

Fraud as a type of theft: issues of legal regulation

Fraude como uma forma de desvio de fundos: problemas de regulamentação legal

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Revista Brasileira de Direito, Passo Fundo, vol. 19, n. 1, e4921, janeiro-abril, 2023 - ISSN 2238-0604

[Received/Recebido: november 28, 2023; Accepted/Aceito: november 29, 2023;

Publicado/Published: january 24, 2024]

DOI: <https://doi.org/10.18256/2238-0604.2023.v19i1.4921>

Como citar este artigo / How to cite item: [clique aqui/click here!](#)

Abstract

Fraud as a type of theft is a common and difficult to detect (according to recent statistics) type of crime. The article considers the concept, content, and nature of fraud as a type of theft in Russian criminal law. The technique of fraudulently acquiring the right to someone else's property is identical but this study dwells on such an exclusive option for theft as the acquisition of property rights. The main method for solving the research problem is a comparative-legal statistical study of fraud clearance rates. The authors consider some articles of the current Criminal Code of the Russian Federation to analyze and draw a conclusion regarding the novelty and the need to adopt new articles. It is concluded that deception can be expressed in an active form, the deliberate communication of false or distorted information, or in a passive form, i.e., hiding the truth or legally significant facts. From the outside, it seems that the victim of fraud willingly transfers their property to the perpetrator. However, the real situation is not like that. The victim, being delusional, does not realize that they were deceived, and their trust was abused.

Keywords: Fraud; Type of theft; Criminal law; Punishment; Crime; Property; Forensic signs; Justice.

Resumo

A fraude como forma de desfalque é um tipo de crime bastante comum e difícil de resolver (de acordo com as estatísticas dos últimos anos). O objetivo do artigo é estudar o conceito, o conteúdo e a natureza da fraude como forma de furto no direito penal russo. A técnica de aquisição fraudulenta do direito à propriedade alheia é idêntica, mas estamos falando de uma variante exclusiva de furto como a aquisição de direitos de propriedade. O principal método estabelecido na base da solução do problema consiste no estudo estatístico jurídico comparativo das possibilidades de revelação desse tipo de crime como fraude. No artigo, os autores investigaram alguns artigos do atual Código Penal da Federação Russa, tentaram analisar e chegar a uma conclusão sobre a novidade e a necessidade de adotar novos artigos. Conclui-se que a fraude pode ser expressa de forma ativa, expressa no relato deliberado de informações falsas ou distorcidas, ou de forma passiva, expressa na ocultação da verdade, no silêncio sobre fatos legalmente significativos. Para uma pessoa de fora que observa o processo de fraude, parece que a própria vítima transfere sua propriedade para o criminoso. Entretanto, esse não é o caso. Na verdade, a vítima o faz iludida, sem perceber que se tornou vítima de fraude (abuso de confiança).

Palavras-chaves: Fraude; Forma de apropriação indébita; Direito penal; Punição; Delito; Propriedade; Características Criminalísticas; Justiça.

1 Introduction

The In this study, we considered some articles of the current Criminal Code of the Russian Federation and tried to analyze and draw a conclusion regarding the novelty and the need to adopt new articles. Article 159.1 of the Criminal Code of the Russian Federation provides for criminal liability for fraud in the field of lending, calling it the theft of funds by a borrower through providing a bank or other creditor with knowingly false and/or inaccurate information. The essence of the loan lies in the fact that the funds of one economic entity (the lender) are transferred to another entity that needs them (the borrower). The Civil Code of the Russian Federation provides for three types of loans: banking, commodity, and commercial. However, given that only money can be the subject of a crime, there is no criminal liability for obtaining a commodity loan (Gladkikh, 2014, p. 46). The stealing of funds in the process of obtaining an educational or consumer loan should also be qualified as fraud in the field of lending. We cannot but mention the catchphrase of Professor A.M. Yakovlev about the “backbone formula” of economic crimes – “fraud or breach of trust” that have become the most common ways to generate income. In this regard, there is a threat to unformed business ethics, the psychology of normal economic activity, and the rules of business that comply with the law. As a result, this process radically changes the business environment (Aliev, 2014).

2 Methods

It is important to understand that deception can be expressed in an active form (as the deliberate communication of false or distorted information) or in a passive form (through hiding the truth or concealing legally significant facts). From the outside, it seems that the victim of fraud willingly transfers their property to the perpetrator. However, the real situation is not like that. The victim, being delusional, does not realize that they were deceived, and their trust was abused. There are different types of fraudulent pretense (Komissarov et al., 2012).

The study considers the legal nature and essence of the object of theft. The generic object of theft is a set of social relations in the economic sphere. The specific object is a set of social relations that ensure the right of ownership or other legal rights to own, use, and dispose of one’s property. The immediate object is the right of ownership. Several thefts are two-object and have an additional direct object. The subject of theft has its own distinctive features that allow us to distinguish it from other elements of the crime (environmental crimes, arbitrariness, etc.). These features include social, material (physical, real), economic, and legal.

3 Results and Discussion

In recent years, the doctrine of criminal law and the law enforcement of different countries demonstrate a clear tendency to expand the general concept of theft and to include brand-new phenomena in this normative definition. From the moment of their emergence, there is an urgent need not only for adequate positive regulation but also for public protection. This concerns the dematerialization of theft and avoiding the material basis of the subject of criminal encroachment (due to the inclusion of property, obligation, information rights, and intangible goods in its subject), as well as the very mode of action in case of theft, shifting the emphasis of criminal law protection from real to legal obligations.

The constituent elements of a crime provided by Article 159.6 of the Criminal Code of the Russian Federation were due to an increase in cases of fraud using communications, information, and telecommunications networks, as well as the need to individualize the punishment for the crime committed. The number of Internet users is constantly growing.

Within the framework of this article, we dwell on fraud in the field of housing construction having the following forensic features. The object of the crime is public relations protected by criminal law that are subject to criminal encroachment. The object represents an integral part of the corpus delicti. The generic object of fraud is a set of social relations that ensure the normal functioning of the economy. The specific object of fraud is property relations in general. The direct object of fraud is property relations violated by a certain crime: private, state, municipal, or public property.

The intensity of a certain criminal encroachment on property relations when committing fraud is characterized by the property damage caused. The subject of a crime is a material object directly affected by the offender encroaching on the object. The subject of fraud is tangible assets (including money) transferred to the criminal by the victim under the influence of deceit or breach of trust. Deception in fraud is used to mislead the person who disposes of the property and thereby to ensure the transfer of property.

False information reported in case of fraud (or hidden information) can relate to any circumstances, in particular to legal facts and events, quality, the value of the property, the identity of the perpetrator, and their powers or intentions (Grudtsina et al., 2022). For example, L. had a privatized apartment in common shared ownership but hid this fact from the bodies implementing the State Housing Certificates federal target program. L. submitted fictitious data to illegally obtain a housing certificate for a gratuitous allowance for purchasing a dwelling in the amount of 1,522,500 rubles. L. cashed out this certificate and disposed of the money at their own discretion. These actions were qualified by the Russian court under Clause 3 of Article 159 of the Criminal Code of the Russian Federation as fraud committed on a large scale.

By virtue of Article 78 of the Criminal Code of the Russian Federation, if two years have passed from the date of committing a crime of minor gravity (causing damage of up to 1.5 million rubles under Clause 2 of the same article) and six years have passed since the day of committing a crime of medium gravity (causing damage of up to 6 million rubles under Clause 3 of the same article), the person is exempted from criminal liability since the statute of limitations expires. Previously, when committing theft by fraud in the amount exceeding 250,000 rubles and 1 million rubles, the act would have been qualified (in the absence of other signs) under Clause 3 and Clause 4, respectively, as a grave crime with the statute of limitations at 10 years. By increasing the amount of large and especially large damages for articles 159.1, 159.3-159.6 of the Criminal Code of the Russian Federation, the legislator lowered the public danger of criminal acts committed in the field of lending, using payment cards, entrepreneurial activity, insurance, and computer information.

In our opinion, this is unreasonable. Due to the expiration of the statute of limitations, the offender cannot be prosecuted, while the victim has suffered the damage since they are deprived of the opportunity to compensate for the material damage caused.

What kind of information is understood as unreliable and how does it differ from deliberately false? In this case, law enforcement bodies cannot provide the official interpretation of this concept. We believe that deliberately false information is the same as unreliable information; therefore, it is superfluous to indicate both concepts in the Criminal Law of the Russian Federation.

In addition, the formulation of the concept of fraud in the field of entrepreneurial activity is evaluative (fraud is associated with the deliberate failure to fulfill contractual obligations). In this connection, it is not clear how to qualify a partial fulfillment of such obligations. Enforcement examples are new articles of the Criminal Code of the Russian Federation which provide criminal liability for committing fraud. We would like to consider criminal sentences under articles 159.1-159.5 of the Criminal Code of the Russian Federation, drawing an analogy with those sentences that were passed by the courts for similar crimes in the same spheres of public life.

It is important to understand that the classic definition of fraud specified in Article 159 of the Criminal Code of the Russian Federation is universal. The effectiveness of this norm is conditioned by its proper understanding and application by the bodies conducting preliminary investigations and the judiciary rather than the differentiation of fraud into separate articles. Therefore, it is necessary to improve the professional level of law enforcement and judicial systems.

Most fraud cases in the field of lending are committed by persons who pretend to be bona fide borrowers. In this regard, another question arises: How to classify fraudulent actions in the field of lending committed by a bank employee or a credit

institution that provides false information about a third party who becomes only a formal borrower since fraudulent actions were committed without their knowledge? According to Article 159.1 of the Criminal Code of the Russian Federation, the actions of an official are not included in the constituent elements of this crime. Consequently, this act shall be classified in conformity with Clause 3 of Article 159 of the Criminal Code of the Russian Federation. This classification seems illogical since criminal law contains a special rule on loan fraud which should apply to all the perpetrators of this crime (Babaeva et al., 2022).

Banks can insure themselves against fraud committed by customers in several ways:

1. Setting fines for customers in case of proven cardholder fraud;
2. Regulating the deadline for the return of funds, i.e., the immediate return of the minimum amount to the client given that the remaining part of the debited funds is compensated after the investigation;
3. Specifying the procedure for reimbursement of unauthorized debited funds in client agreements;
4. Improving fraud risk assessment methods and developing customer awareness programs (Chuchaev, 2016).

The best solution to this problem is to create a unified system based on the all-Russian database and the rapid exchange of data between insurance companies, law enforcement agencies, and other interested organizations. This approach is being implemented in auto insurance. Now such fraud cases can lead to the fact that not a single insurance company or broker will work with such organizations, i.e., there will be no way to insure one's products (Inogamova-Khegay, 2013).

Speaking about the subject of crime under Article 159.6 of the Criminal Code of the Russian Federation, several scholars (for example, V.M. Aliev and E.V. Argun) believe that the objectives of modern law enforcement are unattainable if the subject of the crime is interpreted only as an object of the material world. It seems that computer information, in respect of which various manipulations are performed (input, deletion, blocking, modification), is a means of committing this crime rather than its object.

The following causes and conditions (factors) that give rise to economic crimes are commonly referred to as organizational ones: the lack of effective (primarily computer) technologies for investigating new forms of fraud causing property damage through deceit or breach of trust, as well as tax, customs, currency, and credit crimes (Aliev & Argun, 2016).

Computer fraud committed through the mobile bank option unites a set of crimes where a person gets an incentive to withdraw funds after receiving information about the receipt of funds to a certain bank account. On the contrary, the long-term embezzlement of funds from rightful owners should be qualified as a single ongoing

fraud (if such a person initially had the intent to embezzle in small amounts over a certain period). In the absence of a single intent in relation to all the cases of theft, they are subject to independent qualification according to the totality of their *corpus delicti*.

Within the framework of this article, one should dwell on such a type of fraud as fraud in the field of housing construction. This has the following forensic features:

1. A specific object of fraudulent encroachment is the sphere of housing construction which establishes bilateral or multilateral legal relations in connection with an investment in the construction of residential real estate;
2. A special composition of such crimes is an organized group consisting of authorized bodies and officials of construction and management companies that use the legal status of a construction company for the purpose of criminally misappropriating investors' funds; an organized group of officials from fictitious construction companies;
3. Attracting funds from investors in housing construction by concluding illegal transactions; the use of fictitious (knowingly false) documents by fraudsters for the construction of residential real estate;
4. Imitating construction activities by fraudsters, providing investors with false information about the construction of residential facilities;
5. Using corrupt ties with public authorities, administration, or banking institutions by fraudsters;
6. Taking possession of investors' funds under the guise of financial and economic activities of a legal entity, disguising criminal actions as a violation of civil obligations;
7. Causing damage to deceived investors on an especially large scale.

Fraud as a crime consists in reporting deliberately false information about the use of attracted investments for the construction of a residential building, and the real intentions of the developer to build a real estate object and transfer it to the ownership of the investor. A mandatory feature of fraud is the conclusion of fictitious contracts and the use of fictitious documentation during construction activities.

The abuse of trust is expressed through the misuse of the investor's confidence by members of an organized criminal group, which arose as a result of civil law relations. In this case, members of an organized criminal group fulfill some contractual obligations related to the construction of a residential facility (purchase building materials, build several floors, etc.) for a certain time without any intention to fulfill these obligations in full.

The criminal legislation of the Russian Federation does not contain a separate article for fraud in the field of housing construction and, in general, classifies fraud as a crime against property: unlawful acts that encroach on someone else's property rights

and cause material damage to the injured person, i.e., the owner of material goods. Property relations exist within the system of economic relations, which determines their economic nature and content. The housing construction industry (primary real estate market) is a separate sector of the country's economy, whose subjects operate under the conditions of an organizational and economic system. Thus, property relations are an object of criminal encroachments in the economic sphere. In this connection, fraud in the field of housing construction, including that committed by an organized group, should be classified as an economic crime.

At the legislative level, legal relations arising in the field of housing construction are regulated by the Land, Housing, Civil Codes of the Russian Federation, federal laws "On Basic Urban Planning", "On Land Management", and "On Architectural Activities", and other legal acts. The procedure for attracting investments is governed by the Law of the Russian Federation "On Investment Activity" and the Decree of the Government of the Russian Federation "On the Provision of a Lump-sum Subsidy for the Purchase of Residential Premises to Federal State Civil Servants". However, these legal acts regulate only the general provisions of investment in construction in Russia and do not consider the development of social-legal relations emerging in the field of housing construction. Thus, there is no clear procedure for attracting and using investors' funds at the legislative level. The main parties to legal relations in the primary real estate market are as follows:

- a. A manager is a financial institution that acts on its own behalf in the interests of the founders of property management and manages the funds attracted;
- b. A developer is a legal entity that, in accordance with the procedure established by law, has received the right to use a land plot for the construction of housing facilities or, in accordance with concluded agreements, has the right to dispose of living space in houses under construction (reconstruction);
- c. Investors (principals) are parties to investment activity, deciding on investing their own, loan and borrowed property and intellectual deliverables in investment objects.

Using gaps in the current legislation, unscrupulous developers conclude agreements on investing in housing construction and carry out the construction of a residential property without the necessary permits in violation of state building codes and design requirements (Komarova, 2003).

The dynamics of crime to a certain extent embodies the confrontation between efficiency and humanity in the fight against crime and reflects the state of law and order on any given scale (Yuzikhanova, 2006).

4 Conclusion

In view of the above, we can draw the following conclusions. Article 159 of the Criminal Code of the Russian Federation covers all types and methods of committing fraud introduced by the legislator in articles 159.1-159.6 of the Criminal Code of the Russian Federation. The classic definition of fraud in the Criminal Code of the Russian Federation is general, i.e., it covers all areas of social relations (Grudtsina, 2022).

In 2021, a clearance rate for committed thefts in the form of fraud amounted to only 46.9% (75,900 crimes) of the total number of crimes committed in Russia, which is an extremely low figure. These statistics show that the number of fraud cases in the overall structure of committed crimes is steadily growing. Thus, the share of fraud committed in the overall structure of crimes was 7.04% in 2019, 6.13% in 2020, and 6.09% in 2021.

The main features distinguishing between fraud and other forms of stealing are as follows: a) theft is the covert action of stealing; b) misappropriation and embezzlement is the entrustment of property to the guilty; c) larceny is the daylight (i.e., obvious to the victim) stealing of someone else's property; d) robbery is an attack for the purpose of stealing, committed with the use of violence threatening one's life or health (or the threat of its use).

The legislator differentiated measures of criminal law in the form of punishment for persons who committed fraud, depending on the scope, by reducing the maximum term of imprisonment and automatically transferring crimes to the category of less serious ones. In addition, the legislator distinguished between the amounts of major and grand damage, but the goal set was not achieved.

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