Original Article

Some Problems Of Decision Of Property Crimes From Civil Legal Delicts

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Abstract

The purpose of this article is to analyze the composition of fraud in the light of the constitutional changes of the Republic of Armenia carried out in 2015. In particular, the constitutional and legal provision that "no one can be deprived of liberty twice only for the reason that he is unable to fulfill civil law obligations" dictates the need to highlight topical and debatable issues related to the analysis of certain signs of fraud, distinguishing this crime from other elements of crimes and from civil law torts. The article suggests some ways to improve the criminal legislation of the Republic of Armenia and the Russian Federation, gives some recommendations on the rules for the qualification of fraud.

Keywords: crime; embezzlement; fraud; the right to someone else's property; guilt; responsibility; civil transaction

INTRODUCTION

Fraud is one of the most common and dangerous forms of stealing someone else's property. The study of judicial practice shows that, despite numerous scientific studies, such issues as the moment of intention to fraud continue to remain controversial; the content of the right to someone else's property; criteria for distinguishing fraud from civil law tort, etc.

Of particular importance are new types of fraud (banking, insurance, computer, etc.), which have not yet been criminalized under the Criminal Code of Armenia.

Improvement of criminal legislation should not hinder the development of market relations. However, it is not uncommon for fraudsters to evade criminal liability under the pretext of civil transactions.

The relevance of the research topic is also dictated by the adoption of the new Criminal Code of the Republic of Armenia on May 5, 2021, which comes into force on July 1, 2022.

According to the Constitution of the Republic of Armenia (hereinafter - RA) «no one can be deprived of their liberty just because they are unable to fulfill their civil obligations». Note that this fundamental provision is enshrined in Art. 11 of the International Covenant on Civil and Political Rights 1966. This article states that "no one shall be deprived of his liberty on the sole ground that he is unable to fulfill any contractual obligation" [1. P. 57].

In connection with the adoption of this provision, a number of problems arose about the correlation of constitutional and criminal law norms establishing criminal liability for fraud, other property and economic crimes, as well as their delimitation from civil law tort. Fraud is defined as “theft of someone else’s property or the acquisition of the right to someone else’s property by deception or abuse of trust” (Article 178 of the RA Criminal Code). At the very least, the following closely interrelated issues need serious clarification:

In particular:

– content of the objective side of the fraud;

– subjective orientation of intent and the time of its occurrence to theft of property;

– the ratio of the civil law concept "the right to someone else's property" and the acquisition of the right to someone else's property as a type, manifestation of fraud;

– criteria for delimiting fraud from a civil law transaction.

The content of the noted constitutional norm and its impact on the basis and limits of criminal liability for fraud is of great theoretical and practical importance.

In the process of the development of market relations, new types of fraud have appeared: banking, computer, insurance, in real estate transactions (mortgages), in the field of small business, in the field of high technologies (phreaking, hacking, radio piracy), etc. Qualitatively new and rather complicated, in terms of disclosure, forms of deception or abuse of trust have made the work of law enforcement agencies even more difficult. Fraud leaves almost no trace; the will of the victim and the criminal outwardly coincide; a fraudulent transaction has the form of an ordinary contract and is disguised as a civil law relationship. It is not uncommon for a punishable fraud to be extremely difficult to distinguish from violations of civil law obligations. As a consequence, judicial errors are made, instead of acquittals, convictions are passed, and vice versa.

The noted constitutional provision should be the legal basis for refusal of the repressive bias of the investigative and judicial practice of fraud. Against this background, Art. 178 of the RA Criminal Code needs radical clarification. The legal essence of the composition of fraud and its criminal-legal features should be defined in such a way as to maximize the clear distinction between the criminal and civil liability of the subjects. Moreover, the improvement of criminal legislation should help the subjects of market relations to exercise their property rights with full rights and confidence, and to participate effectively in the economic activities of the state.

In recent years, a negative practice has developed in the activities of creditors about "the confidence that under the threat of inevitable criminal punishment, the debtor will not only be prosecuted, but will also pay all debts to him". In turn, fraudsters, under the pretext of civil transactions, are trying to evade criminal punishment.

Let us turn to the analysis of some of the elements and signs of the composition of fraud.

In Art. 178 of the RA Criminal Code essentially provides for two types of fraud: 1) fraud - theft of someone else's property and 2) fraud is the acquisition of the right to someone else's property. However, the legislator in the new RA Criminal Code defines fraud as theft by deception or abuse of trust.

Deception and abuse of trust are ways, means of stealing someone else's property or acquiring the right to property.

The concept of fraud - theft of someone else's property is characterized by the following features:

· selfish purpose;

· wrongfulness;

· gratuitous withdrawal;

· turning someone else's property in favor of the guilty person or other persons;

· causing damage to the owner or other owner of this property.

These signs are given in the definition of theft of someone else's property, formulated in Note 1 to Art. 158 of the Criminal Code of the Russian Federation (Theft). Unfortunately, the concept of theft of property is not disclosed in the current RA Criminal Code. However, in the theory of criminal law and in the practice of the law enforcement bodies of the RA, the same signs of theft are taken as the basis. A similar concept is enshrined in the new RA Criminal Code.

Fraud - the acquisition of the right to someone else's property differs from fraud - the theft of someone else's property in that it is not inherent in the subject of theft - someone else's property.

The concept of the subject of theft is significantly narrower in terms of the volume of the civil-legal category of property, both in the broad and in the narrow sense of the word. [2. P. 192].

The subject of fraud, in addition to property, is also the right to someone else's property as a legal category. The right to property in civil law is a variety of property rights, defined as “the subjective rights of participants in a legal relationship associated with the ownership, use and disposal of property, as well as those material (property) requirements that arise between participants in economic turnover regarding the distribution of this property and exchange (goods, services, work performed, money, securities, etc.)”.

In the criminal legal sense, property rights are not covered by the concept of property, since in this branch of legislation, property and the right to property are different categories that are different from each other. [3. P. 375].

It is the documents containing indications of property rights, including their acquisition, that, as practice shows, are often the subject of various fraudulent transactions. Moreover, from the moment the fraudster receives such a document, on the basis of

the possession of which he acquired the right to the property, the crime is recognized as completed, regardless of whether the fraudster managed to obtain the corresponding property in kind or in monetary terms.

From the outside, the specificity of this crime lies in the fact that the owner, as it were, "voluntarily" transfers or alienates his property to the swindler. However, such “voluntariness” is not based on the victim's awareness of its true conditions and consequences, since it is caused by delusion due to deception or abuse of trust. According to the Civil Code, the alienation of property can be made only with the consent and (or) on behalf of the owner. Since the owner does not give the specified consent and his will to alienate the property in case of fraud, the criminal, by deception or abuse of trust, actually withdraws this property from the owner or acquires the right to this property. It is these two actions that constitute the signs of the objective side of fraud.

Without dwelling on the content and forms of manifestation of deception and abuse of trust, we note that Art. 178 of the RA Criminal Code (Article 159 of the RF Criminal Code) is stated unsuccessfully. Linking the composition of fraud with theft makes it difficult to apply this rule. The essence of fraud is not theft, but the infliction of property damage on the victim. The concept of “theft” does not cover all possible ways of committing fraudulent activities. N. A. Lopashenko believes that the acquisition of the right to property by deception or abuse of trust is a special type of fraudulent theft [4. P. 261].

Responsibility for causing property damage under the RA Criminal Code (RF Criminal Code) is established, in addition to fraud, and in other articles (Articles 184, 191, etc.).

For example, damage caused by abuse of trust as a result of failure to pay due (payment for services rendered or work performed, credit debts, etc.) must be qualified under Art. 184 of the RA Criminal Code, outwardly there is no theft (since the method of causing damage is intangible). However, in fact, in practice, this composition is difficult to distinguish from fraud. The search for the right norm is all the more complicated when a person, for example, receiving a loan from a victim, really deliberately returns the money, but later decides not to return, which is often done in our reality. In both the first and second cases, the swindler cannot be prosecuted under Art. 178 of the Criminal Code, since, in accordance with the current version, fraud from the subjective side presupposes direct intent, since theft, as noted, is expressed in the seizure of property for a mercenary purpose.

According to Art. 178 of the Criminal Code cannot be held accountable for those cases when the infliction of property damage through deception or abuse of confidence by a person is committed with indirect intent. For example, when concluding an agreement on the performance of work, the provision of services, the sale of property, as a rule, a person assures of the seriousness of his intentions, financial capabilities, etc., but subsequently turns out to be unable to fulfill his contractual obligations.

As a rule, the investigating authorities and courts are forced to qualify such an act as fraud.

There is a problem of delimiting a criminal offense from civil law responsibility. The current version of Art. 178 of the Criminal Code does not give such an opportunity. Determining the composition of fraud through the method of causing harm - theft (i.e. seizure) of property, the legislator, on the one hand, left a wide loophole for criminals, and on the other hand, created problems in proving and establishing signs of the subjective side of this crime.

In case of fraud, the perpetrator realizes that he is misleading the victim or knowingly uses his trust to obtain someone else's property and take possession of it, and wishes this. In other words, it is necessary to prove the simultaneous presence of two circumstances: 1) direct intent to steal; 2) the occurrence of intent before the receipt of property or the acquisition of the right to property.

It is rather difficult to prove the existence of these circumstances. For this reason, law enforcement agencies are constrained by the need to initiate criminal cases. The courts, in turn, recognizing fraudsters as guilty, as a rule, avoid substantiating the actual presence of signs of a subjective side, so as not to "ruin" the criminal case.

Unfortunately, the application of the constitutional and criminal procedural principle that all irremovable doubts about the guilt of the accused should be interpreted in his favor is a rare phenomenon in our legal reality.

Against this background, the adoption of the aforementioned constitutional provision is indeed relevant and dictated by objective necessity. But without improving the relevant norms of the criminal law, this provision remains declarative. Moreover, the need to improve, first of all, the composition of fraud is due to the difficulties of distinguishing it from such compositions as pseudo-business (Art.189), deliberate bankruptcy (Art.193), fictitious bankruptcy (Art.194), illegal use of a trademark (Art. 197), deliberately false advertising (Art. 198), deception of buyers (Art. 212).

In most cases, the forms of manifestation of the noted acts form a kind of fraudulent deception. Such a wide range of differentiation of criminal responsibility for such acts (taking into account the different ways of their commission, the diversity of the object of the encroachment) and the allocation of a multitude of individual offenses is a dead-end path for the development of criminal legislation. This fragmentation paralyzes law enforcement.

Of course, fraud differs from the marked offenses in some ways. However, this is not enough to differentiate them from each

other, since the main features coincide. A number of authors state that the scope of committing fraud is a very accidental circumstance and, in any case, does not determine the qualification of the committed act [5. P. 138].

Therefore, in our opinion, it would be correct and optimal to expand the disposition of Art. 178 of the RA Criminal Code, including many of the noted related compositions, including Art. 184 of the Criminal Code. In other words, fraud should become a generic concept that accurately expresses its legal essence. In this regard, in the legal literature, it is proposed to replace the term fraud with a new name: "Causing property damage with a mercenary purpose by deception or abuse of trust" [6]. By the way, this approach was laid down in the Criminal Code of the RSFSR in 1926. Similarly, fraud is defined in the Criminal Code of many foreign countries. So, for example, § 263 of the Criminal Code of the Federal Republic of Germany establishes the liability of a person for fraud, "which, with the intention of providing himself or a third party with an unlawful property benefit, will cause damage to the property of another by misleading him or keeping him delusional, presenting false facts as true or distorting true facts".

The noted approach will allow eliminating excessive competition between related offenses, the delimitation of fraud from other offenses will occur in accordance with the competition rule of general and special rules.

In addition, the above formulation will also include cases of causing property damage with indirect intent. There will be no need to prove intent to steal. The question, which is difficult to prove at the present time: "did the intent arise for non-repayment of the debt before receiving the borrowed amount or after?" Will not affect the qualification of the crime. Thus, fraud will include both cases of theft (seizure) of property, and other cases of property damage, but with a specified form of intent and the moment of its occurrence.

In addition, the amendment of Art. 178 of the RA Criminal Code in the indicated direction excludes unjustified qualification as fraud, careless infliction of property damage on the counterparty under the transaction.

Finally, the improvement of this and other norms of the Criminal Code, taking into account the noted features, is consonant with the provision enshrined in the noted norm.

This constitutional provision is directly related to the problem of the grounds for criminal liability. Its meaning is to limit the possibility of unjustified criminalization of acts that represent a form of realization of the constitutional right of citizens to freely use and dispose of their property, as well as arbitrary interpretation of the existing criminal law norms establishing the corresponding prohibition.

From the etymological and logical interpretation of the constitutional norm, it follows that the existence of grounds for criminal liability cannot be made dependent on the failure to fulfill civil obligations. In this case, it must be established that the person is not able to fulfill these obligations. It should be noted that this provision adjusts the boundaries of criminal law repression, thereby enabling the legislator to properly regulate criminal law relations in the field of property protection and economic activity. The mechanism for the implementation of the constitutional prescription, along with other circumstances, should be the basis for the criminalization of the relevant acts.

As you can see, the failure of a person to fulfill civil obligations that do not entail criminal liability must be confirmed by the fact that he does not have the opportunity to fulfill them.

The concept of "not being able to ..." needs to be clarified, especially since offenders will always motivate their behavior (actions) in order to evade criminal responsibility by the absence of such an opportunity. It seems that this criterion laid down in the constitutional provision has objective and subjective aspects, primarily of a legal nature.

Note that the lack of an objective "opportunity" to fulfill civil obligations indicates the absence of intent in the person's act. We can only talk about negligence or arrogance as forms of negligence (cases of innocent property damage are also possible). Consequently, in such cases, criminal liability is excluded.

From a methodological and legal point of view, the concept of "unable" should be considered through the analysis of the subject's ability and objective opportunity to fulfill contractual obligations, as a necessary condition for a correct decision on the presence or absence of signs of a crime.

For the recognition of an act as criminally unlawful, it is not enough to have a civil obligation and the need to act. An action (action or inaction) also presupposes the presence of a real opportunity to act - to fulfill obligations acquired from civil law relations.

The decision of the question of whether the subject had the ability and objective ability to perform his duties depends on the specific circumstances of the case. Therefore, the assessment of these requirements should be based on both subjective and objective criteria.

The subjective criterion is as follows: could a given subject, given his property status, physical and mental data, professional skills, knowledge, experience in the current situation, fulfill the duties that are required of him. At the same time, as V.N. Kudryavtsev notes, "the maximum limit of these requirements is an objective criterion: the obligation to perform the required

action. This duty, being a normative category, has a more or less general character" [7. P. 155].

The inability to fulfill civil obligations to repay debt, provide services, work may also be due to objective reasons. These include: deterioration of the property and financial situation of a person due to reasons beyond his control; bankruptcy; the victim's fault; unlawful interference (behavior) of other persons; the presence of force majeure; physical or mental coercion and other objective reasons.

In such cases and taking into account the specific circumstances of the case, a person who is unable or unable to fulfill his duties cannot be held criminally liable. It can bear civil law liability.

It follows from the content of the analyzed constitutional norm that non-fulfillment of a civil legal obligation cannot be considered a sufficient condition for the arrest of a person and the onset of criminal liability.

Only deliberate failure by a person to fulfill his contractual obligations can be considered a prerequisite for the initiation of criminal prosecution. In this case, it is necessary to establish, prove the presence of all elements and signs of the alleged corpus delicti.

The foregoing allows us to draw the following conclusions:

1. The current version of Art. 178 of the RA Criminal Code (fraud) presupposes the presence of direct intent to steal property or acquire the right to property.

At the same time, the infliction of property damage to the victim in a number of cases is possible with indirect intent.

In this regard, fraud should be defined without reference to "theft", but through "causing property damage through deception or abuse of trust." This generic term will include a variety of fraudulent practices, implying both direct and indirect intent. At the same time, the moment of occurrence of the criminal intent (premeditated or subsequently arisen intent) will not affect the qualification of the crime for causing property damage.

2. At the heart of the general distinction between criminal liability and civil liability associated with causing property damage to the victim is the constitutional provision that "a person cannot be deprived of liberty only on the grounds that he is not able to fulfill his civil law obligations".

3. In each specific case, it is necessary to establish the objective and subjective reasons for the person's failure to comply with civil law obligations. At the same time, if the basis of such an act (behavior) is intent, that is, the failure to fulfill civil legal obligations is the result of deliberate, deliberate actions, the noted constitutional norm is inapplicable. We can only talk about criminal liability. If the failure of the subject to fulfill its contractual obligations is due to negligence in relation to the act or the consequences that have occurred, criminal prosecution by virtue of this constitutional norm is excluded. Civil law liability is incurred for the committed offense.

4. To bring a person to criminal liability for fraud or other property crimes, it is necessary to have all the objective and subjective signs that characterize this act as a crime. Failure by a person to fulfill his civil legal obligations should be assessed in the context of the presence or absence of elements and signs of one or another corpus delicti (unlawfulness of the seizure of property, the presence of intent, as well as a selfish purpose, the gratuitousness of the seizure (circulation) of property, the circulation of someone else's property in his favor or in benefit of other persons, causing damage to the owner of the property through deception or abuse of trust, etc.).

5. Correct and full application of criminal law provisions providing for liability for many property and economic crimes is possible taking into account the analysis of the relevant norms of civil legislation.

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