



Modern Trends in the Development of Military Criminal Law in Russia

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Abstract

Introduction: the article is devoted to the analysis of modern trends in the development of military criminal law in Russia through the prism of its September 2022 reform. *Purpose:* to study changes in the Criminal Code of Russia introduced by the legislator in September 2022 and to identify their positive and negative aspects. On the basis of generalization of Soviet and modern experience of some post-Soviet countries to determine necessary changes in the current domestic and international situation to maintain a high combat readiness of the Russian army by improving the maintenance of military law and order. *Methods:* historical, comparative-legal, empirical methods of description and interpretation, theoretical methods of formal and dialectical logic, legal-dogmatic method and a method of legal norm interpretation. *Results:* consideration of historical and contemporary military events and a socio-political situation in general shows merits of the changes introduced by the legislator, however, there is a need for their significant improvement. *Conclusion:* since military service during wartime is of paramount importance for national security, it is necessary to improve legislation on crimes against military service, especially during mobilization, and law enforcement practice, which would enhance protection of state interests during wartime. Evasion of mobilization and unjustified surrender of means of warfare to the enemy should be criminalized. This will in one way or another affect combat effectiveness of the Russian army. Stiffening responsibility for military crimes will have a preventive effect.

Key words: military policy; military criminal law; reform of military law; military crimes; responsibility of servicemen; special military operation; partial mobilization.

5.1.4. Criminal law sciences.

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Legal relations related to military service, particularly in wartime, are always extremely important due to the special role of the army in protecting vital interests of society and the state. A comprehensive study of topical issues of criminality among military personnel is one of the important means of solving military-legal problems of public and state importance.

For many years, crimes against the order of military service have occupied an insignificant place in the share of crime in Russia. However, the state of affairs has changed since the beginning of a special military operation on February 24, 2022, the outcome of which will influence the geopolitical situation in the world and Russia. This circumstance also leads to significant amendments to criminal law, as well as law enforcement practice.

The Decree of the President of the Russian Federation No. 647 of September 21, 2022 "On the Announcement of Partial Mobilization in the Russian Federation" and the Federal Law No. 365-FZ "On the Introduction of Amendments to the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedural Code of the Russian Federation were to ensure proper legal protection of relations that have arisen in connection with the conduct of military operations, namely, execution of the state defense order, mobilization and the associated procedure for military service.

Given the importance of the amendments to ensure the state security and the haste of their adoption, their scientific understanding is required from the standpoint of the criminal law doctrine and law enforcement, given that some of them, unfortunately, have certain flaws.

In 2022, the legislator introduced amendments to criminal law. However, the September package of amendments to the Criminal Code of the Russian Federation could be called a reform of military criminal law.

The legislator introduced a clarification of the aggravating circumstance provided for in paragraph "I" of Article 63 of the Criminal Code of the Russian Federation, in the form of committing a crime not only in conditions of armed conflict, but also "during mobilization or martial law, during wartime or in conditions of warfare", determined aggravating and specially aggravating elements of crime in the above conditions, and also criminalized acts in the form of voluntary surrender, looting, violation of terms

of the contract and the state contract for the state defense order (articles 201.2, 201.3, 285.5, 285.6 of the Criminal Code of the Russian Federation¹).

Major amendments concerned tightened liability for the commission of crimes during the period of mobilization or martial law, in wartime or in conditions of armed conflict or warfare. Despite the existence of legal definitions of the introduced special circumstances, the application of the concept of mobilization may be complicated, since legislation lacks a definition of the moment of its termination. Senior officials' statement about its completion seems clearly insufficient; this fact should have a legal formalization, for example, in the form of Presidential decree.

New elements of crime provide for more severe punishment. With such high terms of imprisonment, the probability of a suspended sentence is significantly reduced. In the current complex military-political conjuncture, public danger of consequences of committing these acts is increased. For example, mass unauthorized abandonment of positions on the front line can lead to their occupation by the enemy. To return the territories lost, assault actions are conducted, as a rule, with greater losses than those of the defending side. At the same time, those soldiers who did not succumb to cowardice and violate discipline, would bear losses. Even one copy of the new equipment left on the neutral front line can lead to its capture by the enemy and further study by reverse engineering to improve the tactics of fighting it. All this can even affect the strategic situation at the front, and therefore the course of the armed conflict and the defense capability of the state as a whole.

Ya.N. Ermolovich gave approximately such reasons for determining an aggravating circumstance of committing crimes in wartime or in a combat situation in criminal legislation [1].

Another amendment is related to correcting a concept "crime against military service" fixed in Article 331 of the Criminal Code of the Russian Federation. Earlier Russian criminal legislation did not contain a criminal qualification of crimes against military service committed during wartime or in a combat situation. The amendments

¹ Since these articles are related only to executors of the state contract for the state defense order and not to the military, they will not be considered in this paper.

are made to eliminate legal gaps in the present and future. Recognizing paragraph 3 of Article 331 of the Criminal Code as invalid, the legislator restored the principle of legality, confirming the status of the Criminal Code as the only codified legislative act establishing criminality and punishability of the act. Special legislation on criminal liability for crimes against military service is not required to be adopted now [2, p. 889]. Paragraph 3 of the said article in the previous edition referred to the legislation of wartime. However, no such legislation was adopted either in 1996, at the time of the counter-terrorist operation in Chechnya, or in September 2022, at the time of the special military operation, but crimes were also committed in peacetime, but in a combat situation. One of the authors of the draft law Deputy Ernest Valeev described the problem as follows, "When the Criminal Code was adopted, the moments that the country could conduct a special military operation were not taken into account ..., now there is a need to fix it in criminal legislation" [3].

According to Kh.A. Musaev, more than three thousand crimes were committed by military personnel during the period of counter-terrorism operations in the North Caucasian region from 1999 to 2005 [4]. The scientist presents an example from judicial practice: an ordinary soldier voluntarily left a self-propelled artillery division in a combat position near the airport of Grozny and tried to go home, but was detained. At the same time, the court qualified the described act as negligence under Article 293 of the Criminal Code of the Russian Federation, and not as a crime against military service, despite the fact that it also referred to the violation of articles of the combat charter, which operated in a combat situation. The author, based on the statistics of the Main Military Prosecutor's Office of the Russian Federation, according to which 2,290 cases were initiated in the military Prosecutor's Office for crimes committed in a combat situation, concludes about the problem of conflict between norms of law and law enforcement: acts recognized as criminal only in peacetime and actually decriminalized in wartime and in a combat situation are recognized crimes in the presence of combat operations [4].

So, Kh.A. Musaev criticizes current (at the time before the introduction of new amendments to the Criminal Code of the Russian Fed-

eration) law enforcement practice, pointing to conflicts between general norms of law and the real situation in a combat situation, where many acts are essentially decriminalized, although formally recognized as crimes. The essence of the problem is the discrepancy between the legal qualification of such acts and the specifics of their commission during combat operations.

Now, the term "combat situation", mentioned only in Part 3 of Article 331 of the Criminal Code of the Russian Federation, for the application of which a special law was required, is absent, and terms "conditions of armed conflict" and "conduct of combat operations" in qualified and specially qualified elements of crimes against military service are present. Legislative definition of these terms is provided by the Supreme Court in paragraph 2 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 11 of May 18, 2023 "On the Practice of Consideration by Courts of Criminal Cases of Crimes against Military Service", eliminating legal uncertainty.

Having restored the principle of unified criminal legislation consisting only of the Criminal Code of the Russian Federation, the legislator adopted the Federal Law No. 270-FZ of June 24, 2023 "On the Specifics of Criminal Liability of Persons Involved in a Special Military Operation" and introduced new norms of criminal law without amendments to the Criminal Code of the Russian Federation, thus, in our opinion, contradicting to Article 1 of the Code. In addition, attention should be paid to violation of the legislative technique in the wording of Article 1 of the law that stipulates regulation of relations related only to exemption from criminal liability, while Article 5 refers to exemption from punishment. The legislator also did not consider it necessary to introduce the practice of applying postponement of execution of punishment to military personnel in wartime, which proved its value and effectiveness back in the years of the Great Patriotic War.

Separately, it is necessary to pay attention to the amendments to Article 332 of the Criminal Code of the Russian Federation. From now on, the mere fact of non-execution of an order during martial law, wartime, or in conditions of armed conflict or combat operations is an act that entails criminal liability regardless of the consequences; the penalty for the crime committed is already up to 10 years in prison, which

is twice as much as the maximum sanction in this article before amendments.

Determination of an act in the form of refusal to participate in military or combat operations is justified due to a large number of refusals of military personnel from being sent to the zone.

It should be pointed out that the legislator, by introducing Note 2 to Article 337 of the Criminal Code of the Russian Federation, established liability for unauthorized abandonment of a unit or place of service by citizens being in reserve and undergoing military training on an equal basis with contract servicemen.

The Criminal Code of the Russian Federation was supplemented with new compositions in the form of voluntary surrender (Article 352.1) and looting (Article 356.1) in the section of crimes against peace and security of mankind. The need to introduce Article 352.1 of the Criminal Code of the Russian Federation is related to the current state of the special military operation. Long time fighting, as well as the most serious losses in the 30-year history of armed conflicts, encourage the enemy to urge Russian soldiers to surrender into captivity. This is done in various ways: from the time-tested distribution of propaganda leaflets to the launch of entire projects to ensure traitor's escort, starting with expressing a desire to surrender and ending with the transition to the trench of Ukrainian military formations. Cases of voluntary surrender can demoralize other servicemen and be used by propaganda of the enemy and their allies to discredit combat capabilities of the Armed Forces of the Russian Federation. Moreover, further, both voluntarily and by blackmail, a prisoner can join collaborationist formations, which happened during the Second World War.

Due to the absence of the composition of "voluntary surrender" before the amendments, there were difficulties in studying criminal-legal characteristics of this act [5]. It hampered qualification of the specified composition; it could be considered as desertion (Article 338 of the Criminal Code of the Russian Federation) [6] and high treason (Article 275 of the Criminal Code of the Russian Federation), to which the current Article 352.1 of the Criminal Code of the Russian Federation has a reference.

The issue of applying provisions of the Criminal Code of the Russian Federation to military personnel on circumstances excluding the criminality of an act, such as extreme necessi-

ty, physical or mental coercion, remains debatable, since it is not clear whether participation in combat operations precludes the prevalence of life over the rest of goods. The Resolution of the Plenum of the Supreme Court of the Russian Federation No. 11 of May 18, 2023 "On the Practice of Consideration by Courts of Criminal Cases on Crimes against Military Service", in fact, does not disclose these circumstances.

In general, the amendments and additions are aimed at eliminating some legal gaps that have become more relevant than ever, as well as tightening responsibility in order to strengthen the overall prevention of acts that have an increased public danger in the conditions of warfare.

At first glance, voluminous changes in criminal law do not cover such an important legal relationship provided for by the Constitution of Russia as the fulfillment of the most important civil duty to protect the Fatherland. To date, there is an obligation to appear upon notice of local body of military administration, and there is no liability of persons subject to mobilization for evading it. At the moment, the compositions provided for in Chapter 33 of the Criminal Code of the Russian Federation cannot be applied to evaders from mobilization. According to Article 331 of the Criminal Code of the Russian Federation, subjects of military crimes can only be military personnel undergoing military service on conscription or under contract, as well as citizens who are in reserve during their military training. Currently, liability for non-appearance upon notice of local body of military administration during the mobilization period is provided only by articles 21.5 "Non-Fulfillment of Military Registration Duties by Citizens" and 21.6 "Evasion of Medical Examination" of the Administrative Code of the Russian Federation. The disposition of Article 328 of the Criminal Code of the Russian Federation provides for liability for evading conscription in the absence of legal grounds for exemption from this service. However, paragraph 2 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 3 of April 3, 2008 "On the Practice of Consideration by Courts of Criminal Cases on Evasion of Conscription and from Military or Alternative Civil Service" stipulates that subjects of this crime are male citizens who have reached the legal age from which they are subject to conscription or those who are liable

for military duty and are not in reserve, subject to conscription for military service in accordance with the procedure established by law. The Supreme Court of the Russian Federation indicates that after reaching the age limit for conscription, only persons who committed this crime before they reached the specified age may be subject to criminal prosecution for evading conscription, provided that the statute of limitations for bringing them to criminal liability has not expired.

Thus, Article 328 of the Criminal Code of the Russian Federation provides for liability for evasion from military service or alternative civilian service. At the moment, there is no judicial and even investigative practice for repeated failure to arrive at a recruitment office after receiving a summons without valid reasons by a person in reserve during the mobilization period. So, for example, the first criminal case initiated by the Zarechensk Interdistrict Investigative Department of the Investigative Directorate of the Investigative Committee of Russia in the Penza Oblast on September 28, 2022 for draft evasion during the mobilization period was terminated due to the recognition by the Prosecutor's Office of the Penza Oblast of the illegal decision on initiation [7]. The absence of liability was also confirmed by the head of the Federation Council Committee on Constitutional Legislation and State Construction Andrei Klishas, stating that "the issue of the need to make any amendments to the legislation in this part is subject to detailed discussion with the State Duma" [8]. Now a citizen is subject to liability only within the framework of Article 337 of the Criminal Code of the Russian Federation, if he passes a medical commission, an order is issued for him to enroll in the ranks of the Armed Forces of the Russian Federation, but he decides to run away, thereby really committing unauthorized abandonment of a unit or a place of service. In this case a soldier has already passed the conscription stage and therefore does not evade from mobilization. At the moment, the authorities, having officially successfully completed partial mobilization, are unlikely to make changes to the Criminal Code of the Russian Federation or even to the above-mentioned resolution of the Plenum of the Supreme Court of the Russian Federation. The only thing that now fills this gap is the above-mentioned precedent of the Penza Regional Prosecutor's Office, therefore it is

necessary to bring clarity at the legislative level.

The creation and maintenance of an effective defense system is the key to the sovereignty and security of any state. Mobilization for military service plays an important role in ensuring the combat capability of the country's armed forces. The existence of criminal liability for evading conscription serves as a deterrent for potential draft dodgers, thereby contributing to ensuring the country's defense capability.

Thus, in order to eliminate the legal gap, it is necessary to introduce criminal liability for evading conscription by a separate article of the Criminal Code of the Russian Federation, ranking liability for committing evasion in wartime.

The punishment provided for in Article 328 of the Criminal Code of the Russian Federation for committing a crime in these conditions does not meet the principle of proportionality. It is currently impractical to correct the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 3 of April 3, 2008 due to the lenient punishment provided for by the current legislation, which does not correspond to the principle of justice and is thus unable to implement a preventive task. We assume that some people consider punishment more acceptable than taking part in combat operations [9].

Experience of post-Soviet countries, for example, Belarus, is worth considering. Article 435 of the Criminal Code of Belarus, which is analogous to Article 328 of the Criminal Code of the Russian Federation, provides for liability for "evasion of conscription measures" in the form of punishment by community service, fine, arrest, restriction of liberty for up to 2 years, or imprisonment for the same term. At the same time, "evasion of conscription measures during mobilization" is fixed in Article 434 of in the Criminal Code of Belarus and is already punishable by imprisonment for a term of 2 to 7 years.

Article 336 of the Criminal Code of Ukraine provides for imprisonment for a term of 3 to 5 years for "the evasion of conscription for military service during mobilization, in a special period, for military service on conscription of reservists in a special period. We believe that classification of such acts as crimes of moderate gravity, as it is enshrined in the Criminal Code of Ukraine, does not correspond to the real nature of public danger of this act. Therefore, we find it reasonable to take the Soviet

criminal legislation as an example. Article 81 of the 1960 Criminal Code of the RSFSR for evading conscription provided for imprisonment for a term of 3 to 10 years, but the same act committed during wartime was already punishable by imprisonment for a term of 5 to 10 years or the death penalty.

We believe that introduction of this composition will ensure a serious attitude for mobilization measures or, in any case, will create an effective general prevention. The introduction of criminal liability for evading mobilization will contribute to an equal and fair distribution of the burden of military duty to protect the interests of the state and its people among citizens. This will prevent unpunished neglect of this duty.

Maximum sentences for evaders should be also differentiated. Introduction of different terms of punishment reflects the severity of the crime committed and takes into account the specific circumstances under which the evasion occurred. During the period of participation in an armed conflict, the political situation in the state becomes more tense and the need for military personnel to protect national interests is even more acute. Thus, tougher penalties for evading service during special military periods is a reasonable measure designed to ensure that citizens fulfill their duty to the Fatherland during a period of aggravated threat to national security.

Therefore, we propose to supplement the Criminal Code of the Russian Federation with Article 328.1 "Evasion of conscription for military service during mobilization" with the following content:

"1. Evasion of conscription for military service in the Armed Forces of the Russian Federation is punishable by imprisonment for a term of three to seven years.

2. The same act, as well as evasion of further conscription for military service in the Armed Forces of the Russian Federation, committed during martial law, during wartime or in conditions of armed conflict or combat operations are punishable by imprisonment for a term of five to ten years".

Undoubtedly, a high term of imprisonment and thereby classification of this crime as serious will significantly reduce a number of evaders. However, some people will prefer to serve a sentence in the form of imprisonment. In this regard, it is worth paying attention to Article 46

of the Criminal Code of the RSFSR "Postponement of the execution of a sentence to a serviceman or a person liable for military service in wartime" and introduce a similar institution into the modern Russian Criminal Code (Article 82.2) with modern formulations that meet the realities of participation in military confrontations, namely:

"1. During the period of mobilization or martial law, during wartime or in conditions of armed conflict or combat operations, the court may postpone the actual serving of the sentence imposed on a serviceman or a reservist subject to conscription or mobilization until the end of combat operations with the transfer of a convicted person to the army and further transfer to the zone of combat operations. In these cases, the court may postpone the execution of additional punishments.

2. In case a convicted person sent to the army has been promoted by a commander in accordance with the Disciplinary Statute of the Armed Forces of the Russian Federation or awarded a state award, then, on the recommendation of the relevant military command, the court may release him from serving his sentence or the rest of the sentence with the removal of his criminal record or replace the remainder of the sentence with a milder type of punishment.

3. In case, during the period of postponement of serving a sentence, a convicted person specified in Part 1 of this Article commits a new crime, the court shall impose punishment on him according to the rules provided for in Article 70 of this Code".

A negligent attitude to products of the military-industrial complex on the battlefield is another problem. So, according to the telegram channel "Military Informant", on February 24, during the landing at the Gostomel airfield, the Ka-52 helicopter was shot down by MANPADS. The crew made an emergency landing in a field near the airfield and was successfully evacuated. However, further, the helicopter had been left there for almost 40 days before the retreat of the Armed Forces of the Russian Federation from Kiev, where it was later found by Ukrainian soldiers. The helicopter was neither evacuated nor at least destroyed, while the Ukrainians took out the wreckage of the damaged modern equipment. The helicopter was left with all the technical component. After its discovery,

Ukrainian soldiers took the helicopter away and, most likely, studied it thoroughly together with specialists of the Armed Forces of NATO countries [10].

This loss can at least help the enemy and its allies in the fight against helicopter units of the Russian army and even further contribute to the development of military helicopter construction and, thus, the military-industrial complex as a whole. The possibility of the occurrence of these consequences can be confirmed by the fact provided by the "Free Press". The American MQ-9 Reaper UAV shot down and raised from the seabed in March 2023 gave the relevant units of the Russian Defense Ministry significant information about characteristics of some critical electronic components of this reconnaissance and strike drone [11].

To prevent such a situation, the authors suggest introducing Article 340.1 with such a composition as "surrender or abandonment of the means of warfare to the enemy" into of the Criminal Code of the Russian Federation. The wording can be taken from Article 261 of the Criminal Code of the RSFSR, following the example of Kazakhstan and Ukraine.

Public danger of the crime "surrender or abandonment of the means of warfare to the enemy" is obvious, since it encroaches on the ability of the chief to perform his duties under any conditions and decisively direct actions of his subordinates in the interests of military law and order [12].

In Soviet legislation, in case the chief of the military forces surrendered the military to the enemy and/or abandoned fortifications, military equipment and other means of warfare not in a combat situation, but these actions did not pursue the purpose of assisting the enemy, he was punishable by imprisonment for a term of three to ten years or the death penalty.

In the Criminal Code of Ukraine, this act is enshrined in Article 427, which is similar to the above article, except for the presence of capital punishment. In the Criminal Code of Kazakhstan, the disposition of the article is the same, but the sanction already provides for imprisonment for a term of ten to twenty years or life imprisonment with or without deprivation of citizenship of the Republic of Kazakhstan.

The authors propose to supplement the Criminal Code with Article 340.1 of the following content:

"Surrender of the military to the enemy by the chief of military forces, as well as abandonment of fortifications, military equipment and other means of warfare to the enemy not in a combat situation, in the absence of elements of a crime provided for in Article 275 of this Code".

The sanction in this case should be no milder than a similar norm of the Soviet criminal law, with the exception of the death penalty.

Summing up, it should be noted that military service during military conflicts is of paramount significance for the protection of vital interests of society and the state, and therefore the legal relations associated with it are of particular importance. The issue of crimes against military service, both in general and committed during or in connection with mobilization, remains relevant in connection with Russia's participation in armed conflicts, both on the territory of the former Soviet Union and other restive regions of the world. This requires constant comprehensive research, including taking into account modern challenges and threats in the military sphere.

Proceeding from the above, it is possible to predict further development of criminal legislation, which does not always keep up with changing social relations, remaining imperfect.

In particular, it is necessary to resolve the issue of introducing criminal liability for evading mobilization, especially when the country needs to replenish the ranks of the armed forces. Probably, in the September 2022 socio-political conjuncture, the legislator did not want to immediately introduce criminal liability for evading mobilization, so as not to provoke additional complications of the domestic political situation associated with the population's disapproval of mobilization measures introduced for the first time after the Great Patriotic War. However, in the current geopolitical situation, it is necessary to introduce liability for evading mobilization to prepare for possible large-scale military conflicts, in which the quality of mobilization measures at the first stages of the war can play a decisive role.

In order to form a responsible attitude to products of the military-industrial complex and national security directly on the battlefield, it is reasonable to introduce criminal punishment for unjustified surrender or abandonment of the means of warfare to the enemy. Competent

handling of the means of warfare will mainly prevent the enemy from gaining access to Russian weapons technologies.

Tightening of the responsibility for military crimes is justified already in terms of creating a preventive effect for the population, which will undoubtedly work against one or another part of unstable persons and increase the vigilance of the authorities.

It is important to note that committing crimes against military service during the mobilization period undermines combat readiness of the army and poses a threat to the national security of the state. Therefore, criminal law protection of military service during mobilization needs further improvement both at the level of legislation and law enforcement practice in order to boost legal protection of state interests in wartime.

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