a large or especially large amount, everything he did was subject to qualifications under Part 3 of Art. 30 of the CrC RF and the corresponding part of Article 228.1 of the CrC RF.

In the current version, this clarification is absent, but this fact does not exclude the qualification of the sale of narcotic drugs as a single crime.

For example, considering the actions of the convicted O. A. V., associated with the stash of psychotropic substances, as 11 crimes provided for by paragraph "g" of Part 4 of Art. 228.1 of the CrC RF, the court in the verdict indicated that the illegal sale of psychotropic substances should be considered completed from the moment the person completes all the necessary actions to transfer the specified substances to the acquirer, regardless of their actual receipt by the acquirer.

At the same time, as follows from the verdict, the convicted O. A. V. acquired 41.94 g of amphetamine from an accomplice no later than April 14, 2017. After that, in order to further market the entire substance to an indefinite number of persons, it was packed by her in 11 bundles. In the period from April 16, 2017 to 09 hours 15 minutes on April 20, 2017, she made 11 stashes of psychotropic substances in the Koptevo district of Moscow. At the court hearing, without denying the actual circumstances of the case, O. A. V. explained that she did not have time to inform anyone about the whereabouts of her stashes of psychotropic substances in connection with her detention.

From the testimony of the convicted O. A. V. during the preliminary investigation, examined by the court and based on the verdict, it also does not appear that she informed anyone about the stashes of psychotropic substances made by her. During the examination of the mobile phone confiscated from O. A. V., no information about the transfer of O. A. V. to the accomplice or other persons of information about the location of the stashes of psychotropic substances made by her was found. This fact is also not confirmed by any other evidence in the case, and therefore the actions of the convicted person are unreasonably qualified by the court as the final corpus delicti. Moreover, as seen from the judgment, the intent of condemned O. A. C. was aimed at selling the entire acquired amount of the psychotropic substance of amphetamine weighing 41.94 g, which she packed into 11 bundles and stashed. In such circumstances, the Presidium believes that the actions of O. A. V. related to the implementation of the stashes of the psychotropic substance of amphetamine should be classified as one crime under Part 3 of Art. 30, paragraph "g" part 4 of Art. 228.1 of the Criminal Code of the Russian Federation[17].

A. A. Kryukov and V. N. Shikhanov also note

[17] The Decision of the Presidium of the Moscow City Court of February 26, 2019 in case No. 44u-76/19. https://mos-gorsud.ru/mgs/cases/docs/content/4bde6419-c3bd-4a4e-9e9e-0e244f458088 (accessed 18.08.2021).

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that the absence in the text of Ruling No. 14 of a mention of a single continued sale of these items does not mean that this legal structure is not applicable to Art. 228.1 of the CrC RF [29, p. 10-11].

In a situation where the placement of a narcotic substance is carried out in several caches, but information about their location is reported to the so-called store (i.e., the person involved in the organization of the illegal sale of narcotic drugs via the Internet), the courts qualify the crime as a single crime, citing the existence of a single intent to sell the entire batch [30].

In our opinion, a legal professional should not wait for the Plenum of the Supreme Court of the Russian Federation to provide an explanation on all problematic issues of qualifying crimes.

Fourthly, the Plenum of the Supreme Court of the Russian Federation in the mentioned Ruling No. 14 provided an explanation that replaces the provisions of Art. 30 of the CrC RF, which provides for the concept of an unfinished crime. Paragraph 13.2 explains that if a person (in order to carry out the intent to illegally sell the relevant items) illegally acquires, stores, transports, manufactures, processes them, thereby performing actions aimed at their subsequent implementation and forming part of the objective side of sales, however, for reasons beyond person's control, does not transfer the substances, plants to the acquirer, then such person is liable for the attempt to illegally sell these substances, plants. In our opinion, the listed behaviors are nothing more than preparation for marketing. They cannot form its objective side, since paragraph 13 of Ruling No. 14 gives a mutually exclusive explanation that only the intent to sell these items can be evidenced if there are grounds for their acquisition, manufacture, processing, storage, transportation by the person who does not use them, amount, accommodation in a package convenient for transfer, availability of an appropriate agreement with consumers, etc.

5. Conclusions

The law enforcement process is based on such reference points as the norms of the law, judicial discretion, formed judicial practice, the position of the Plenum of the Supreme Court of the Russian Federation. It is rarely possible to compensate for defects in legal writing by giving an explanatory nature to the rulings of the Plenum. The absence of a law, written for literal interpretation, at the disposal of the law professional will not lead the latter to the presence of a single denominator. It is not always justified to compensate for the situation by applying judicial discretion, since the latter is possible only within availability of a legal alternative. The assignment of precedent status to a court decision may lead to the substitution of the law with the position in a particular case.

The foregoing shows that judicial practice on the mentioned issues is not uniform. In the presence of similar situations, the courts qualify the offense using different norms of the law, which negatively affects the existence of the principle of legality and entails different results.

It should be noted that the question of the significance of the rulings of the Plenum of the Supreme Court of the Russian Federation in the forming of a uniform vector of judicial practice has been controversial. The endless addition of the code by new articles, on the one hand, indicates the desire of the legislator to immerse behavioral models that are socially dangerous into the legal framework, but, on the other hand, it triggers a mechanism for clarifying the rules for their application, and sometimes leads to their contradictory interpretation.

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INFORMATION ABOUT AUTHORS

Yulia S. Pestereva – PhD in Law, Associate Professor; Associate Professor, Criminal Law and Criminology Department

Siberian Law University
12, Korolenko ul., Omsk, 644010, Russia E-mail: chrononavigator@rambler.ru ORCID: 0000-0001-6363-7496
SPIN-code RSCI: 7084-2920

Irina G. Ragozina – PhD in Law, Associate Professor, Honorary Worker of Education of Omsk region; Head, Criminal Law and Criminology Department
Siberian Law University
12, Korolenko ul., Omsk, 644010, Russia E-mail: ragoig@mail.ru
ORCID: 0000-0003-3983-9869
SPIN-code RSCI: 1231-5820

Elena Ivanovna Chekmezova – PhD in Law, Associate Professor; Associate Professor, Criminal Law and Criminology Department
Siberian Law University
12, Korolenko ul., Omsk, 644010, Russia E-mail: e555@list.ru
ORCID: 0000-0001-6060-4517
SPIN-code RSCI: 8756-3938

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