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Problems of Qualifying Crimes against the Established Order of Service Committed by Employees of Institutions and Bodies of the Penal System

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Abstract

Introduction: crimes against the established order of service, committed by employees of institutions and bodies of the penal system, are determined by the legislator not in the Criminal Code of the Russian Federation, but in Paragraph 5 of Part 2 of Article 157 of the Criminal Procedural Code of the Russian Federation, which defines the competence of heads of institutions and bodies of the penal system to perform urgent investigative actions on the specified category of crimes for which the preliminary investigation is mandatory. *Purpose*: to answer the question posed by the law enforcement officer about which illegal acts relate to crimes against the established order of service, the subjects of which are penal system employees. The author identifies several independent research subjects: 1) norms of the Criminal Code of the Russian Federation; 2) Chapter 30 of the Criminal Code of the Russian Federation, listing crimes against state power, the interests of public service and service in local self-government bodies; 3) certain provisions of the criminal codes of the RSFSR of 1922, 1926, 1960; 4) monographs of scientists; 5) textbooks that consider the specifics of crimes encroaching on state power, the interests of public service; 6) statistics of the Federal Penitentiary Service of Russia for 2021, revealing the categories of crimes taken into account and committed by employees of the penal system; 7) judicial practice, generalized and published by the Constitutional Court of the Russian Federation, the Supreme Court of the USSR, the Russian Federation; 8) Section V of the Code of Criminal and Correctional Punishments (1845); 9) federal laws regulating certain issues of public service; 10) the federal law, the law of the Russian Federation, the decree of the President of the Russian Federation, and regulations establishing the rules of service for the penal system employees. The volume and variety of the research subject require, in turn, the use of a number of scientific *methods*, such as description, comparison, specification, idealization, analogy, expert assessments, reference points, deduction, induction, and comparative legal research. As a result, the author comes to the conclusion that the wording of Paragraph 5 of Part 2 of Article 157 of the Criminal Procedural Code of the Russian Federation is not fully correct. It is hardly advisable to point out the “order of service”, which is the object of illegal activity of penal system employees, if this is not stated in the Criminal Code of the Russian Federation.

Keywords: civil servant; employee of the penal system; crimes against state power, interests of public service, order of service.

5.1.4. Criminal law sciences.

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Introduction

Law enforcement practice, ideally, should mirror the provisions prescribed by law, while eliminating violation of the rights, freedoms and legitimate interests of citizens. The ideal situation is when the law describes an illegal act in all aspects, simplifying the law enforcement qualification (application). The act that appeared in a certain period of time is perceived by citizens as normal and not dangerous, and only after it is recognized as such and falls under a legislative prohibition, authorized officials are entitled to combat it by legal means. Thus, only from the moment the act is declared criminal, it practically receives the status of a crime with all the ensuing legal consequences. In legal terms, illegality is evidence that the issue of combating this socially dangerous act is included in the agenda of national importance, the state has recognized the public danger of such an act. Declaring an act criminally punishable is a legal act (the right) of state power. The disposition of a criminal law norm describes an act for which a specific punishment is provided. This is a general approach to the construction of criminal law norms.

The article considers crimes against the established order of service, committed by employees of institutions and bodies of the penal system, which are referred to in Paragraph 5 of Part 2 of Article 157 of the Criminal Procedural Code of the Russian Federation. This problem is widely discussed in the scientific community [1, pp. 59–327; 2; 2–7]. Besides researchers' opinions, we analyze the Criminal Code of the Russian Federation, law enforcement practice provided by the Constitutional Court of the Russian Federation, the Supreme Court of the USSR, the Russian Federation, and statistics of the Federal Penitentiary Service of Russia, as well as legal acts of the Russian Empire and the RSFSR.

Research part

In the current version of the Criminal Code of the Russian Federation, the word "service" is used about 90 times, but the phrase "employee of the penal system" is missing. Chapter 23 of the Criminal Code of the Russian Federation provides a list of crimes (7) against the interests of service in commercial and other organizations [8, pp. 577–589], Chapter 30 – 17 elements of crimes against state power, interests of public service and service in local self-government [8, pp. 837–868]. Chapter 33 also enumerates a list of crimes in which the word "service" is mentioned, but they are directly related to military service (22 elements). Proceeding from the fact (and not only) that the generic object of military crimes is the relations that develop regarding the provision of the established procedure for military service [8, pp. 932–950], additional specialized legal acts are used for their qualification (dispositions of the articles are of a blank nature), for example, federal laws No. 53-FZ of March 28, 1998) (as amended of September 24, 2022) "On military duty and military service"; No. 76-FZ of May 27, 1998 "On the status of military personnel", Presidential decrees No. 1,237 of September 16, 1999 "Issues of military service" together with the Regulations on the procedure for military service; No. 1,495 of November 10, 2007 (as amended of July 31, 2022) "On approval of the general military charters of the Armed Forces of the Russian Federation".

In the above regulatory legal acts, the spheres of life of a serviceman are explicitly stated. Therefore, the established illegal acts of military personnel encroach on certain components of the military service procedure, for instance, non-execution of an order (Article 332 of the Criminal Code of the Russian Federation) – on the order of subordination, desertion – on the military service pro-

cedure (Article 338 of the Criminal Code of the Russian Federation).

The stated above shows the possibility (in case the legislator strives for and practice needs) to form a separate chapter in the Criminal Code of the Russian Federation "Crimes against the order of service in the penal system". There is a sufficient number of normative legal acts specifying its individual circumstances, but the practice of illegal activity is not so diverse, and activities of the penal system (its employees) are fundamentally different from the order and conditions of military service.

Based on the subject of the study, we focus on the illegal acts stipulated by Chapter 30 of the Criminal Code of the Russian Federation, some elements presented in it encroach on the state power and interests of civil service. They differ from other criminal encroachments and are named as official by criminal law specialists. With regard to the penal system, these crimes encroach on public relations that ensure normal and legitimate activities of authorities of other state bodies. Researchers point out that "the direct object of this group of crimes are social relations that ensure normal functioning of individual parts of the state apparatus... In some corpus delicti, an additional object may be legitimate interests of citizens or organizations (articles 285, 286 of the Criminal Code of the Russian Federation); health (Part 3 of Article 286 of the Criminal Code of the Russian Federation); life (Part 2 of Article 293 of the Criminal Code of the Russian Federation); property (articles 285, 286, 293 of the Criminal Code of the Russian Federation)" [8, p. 838].

The specifics of the crimes under consideration is predetermined by public service – professional activity to execute powers of state bodies – official duties of authorized persons. According to the Federal Law No. 58-FZ of May 27, 2003 "On the system of public service of the Russian Federation", the system of public service includes public civil service, military service, and law enforcement service. In Article 7 law enforcement service is defined as "a type of federal public service, which is the professional official activity of citizens holding positions of law enforcement service in state bodies, services and institutions performing functions to ensure security, law and order, combat crime, and protect human and civil rights and freedoms".

It is worth mentioning that Paragraph 1 of Article 19 of this law in the first edition stipulates that "the definition of law enforcement service as a type of federal public service can be applied *from the date of entry of the federal law on law enforcement service*" (emphasis added). The draft federal law "On the law enforcement service of the Russian Federation" has been worked out for about 10 years, but it has not been completed.

For this reason, since January 1, 2016, this article has become invalid. The Federal Law No. 262-FZ of July 13, 2015 "On amendments to certain legislative acts of the Russian Federation regarding clarification of the types of public service and invalidation of Part 19 of Article 323 of the Federal Law "On customs regulation in the Russian Federation"" amended Article 2 of the Federal Law "On the system of public service of the Russian Federation". In the new edition, the system of public service includes public civil service, military service, public service of other types. Part 3 of this article states that "military service and public service of other types, which are established by federal laws, are types of federal public service". In accordance with Paragraph 2 of Article 9, lists of standard positions of federal public service of other types are approved by the President of the Russian Federation. There is no such a list so far.

The Federal Law No. 197-FZ of July 19, 2018 "On service in the penal system of the Russian Federation and on amendments to the law of the Russian Federation "On institutions and bodies executing criminal penalties in the form of imprisonment'" does not disclose the specifics of this service. It, as if repeating the provisions of similar federal laws, says that it is a type of "... federal public service, which is a professional official activity of citizens of the Russian Federation ... in positions in the penal system of the Russian Federation ..." (Paragraph 1 of Article 1). At the same time, it points out that "... positions of the penal system employees... are established in the federal body of executive authority ..." (Paragraph 2 of Article 1). The specifics of professional activities of federal civil servants is to a

certain extent reflected in the Law of the Russian Federation No. 5473-1 of July 21, 1993 (as amended July 26, 2021) "On institutions and bodies executing criminal punishment in the form of imprisonment".

It is noteworthy that Part 1 of Article 26 of this Law specifies the delegation (transfer) of powers of legal entities to employees. It says that "employees of the penal system perform their duties and enjoy, within their competence, the rights granted to institutions or bodies of the penal system, which are provided for by this law and other legislative acts of the Russian Federation". According to Article 14, the rights of institutions executing punishment include the exercise of control over compliance with a set of requirements, use of measures of influence and coercion provided for by regulatory acts against offenders, inspection and search of convicts, other persons, their belongings, vehicles (Ruling of the Constitutional Court of the Russian Federation No. 428-O-P of March 6, 2008 "On the complaint of citizen Irina P. Kiryukhina on the violation of her constitutional rights by Part 6 of Article 82 of the Penal Code of the Russian Federation and Paragraph 6 of Article 14 of the Law of the Russian Federation "On institutions and bodies executing criminal penalties in the form of deprivation of liberty").

Chapter 5 of the Law "On institutions and bodies executing criminal punishment in the form of deprivation of liberty" and Paragraph 12 of Article 14 provide for the procedure for the use of physical force, special means and firearms by penal system employees. At the same time, it determines territories (institutions executing punishments, pre-trial detention facilities, adjacent territories where regime requirements are established, protected facilities of the penal system) and duties to be performed (escorting and other cases established by law).

From a brief description of the specifics of the service of employees of the penal system, we return to the category of crimes against the state power, interests of public service and service in local self-government bodies specified in Chapter 30 of the Criminal Code of the Russian Federation. They can only be committed:

– by special subjects (officials [9], representatives of the authorities (entitled to the personal application of state coercion measures), serving in state bodies). The exceptions are bribery and mediation in bribery, as well as assignment of the powers of an official and official forgery (officials are also responsible for the commission of official forgery);

– by virtue of the official position held by a person or using the powers granted to him/her by the position [10; 11];

– with causing harm to ordinary activities of public authorities, public service [8, pp. 838–839].

"The articles of the Criminal Code themselves, writes B.V. Volzhenkin, do not offer any criteria for determining the materiality of the violation of the rights and legitimate interests of citizens, organizations, society or the state, as well as criteria for distinguishing a significant violation from grave consequences. Harmful consequences of official crimes committed in various spheres of activity of officials are very diverse, and it is hardly possible to list them specifically in the law. Significant violation of the rights and legitimate interests is not limited only to causing material damage. It can be physical, moral, political, ideological harm, etc." [1, p. 129].

Having considered the legislative norms of Chapter 30 of the Criminal Code of the Russian Federation, as well as the above conclusion made by a well-known Russian scientist and other researchers mentioned above, we come to the conclusion that law enforcement officers are entitled to give a reasoned, evidence-based assessment themselves and attribute an illegal act to one of these categories of official crime. Thus, we are talking about an evaluative concept.

According to the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 19 of October 16, 2009 "On judicial practice in cases of abuse of official powers and exceeding official authority", "significant violation of the rights of citizens or organizations as a result of abuse of official powers or exceeding official authority should be understood as violation of the rights and freedoms of individuals and legal entities guaranteed by generally recognized principles and norms of

international law, the Constitution of the Russian Federation (for example, the right to respect for honor and dignity of the individual, personal and family life of citizens, the right to inviolability of the home and secrecy of correspondence, phone conversations, postal, telegraphic and other messages, as well as the right to judicial protection and access to justice, including the right to an effective remedy in a state body and compensation for damage caused by a crime, etc.). When assessing the materiality of the damage, it is necessary to take into account the degree of negative impact of the illegal act on normal work of the organization, the nature and size of the damage, the number of injured citizens, the severity of physical, moral or property damage caused to them, etc.".

According to V.I. Dineka and N.G. Kadnikov, "to assess the materiality of the violation of rights and legitimate interests, the totality of the circumstances of the case should be taken into account: these include a number of victims whose rights have been violated; a size and nature of the harm, its materiality for the victim, law enforcement interests; presence of losses and lost profits for a citizen, state... organizations; creating an environment that hinders activities of the organization; disruption of the workflow, etc."[8, p. 840].

We back the point of view of B.V. Volzhenkin that "elements of the crime included in Chapter 30 of the Criminal Code are the ones of so-called general crimes against state power, interests of public service and service in local self-government bodies. They can be committed by any officials (employees) in any sphere of managerial activity, any state or municipal body or institution, as well as Armed Forces, other troops and military formations of the Russian Federation, and entail various consequences. Besides, other chapters of the Criminal Code contain many special elements of crimes committed specifically by certain officials or in a certain sphere of activity, or encroaching on certain social benefits and interests, except for normal activities of the public administration apparatus" [1, p. 153]. We would like to add that the law lacks instructions on officials of the penal system and the corresponding sphere of their activities.

To establish what specific crimes against the established order of service are committed by penal system employees, let us consider the statistics of the Federal Penitentiary Service of Russia, conducted by the Research Institute of Information Technologies of the Federal Penitentiary Service of Russia (RIIT of the FPS of Russia) [12].

In 2021, 211 indictments were issued for criminal crimes, in particular:

– crimes against life and health (Chapter 16 of the Criminal Code of the Russian Federation), in particular, murder (Article 105 of the Criminal Code of the Russian Federation), newborn child murder by the mother (Article 106 of the Criminal Code of the Russian Federation), murder committed in a state of passion (Article 107 of the Criminal Code of the Russian Federation), murder committed when exceeding the limits of necessary defense or when exceeding the measures necessary for detention of a person who has committed a crime (Article 108 of the Criminal Code of the Russian Federation) – 2; causing death by negligence (Article 109 of the Criminal Code of the Russian Federation) – 0; intentional infliction of serious harm to health (Article111 of the Criminal Code of the Russian Federation), intentional infliction of moderate harm to health (Article 112 of the Criminal Code of the Russian Federation) – 2;

– crimes against property (Chapter 21): theft (Article 158 of the Criminal Code) – 8; fraud (Article 159 of the Criminal Code) – 13; embezzlement (Article 160 of the Criminal Code) – 1; extortion (Article163 of the Criminal Code) – 0;

– crimes against public safety (Chapter 24): hooliganism (Article 213 of the Criminal Code of the Russian Federation) – 0;

– crimes against public health and public morality (Chapter 25): illegal acquisition, storage, 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 their parts containing narcotic drugs or psychotropic substances (Article 228 of the Criminal Code of the Russian Federation) – 19;

– crimes against traffic safety and operation of transport (Chapter 27): violation of traffic rules and operation of vehicles (Article 264 of the Criminal Code of the Russian Federation) – 9:

– crimes against the state power, interests of public service and service in local self-government bodies (Chapter 30): abuse of official powers (Article 285 of the Criminal Code of the Russian Federation) – 8; abuse of official powers (Article 286 of the Criminal Code of the Russian Federation) – 45; taking a bribe (Article 290 of the Criminal Code of the Russian Federation) – 71; official forgery (Article 292 Criminal Code of the Russian Federation) – 3; negligence (Article 293 of the Criminal Code of the Russian Federation) – 14 (crimes against the service committed – 141, or 66.8%);

– other crimes (other chapters and articles of the Criminal Code of the Russian Federation) – 16 (7.58%).

So, in 2021, employees of institutions and bodies of the penal system did not commit any specific crimes against the established order of service, fixed in Paragraph 5 of Part 2 of Article 157 of the Criminal Procedural Code of the Russian Federation; 66.8% of their illegal activities, provided for by Chapter 30 of the Criminal Code of the Russian Federation, were directed against state authorities and interests of the civil service.

For the analysis to be more sophisticated, let us consider history of the issue, individual legal documents of the Russian Empire and the RSFSR. The outstanding Russian pre-revolutionary scientist N.S. Tagantsev wrote that "historical interpretation is known to be important in the field of current legislation. For example, we want to study some legal institution that exists at a given time, then in order to properly understand it, we should trace its historical fate, i.e. the reasons for which this institution was established, and the modifications that it underwent in its historical development" [3, p. 21].

The Code of Criminal and Correctional Punishments of 1845 [14] had Section 5 "On crimes and misdemeanors in public and social services". It contained 11 chapters (articles 329–505), each of which had its own individual name in accordance with the content of criminal law norms (Figure), which covered a wide variety of illegal activities and provided for various types of punishments. In our research we are interested in Chapter 11, in particular Section 1 "On crimes and misdemeanors of officials during investigation and trial" (articles 426–434) and Section 3 "On crimes and misdemeanors of police officials" (articles 446–459).

Section 1 contains elements of crimes and offenses with certain penalties. They are the following:

– an official fails to comply with the rules and forms prescribed by law during investigation due to the negligence or ignorance of their duties (1), or selfish or other personal purpose (2) (Article 456);

– negligence of an official who has not launched the investigation, having sufficient reason (1) or if he/she is guilty due to excessive leniency or any predilection for persons, subject to investigation (2) (Article 429);

– an official does not conduct an initial interrogation with the accused within a day after he/she appears or is brought by a judicial investigator or a police officer who, in case the investigator does not arrive to interrogate a person within a day, does not draw up a protocol attached to the case and does not announce to the accused the reasons for his/her detention (Article 460);

– slow investigation conducted by an official in the absence of special obstacles or difficulties or due to hatred, enmity, other illegal motives (Article 461);

– an investigator threatens the accused to confess or a witness to testify, or the torture and cruelty during the investigation (Article 462);

– an official provides the guilty person with means of justification prohibited by law during the investigation or trial, or weakens the strength of evidence against the guilty person (Article 463)

– any negligence or abuse of an official "in cases not fixed in this section" in office, during investigation or in court (Article 464).

Section 3 stipulates liability for:

– the failure to provide the authorities with the papers submitted by detainees, unless prohibited by law (Article 478);

– the failure to inform the authorities on the part of a police official who has taken a citizen

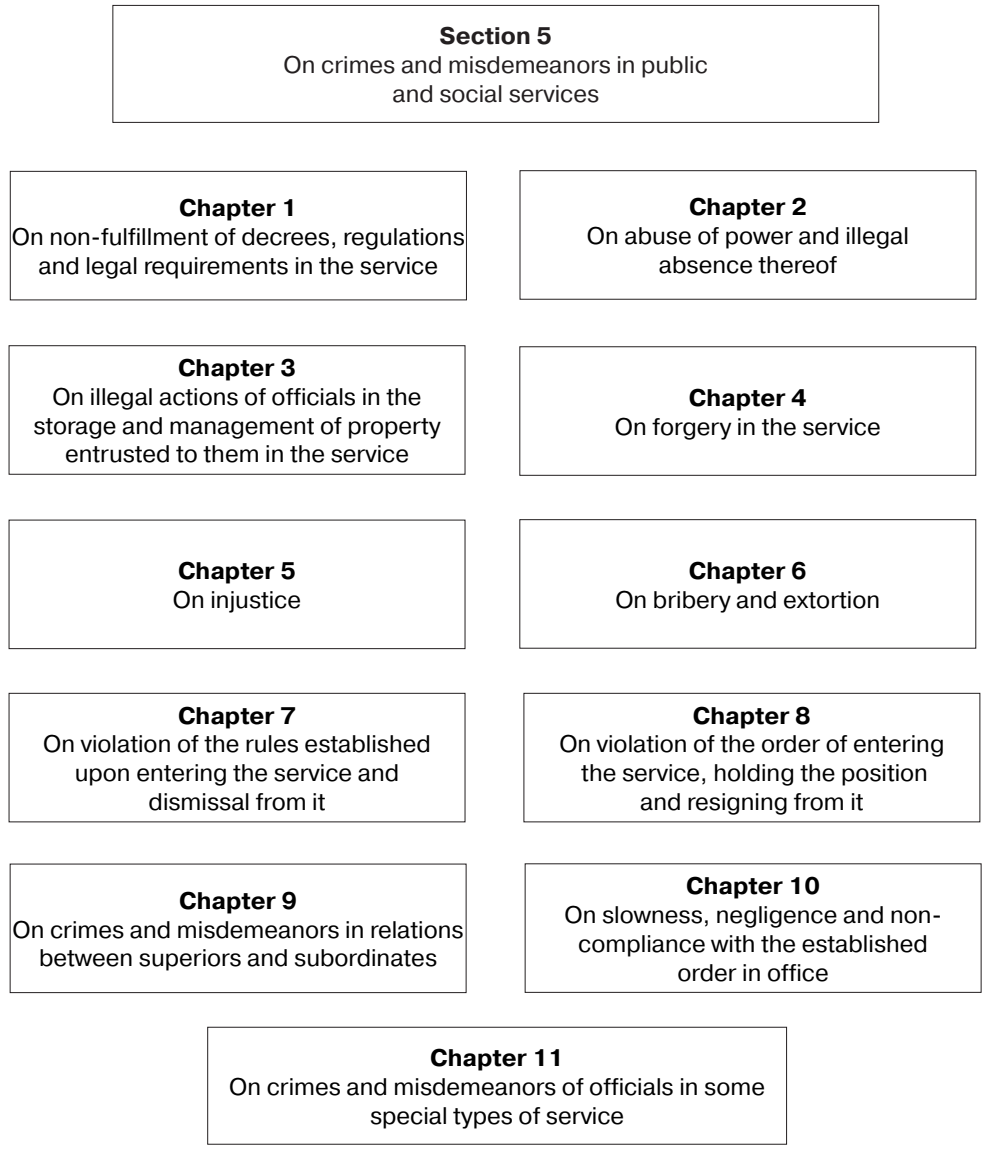

Figure. Code of Criminal and Correctional Punishments (1845)

into custody when it is provided by law (in cities within one day, in the county within a week or with the first mail) (Article 479);

– detention in custody for more than a period determined by a court sentence (without legal grounds) (1) or if it is proved that this is done because of enmity, revenge or for other similar reasons (2) (Article 480);

– negligence of an official or guards in case a prisoner escapes (1) or deliberate favoring, facilitating the escape (2) (Article 481);

– any violence against detainees even to prevent escapes or pacify prisoners, any unspecified and illegal measure on the part of prison guards and warders (Article 482);

–predilection of an official for one of the parties to the detriment of the other when executing a court decision (Article 484);

– harassment of a party when executing a court decision (Article 485);

– mitigating execution of punishment (by mistake, leniency or weakness) contrary to a court sentence (1) or out of self-interest of different types (2) (Article 486);

– strengthening punishment by a police official beyond the measure established by the court by mistake (1) or intentionally, out of revenge, self-interest (2) (Article 487);

– negligence or abuse of authority in cases "not specifically indicated in this section in particular, about the duties and responsibilities of police officials" (Article 488).

Having meaningfully presented two sections of the Code on Criminal and Correctional Punishments (1845), we will outline provisions of the criminal legislation of the Soviet period.

Chapter 2 of the Criminal Code of the RSFSR of 1922 was called "Official crimes". It provided for the following crimes: abuse of power (Article 105; the article had a note: "officials are persons holding permanent or temporary positions in any public (Soviet) institution or enterprise, as well as in an organization or association that has certain rights, duties and powers under the law in the implementation of economic, administrative, educational and other nationwide tasks"); excess of power (Article 106); inaction of power (Article 107); negligent attitude to service (Article 108); discrediting of power (Article 109); abuse of power, excess or inaction of power and negligent attitude to service (Article 110); an unjust sentence imposed by the judge for mercenary motives (Article 111); illegal detention and coercion to testify during interrogation through the use of illegal measures by the party conducting investigation or inquiry (Article 112); embezzlement of money or other valuables by virtue of the official position (Article113); receipt of any form of a bribe by a person doing state, union or public service personally or through intermediaries to perform or non-perform of any action included in the scope of official duties of this person in the interests of the giver. The same actions committed by an official with special powers, or appropriation of particularly important state values. Mediation in the commission of the stated crime, as well as concealment of bribery. Receiving a bribe committed under aggravating circumstances, such as: a) special powers of the official who has taken a bribe, b) violations of his/her duties of service or c) admission of extortion or blackmail (Article 114) (the person who has given a bribe is not punished only if he/she promptly declares extortion of a bribe or assists in the disclosure of a bribery case); provocation of a bribe (Article 115); official forgery (Article116); disclosure by officials of information not subject to disclosure (Article 117); officials' failure to submit the necessary information, certificates, reports, etc. on time at the request of central or local authorities, the submission of which is mandatory for them by law (Article 118).

As the researchers note, in the above chapter, "along with elements of general official crimes that can be committed in any field of activity and by any subject belonging to the category of officials, elements of special crimes in the service were also included, which were subsequently (in the Criminal Code of the RSFSR of 1960) singled out as crimes against justice ..." [1, pp.31–32].

Chapter 3 of the Criminal Code of the RSFSR of 1926 "Official crimes" practically repeated Chapter 2 of the Criminal Code of the RSFSR of 1922 with separate editorial clarifications. Chapter 7 of the Special Part of the Criminal Code of the RSFSR of 1960 was called "Official crimes" and included 6 articles: Article 170 (abuse of power or official position; the article had a note: "officials in the articles of the present chapter are understood to be persons who permanently or temporarily perform functions of government representatives, as well as those who permanently or temporarily hold positions in state or public institutions, organizations or enterprises related to the performance of organizational and administrative or administrative-economic duties, or performing such duties in the specified institutions, organizations and enterprises by special authority"); Article 171 (abuse of power or official authority); Article 172 (negligence); Article 173 (taking a bribe); Article 174 (giving a bribe; the article had a note: "the person who has given a bribe is released from criminal liability in case of extortion of a bribe or if this person has voluntarily reported the incident after giving a bribe"); Article 175 (official forgery).

Without going into a detailed analysis, we will mention that the number of crimes against state power and the interests of the civil service decreased significantly in the Soviet period, while their names correlate with the Code of Criminal and Correctional Punishments of 1845.

Conclusion

So, let us sum up the stated above.

1. The Code of Criminal and Correctional Punishments exhaustively defined illegal activity of officials, police officials, prison lock keepers, wardens, guards, judicial investigators and, accordingly, depending on the nature of the illegal act, provided for a certain type of punishment. There was an interesting form of punishment that would be relevant today. It is as a deduction from the time of ser-

vice (from seniority) from six months to one year. Such a type of punishment would be effective and in modern conditions, would have a positive effect on the responsibility of decisions taken by civil servants, would not entail a criminal record and other negative consequences.

2. The Code of Criminal and Correctional Punishments of 1845 is the most important legal act of the Russian Empire, some of its provisions are of undoubted interest to modern legislators and scientists. Russians should have an idea of it as a significant historical legal monument. However, this does not mean mindlessly copying its provisions, even borrowing some without taking into account modern reality. Attractiveness of the document cannot be compensated by the complexity of its practical application, it contained 1,711 norms (in different editions in different ways and without taking into account the additions made).

3. In Paragraph 5 of Part 2 of Article 157 of the Criminal Procedural Code of the Russian Federation, the legislator should not talk about crimes against the established order of service committed by employees of institutions and bodies of the penal system, since such a category of illegal acts is not mentioned in the Criminal Code of the Russian Federation. All new laws providing for criminal liability should be included in this code. Hence, (new) criminal law norms cannot be contained in any other normative act. In this case, we are referring to the Criminal Procedural Code of the Russian Federation.

4. Encroachments of the penal system employees on the order of service are not provided for by the norms of the Criminal Code of the Russian Federation, as statistics show, they are not in practice. The illegal acts committed by the considered subjects are covered by the legal norms concentrated in Chapter 30 of the Criminal Code of the Russian Federation, which provide for crimes against the state power and interests of the civil service. This should be indicated in Paragraph 5 of Part 2 of Article 157 of the Criminal Procedural Code of the Russian Federation. There is no need to establish special norms for penal system employees' encroachments on the order of service.

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