

ON SOME PROBLEMS OF CRIMINAL LEGAL REGULATION OF SMUGGLING OF CULTURAL VALUES

SOBRE ALGUNOS PROBLEMAS DE REGULACIÓN JURÍDICO PENAL DEL CONTRABANDO DE VALORES CULTURALES

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ABSTRACT

The problem of cultural property smuggling is not new to Russia. Every year, a huge amount of cargo is moved across the border of our country, including rare items, publications, etc. Many of these values are an essential component of the cultural wealth of Russia. This study mainly investigates some prevalent issues of criminal legal regulation of smuggling cultural values. To do so, the general scientific research methods within the framework of comparative, logical and statistical analysis are considered. Based on the results obtained, it can be inferred that the criminal law protection of cultural property from illegal transportation across the state border is far from ideal. Hence, it seems crucial to single out the smuggling of cultural property as a separate corpus delicti, including increased liability in the presence of qualifying signs to boost the practice of applying criminal liability for this crime.

Keywords: smuggling of cultural property; cultural property; smuggling; criminal law; customs control.

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RESUMEN

El problema del contrabando de bienes culturales no es nuevo en Rusia. Cada año, una gran cantidad de carga cruza la frontera de nuestro país, incluidos artículos raros, publicaciones, etc. Muchos de estos valores son un componente esencial de la riqueza cultural de Rusia. Este estudio investiga principalmente algunas cuestiones prevalentes de la regulación legal penal del contrabando de valores culturales. Para ello, se consideran los métodos generales de investigación científica en el marco del análisis comparativo, lógico y estadístico. Con base en los resultados obtenidos, se puede inferir que la protección penal de los bienes culturales contra el transporte ilegal a través de la frontera estatal está lejos de ser ideal. Por lo tanto, parece crucial señalar el contrabando de bienes culturales como un *corpus delicti* separado, incluida la responsabilidad aumentada en presencia de signos calificativos para impulsar la práctica de aplicar la responsabilidad penal por este delito.

Palabras clave: contrabando de bienes culturales; bienes culturales; contrabando; derecho penal; control aduanero.

INTRODUCTION

Foreign collectors are ready to pay huge sums of money for cultural objects that can replenish their collections, even if their export outside the country is prohibited. In general, the black market for cultural property and antiques is huge, and due to its coverage of almost all developed countries of the world, it becomes necessary to ensure their criminal legal protection from smuggling (Lepina, 2020). Thus, the relevance of the research topic is due to the active development of the black market for cultural objects and a sharp increase in its latency level in connection with the transition of sellers and buyers to the Internet (Abbott, 1989; Pruszyński, 1997; Klabbers, 2004).

In support of this thesis, we can cite the research of Yu.V. Puzyreva, who says that «the continuous and rapid development of electronic commerce in cultural property has made the market for cultural and antiquity objects even less transparent, since the sale of cultural objects via the Internet provides a convenient mechanism for offering assets of dubious origin on the international market» (Yu, 2008; Puzyreva, 2020). It was with his help that it became much easier to negotiate the purchase or sale of cultural property, including with representatives of foreign countries. And if there is demand, then there is also a supply, and therefore cultural values are actively transported across borders, thereby causing significant damage to the cultural wealth of our country (Buchel, 2004; Panteleeva & Baksht, 2017).

The study attempts to analyze some prevalent issues of criminal legal regulation of smuggling cultural values. Research on this topic is necessary to develop optimal and effective preventive measures that can help prevent smuggling and preserve the cultural heritage of the Russian Federation.

MATERIALS AND METHODS

The solution of the tasks set in the work was carried out on the basis of the application of general scientific research methods within the framework of comparative, logical and statistical analysis. In addition, some private methods of scientific research were used, for example, the formal dogmatic method, as well as the analysis of various sources to obtain the most accurate information. In addition

to scientific and educational literature and articles in periodicals, regulatory legal acts (for example, the Criminal Code of the Russian Federation), materials of judicial practice, statistical data posted by the Judicial Department of the Armed Forces of the Russian Federation, as well as information analytics of the Customs Service were used.

Within the framework of the presented work, articles of research scientists engaged in the development of the problems of our chosen research topic were used. In particular, the work of E.S. Kalashnikova (Kalashnikova, 2020), as well as the works of A.Kh. Pikhova (Pikhov, 2016), Yu.V. Puzyreva (Puzyreva, 2020), etc.

So, in the Criminal Code of the Russian Federation there is no separate article providing for the offense of criminal liability for the smuggling of cultural property. They are one of the list of subjects of criminal law protection listed in the disposition of Art.226.1 of the Criminal Code of the Russian Federation.

RESULTS AND DISCUSSION

Some scientists believe that the list of subjects of criminal law protection within the framework of Art.226.1 of the Criminal Code of the Russian Federation is too large. For example, E.S. Kalashnikov, in which we fully agree with her (Goldsmith & Posner, 2005; Kalashnikova, 2020). In other words, in the disposition of Art.226.1 of the Criminal Code of the Russian Federation lists too many subjects of criminal law protection, which significantly complicates the application of this article in practice.

Also, on the part of the legislator, it is not entirely advisable and logical to establish the same measure of responsibility for the smuggling of cultural property, and, for example, nuclear materials or weapons of mass destruction. We argue our position by the fact that smuggled weapons can cause much greater damage to the internal structure of the state, including the life and health of its citizens, and human life is the most important object of state protection and protection. Certainly, the smuggling of cultural property can have a negative impact on the maintenance of the cultural fund of the Russian Federation, but it is unlikely that it can affect the life and health of a person.

A similar, but not similar opinion is shared by T.V. Kondrashov, arguing that such a wording of the article is not entirely appropriate, since the movement of cultural property across the border “does not violate public safety” (Kondrashova, 2016). In general, it is rather difficult to agree with the opinion of the scientist, because the smuggling of cultural property, one way or another, damages public safety. Otherwise, it would not be a crime at all. In our opinion, it would be much more appropriate to say that the smuggling of cultural property does not have the highest degree of public danger. We believe that in modern conditions it would be wiser to single out the smuggling of cultural property as a separate *corpus delicti* under Art.226.2 of the Criminal Code of the Russian Federation. Such allocation will help to simplify the procedure for qualifying the committed act, as well as simplify the work with statistics.

So, turning to the data of judicial statistics at the Judicial Department of the Russian Federation (as of today, statistics are provided only for the first half of 2020), one can find that in total in the Russian Federation under Art.226.1 of the Criminal Code of the Russian Federation during this period of time, 158 people were convicted, of which 15 were convicted for committing a crime by an organized group. In addition, the separation of this crime into a separate composition will allow for a more

detailed study of all aspects of criminal responsibility for the commission of the criminal act in question, including on the issue of the measure of possible criminal punishment.

The next problem, which we would like to talk about, also arises from the excessive “vastness” of the content of the disposition of the article in question. Due to the fact that the smuggling of cultural property is not identified in the Criminal Code of the Russian Federation as a separate *corpus delicti*, it is impossible to find reliable official information on how many facts of this crime are committed annually during scientific research. Unfortunately, the legislator does not keep a separate record of how many persons the court issues a conviction on the fact of illegal smuggling of cultural values. Here, we note that a separate record is not kept in relation to other subjects of criminal law protection of Art.226.1 of the Criminal Code of the Russian Federation. In our opinion, this is a significant omission, since the lack of such information significantly complicates the conduct of scientific research on this topic. These data are important for the implementation of not only theoretical research, but also the development of practical recommendations aimed at countering the smuggling of cultural property.

For example, the Belgorod customs service annually confiscates many items of cultural property, which are then transferred to museums and archives in the Belgorod region and other regions. So, in 2020, the Museum of Folk Culture and the Historical and Art Museum-Diorama of the city of Belgorod received such confiscated cultural values as prints of the 19th century, the icon “Savior Almighty” in the salary of the late 19th century, etc. (Cultural values confiscated at the border were handed over to Belgorod museums) And here a completely natural question arises - and what is generally understood by cultural values? This question causes a lot of confusion among theoretical scientists and practitioners.

The first normative legal act, which gave the criteria by which a particular cultural object can be classified as cultural property, was the 1972 Convention on the Protection of the World Cultural and Natural Heritage. After analyzing the text of this international act, we will see that the legislator operates with the concept of “cultural heritage”, the meaning of which is revealed in Article 1 of the Convention. At the same time, the creators of the Convention share the concepts of “cultural” and “natural” heritage, and the first term combines both monumental monuments of architecture and art, and objects of painting, elements of architecture, etc. In other words, in this case we are talking about some then material objects.

As for Russian legislation, Art.3 of the Fundamentals of the legislation of the Russian Federation on culture reveals the content of the concept of “cultural value” as a set of “moral and aesthetic ideals, norms”, as well as languages, dialects, works of culture and art, results and methods of scientific research, etc. That is, this definition according to its content, it unites both material objects and objects of a spiritual nature (Sharma, 2004).

Analyzing article 5 of the Law of the Russian Federation of April 15, 1993 No. 4804-1 “On the export and import of cultural property”, we see that within the framework of this regulatory legal act, cultural property is defined as “movable objects of the material world ...”. That is, already in this law the concept of “cultural value” is significantly narrowed down in content.

Federal Law of June 25, 2002 No. 73-FZ “On objects of cultural heritage (historical and cultural monuments) of the peoples of the Russian Federation” does not operate with the term “cultural value”, however, the general meaning of the content of the term “object of cultural heritage” is similar to the

content of the term “cultural value” from the previously mentioned Law of the Russian Federation.

A natural question arises - what cultural values should be considered as contraband within the framework of the criminal law and why are there such discrepancies in the understanding of the same term in various regulatory legal acts of the Russian Federation?

It is quite logical that if we talk about the application of Art.226.1 of the Criminal Code of the Russian Federation, then we are talking about the smuggling of material values, since even from the point of view of logic and common sense, the smuggling of some intangible cultural values is impossible (for example, language, moral norms inherent in any culture, etc.). It seems necessary to bring all the presented definitions of the term under consideration to a “single denominator” or to make it in the note to Art.226.1 of the Criminal Code of the Russian Federation, a footnote to the normative legal act that should be followed when determining the content of the term “cultural value”. Such a document may well be the Decree of the Government of the Russian Federation of September 14, 2020 No. 1425, within the framework of which the criteria for classifying movable objects as cultural values and classifying cultural values as cultural values of special historical, artistic, scientific or cultural significance are approved. In addition, according to N.Yu. Sudnikova, the new procedure adopted on January 01, 2021 will be able to bring some clarity examination of cultural property (Sudnikova & Grinevich, 2020).

In the Belgorod region, judicial practice concerning the issues of criminal liability for the smuggling of cultural property is not large. When analyzing open sources, we found only two cases: one was convicted, the other was acquitted. In particular, the Sverdlovsk District Court of Belgorod passed judgment No. 1-158/20169 of May 31, 2016 to the citizen A.A. Gnatchenko, who tried to smuggle cultural property from Russia to Ukraine, hiding it from customs control (Schindler & Gautier, 2019).

As for the judicial practice in the Russian Federation, it seems to be much more diverse. For example, the Leninsky District Court of Omsk sentenced citizens A.A. Budnikov to three years' imprisonment by judgment No. 1-545/2018 of September 27, 2018 and Pyatakov A.Yu. According to the materials of the case, the convicts illegally acquired the bone remains of fossil animals (which, according to the results of the examination, were recognized as cultural value), agreed to purchase these remains from them by foreign citizens, and tried to send them by mail to the USA, France and Australia. Illegal actions of citizens were suppressed.

As another example, we can cite the Verdict of the Khankaysky District Court of the Primorsky Territory No. 1-103/2019 of August 29, 2019, according to which five citizens were found guilty of committing a crime under Part 1 of Art.226.1 of the Criminal Code of the Russian Federation. According to the materials of the case, they attempted to redirect mammoth tusks to China, which, according to the expert's opinion, were classified as cultural property (Setha, 2000).

If we turn to foreign practice, we will see that the smuggling of cultural property in the Russian Federation and abroad differs not only in legal regulation, but also in its content. P.A. Novikova quite rightly asserts that in the Russian Federation, icons and other religious items become the main items of smuggling, and abroad - paintings, engravings, sculptures, weapons, etc. (Novikova, 2015).

This is largely due to the national flavor, since it is Orthodox icons that are the main reflection of Russian culture, as a result of which they are so highly valued on the black market. According to the

research carried out by M.M. Boguslavsky in 2012, among foreign countries Italy suffers most from the smuggling of cultural property, since it is in this country that more than 60% of the total mass of art objects is located (Boguslavsky, 2013; Januszkiewicz, 2015). Every year in this country, more than 18 thousand thefts of cultural values are committed, which are exported abroad and resold in private collections for huge sums of money.

All this combined has led to the fact that the overwhelming majority of foreign countries have developed rules for the export of cultural property, the violation of which entails criminal liability. These countries include, for example, Germany, India, Mexico, etc. In addition, in some countries, a licensing procedure for export goods has been introduced, and in the absence of a license, this or that cultural property cannot be moved across the border. For example, in Mexico, the issuance of a license for the export of archaeological cultural monuments is prohibited. In Germany, the Federal Law of August 6, 1955 "On the Protection of German Cultural Heritage from Export" is in force, which also establishes the need to obtain a special permit for the export of an object that is a cultural property for the country. At the same time, the law determines the list of bodies that can issue such a permit - this is the Ministry of Culture of the Federal Republic of Germany or the Ministry of Higher and Secondary Education of the Federal Republic of Germany.

Also, in foreign countries, an effective system of interaction between customs officials and the police has been established, which makes it possible to more quickly respond to attempts to smuggle cultural property from the country and suppress them. Čevers reveals in great detail some aspects of countering the smuggling of cultural property in his article "Smuggling of cultural property as a threat to the intellectual safety of the society: criminal law and its challenges" (Harris, 1991; Čevers & Čevers, 2021).

Thus, we see that the customs authorities annually suppress the smuggling of cultural property, initiate criminal cases and, based on the results of their consideration, issue reasonable sentences. However, a completely natural question arises: how can the commission of this crime be reduced and prevented, and what preventive measures can be taken?

First of all, we believe that it is necessary to improve the criminal legislation in terms of the formulation of the norms of the criminal law. Earlier, we have already said that it would be more expedient to single out the smuggling of cultural property as a separate corpus delicti under Art.226.2 of the Criminal Code of the Russian Federation. In addition, it would be quite reasonable to highlight a number of qualifying features. For example, A.Kh.Pikhov speaks of the need to include such qualifying features as the commission of the crime in question using the Internet, as well as the commission of smuggling by a group of persons by prior conspiracy (Mourato & Mazzanti, 2002; Yu, 2008). We are in solidarity with the opinion of the scientist, and we believe that such a novel will be a significant step towards improving the criminal legislation related to smuggling.

In addition, it is necessary to carry out work to improve the qualifications of customs officers, as they are the ones who carry out the main actions aimed at countering the smuggling of cultural property. In particular, this can be done by organizing mandatory refresher courses on issues related to the determination of the cultural value of objects transported by citizens across the border, etc. It is also necessary to establish closer cooperation between customs services and law enforcement agencies, since only thanks to the coordinated actions of these two structures, it is possible to promptly suppress smuggling and block the marketing channels of cultural property, as well as to identify and suppress

the work of organized groups.

CONCLUSION

Based on the foregoing, it can be concluded that the current state of the criminal law protection of cultural property from their illegal transportation across the state border is far from being in an ideal state. A thorough study of both criminal legislation and the practical activities of customs and law enforcement officials is required. In particular, we consider it necessary to single out the smuggling of cultural property as a separate *corpus delicti*, to include increased liability in the presence of qualifying signs in order to improve the practice of applying criminal liability for this crime, as well as to simplify the work with statistical data, which will become more objective.

To develop a more optimal system of interaction between the police and customs authorities, as well as to improve the regulatory legal framework governing the procedure for importing and exporting cultural property across the border, it is necessary to study the experience of foreign countries, which seems to us to be more extensive and richer than the Russian Federation. We believe that the reception of foreign experience will have a positive effect on the formation of an effective system for protecting cultural values from criminal encroachments in our country.

We also consider it necessary to bring to a single model the scattered definitions of the term “cultural value”, which take place in different regulatory legal acts.

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