

Problems of Qualifying and Detecting Illegal Organization and Conduction of Gambling

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Keywords: criminal law, operational search activities, qualification of crimes, gambling, gambling business, detecting organization of gambling, conduction of gambling.

Abstract: This article studies relevant problems of qualifying organization and conduction of gambling that cause problems in their detection. Special attention is given to developing operational search activities as a complex legal mechanism. The research conclusion underlines the necessity for a systemic approach that could resolve discrepancies in different scientific disciplines; stop promulgation of specialized academic interest and inability to compromise; overcome biased thinking. The study aims to provide an all-encompassing analysis of qualifying and detecting illegal organization and conduction of gambling activities. In order to do this, the authors have outlined the following tasks: to provide the perspective of national legal theorist and foreign specialists on qualifying and detecting illegal organization and conduction of gambling activities in modern society. The comparative legal analysis, combined with general scientific methods, enabled to study examples of the present-day court practice concerning qualifying and detecting illegal organization and conduction of gambling.

1 INTRODUCTION


The desire to take a chance and gamble can be found in any culture at any time period. However, gambling is discouraged in most countries, as it harms interests of individuals and the government. Instead of creating new public goods, gamblers strive to redistribute already existing resources for personal gains, which could eventually lead to nationwide economic stagnation or recession. This necessitates imposing a complete ban or strict limitations on organizing and conducting gambling.


State regulation of gambling in Russia has a long history. Gambling is a relatively new type of business in this country, yet it can be described as one of the most latent and criminalized service industries. This is caused primarily by its significant turnover of cash funds and difficulty to establish proper industry-wide supervision (Smagorinsky, Yevstifeyeva, 2018). In the Russian Federation, there is currently a negative


situation concerning gambling business, partially due to crime qualification problems that consequently hinder detection of gambling crimes by law enforcement operatives.


It should be noted that modern legal science pays much attention to ideas of national theorists (Piven, 2018; Zatsepin A.M., Zatsepin M.N., Filippova O.V., 2018; Kovalenko, 2019; Sukhanov A.V., Genzyuk E.E., Kulikova A.A., Barashyan L.R., 2019;) and foreign specialists (McMullan John L., Perrier David C., 2003; Gainsbury S.M., Angus D.J., Blaszczyński A. 2019; Estevez A., Jauregui P., Lopez-Gonzalez H., 2019) on problems of qualifying and detecting illegal organization and conduction of gambling.

This research aims to analyze problems of qualifying and detecting illegal organization and conduction of gambling.

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2 MANUSCRIPT PREPARATION

This study has examined scientific literature on qualifying and detecting illegal organization and conduction of gambling, including works of both national and foreign legal theorists.

Thus, this analysis of problems of qualifying and detecting illegal organization and conduction of gambling activities is based on scientific and legal practice materials.

3 RESULTS AND DISCUSSION

Legal regulation of gambling is complicated by the wide variety of activities that can be categorized as such. Article 171.2 of Russian Criminal Code provides a blanket norm, with references to Federal Law No. 244-FZ of December 12, 2006, "On state regulation of activities associated with the organization of and carrying out gambling and on amending individual legislative acts of the Russian Federation". The legislators gave an overly abstract definition, while the said federal law regulating respective public relation does not provide a list of such activities. As a result, it is difficult to categorize specific games as gambling. Current scientific literature provides several definitions of gambling games. Criminal law theory also has no unified approach to defining this notion.

For instance, V.D. Legotkin describes the gambling game as a productive activity related to redistribution of material wealth between its participants, who are engaged in this activity due to unfair random-based redistribution, mercenary motives and absence of mechanisms controlling players' emotional condition (Legotkin, 1991). The mentioning of mercenary motives that indicate illegal obtaining of material gains leads to the conclusion that the author studies the notion of gambling games only in the context of criminal activities.

O.A. Ivanova believes a gambling game is a paid game, as agreed on by its participant and (or) organizers that is performed for the purpose of winning in the way established by an agreement between participants and (or) organizers (Ivanova, 2016).

The "payment" factor of gambling games distinguished by the author (Ivanova, 2016) is worthy of interest, yet it can hardly become the reason for excluding "randomness factor" from the definition. Besides, this definition seems applicable to situations, in which the winning depends on participants'

strength, skills, etc. (for example, sports games involving money wagers).

We consider it impossible to fully agree with the said definition of gambling games due to following arguments:

1) indication of a licensed organizer limits application of the definition for cases of organizing and conducting gambling on special gambling zones on the basis of permit (i.e., not on the basis of license);

2) it is unclear why the author considers that an attribute of a gambling game is randomness of its outcome that can be influenced by the participants. The whole point of such entertainment is the uncertainty of its result. Otherwise, there is no reason to organize a game, outcome of which (e.g., winning) can be directly influenced by the player;

3) it seems excessive to specify the fact that agreement on winning is aimed at one party getting financial gains at the expense of another party. The notion of winning, judging by its etymology (getting something through playing or drawing prizes; something that has been gained in such manner), involves obtaining material gains.

Having stated that, a gambling game can be understood as an activity aimed at fulfilling on specified terms an agreement between parties on random-based winning.

Criminal law theory does not have significantly differing notions of organizing gambling activities (Likholetov 2017).

According to R.A. Sevostyanov and E.V. Prosvirin, this notion involves any activities related to creating conditions for gambling: installing slot machines, equipping casino halls, hiring personnel for conducting games etc. (Sevostyanov, Prosvirin, 2013).

O.P. Naumenko defines organization of gambling as any activity aimed at creating conditions for opening a gambling facility or ensuring its further functioning (Naumenko, 2016). However, it is unclear why the author decided to make a distinction in her definition between facilitating opening a facility and its functioning, as the latter is hardly possible without the former.

I.N. Mosechkin offers the definition of illegal gambling organization as processes of creating and financing conditions for making and fulfilling agreements on risk-based winning, as well as management of such conditions (Mosechkin, 2016). However, creation of said conditions most probably includes their financing as well.

Thus, organization of gambling should be understood as a complex of activities, which final result is creating conditions for making risk-based

agreements on winning with an undetermined number of participants on specified rules. They can include obtaining legal permit for this type of activities, obtaining property and equipment for gambling, hiring personnel etc.

We can conclude that conduction of gambling involves performing activities on making and fulfilling risk-based agreements on winning between an undetermined number of participants (or at least one participant) on specified rules. Such activities should be understood as obtaining monetary resources for participation, provision of gambling equipment, payment of winnings, etc.

As of now, criminal law science lacks proper analysis on what should be considered the final moments of gambling organization and conduction. The Supreme Court has not provided any official clarification of this matter. However, legal theory has an examination of similar attributes for crimes stipulated by Article 232 of Russian Criminal Code - Organization or Maintenance of Dens for Consuming Narcotic or Psychotropic Substances.

Given the specifics of gambling activities mentioned above, a more accurate point of view would distinguish the final moment of a criminal action as the moment when a person completes activities aimed at making risk-based agreements with an undetermined number of participants on specified rules

Such activities should include a set of minimally required but sufficient actions that ensure conduction of gambling. The final moment of illegally organizing gambling activities as a criminal action must be estimated basing on actual circumstances of a committed crime, with ability of a gambling facility to conduct games being the decisive criterion.

The fact of an illegal gambling facility beginning to function as such is irrelevant for qualifying its activities as a finished criminal action.

Given this, illegal organization of gambling should be considered finished the moment a person fulfills minimally required activities that ensure making risk-based agreements on winning with an undetermined number of participants on specified rules.

Distinguishing the final moment of a criminal action stipulated by Article 171.2 of Russian Criminal Code – conduction of gambling activities – may face certain difficulties caused by the nature of such games.

Conduction of gambling activities should be considered finalized the moment parties fulfill a minimal set of conditions of their risk-based agreement on winning.

Given the proposed definition of a gambling game as an “activity aimed at fulfilling on specified terms an agreement between parties...”, we can conclude that such an agreement cannot be fulfilled unilaterally, i.e., the organizer’s provision of opportunity for participation is insufficient. This fact must incentivize the other party to fulfill activities they have agreed on.

The organizer’s activities on conducting gambling demonstrate attributes of a public offer, i.e., the opportunity to participate is provided to an unlimited number of people and only those who agree on specified terms and fulfill them can use said opportunity.

It is assumed that conduction of gambling activities will be finalized when two conditions are simultaneously met: an organizer provides opportunities for participation (e.g., access to gambling equipment) and a participant bets money as a wager. The former condition is deemed secondary – the decisive factor is the participant’s acceptance to participate demonstrated by giving money as a wager.

If the money has been wagered, the inability to participate in the game that does not depend on the organizer (power outage, slot machines’ software malfunction etc.) or was caused by force majeure circumstances should not be considered a reason for qualifying the crime stipulated by Article 171.2 of Russian Criminal Code as unfinished.

In cases when the organizer intentionally does not provide access to the game after the wager has been made, it is possible, given other circumstances, to consider finding attributes of a fraud in the organizer’s actions.

Thus, conduction of gambling should be considered finished from the moment the organizer receives money from the participant as a wager granting opportunity to participate in the game according to a risk-based agreement on winning under specified rules.

Besides, the organizer of gambling is understood as the “legal entity performing activities on organizing and conducting gambling”. However, Article 19 of Russian Criminal Code stipulates that only an individual can be considered the subject of a crime. Such ambiguity in understanding and clarification of the legal disposition causes various issues in legal practice. In fact, construction of the notion of crime in this manner, the legislators provision that a legal entity can be the subject of a crime. Yet in practice responsibility for this entity’s actions is born by an individual found guilty, i.e., actions of an organization are associated with actions of a particular person who demonstrates attributes of

the subject of a crime. If a crime is committed not by the direct leader of an organization but by a subordinate employee, the owner in most cases bears responsibility as an accomplice, as provisioned by respective part of Article 33 of Russian Criminal Code.

Current issues of qualifying organization and condition of gambling cause problems in detecting and countering this type of crime. Because of this, further development of operational search activities as a complex mechanism greatly depends on a systemic approach that would resolve discrepancies in different scientific disciplines; stop promulgation of specialized academic interest and inability to compromise; overcome biased thinking. Regulatory acts that are now in effect specify law enforcement subjects tasked with crime detection and prevention. According to Article 151 of Russian Criminal Procedure Code, an exclusive competence to investigate organization and conduction of illegal gambling activities is given to the Investigation Committee of the Russian Federation. Meanwhile, detection of illegal gambling and other economic and corruption crimes through operational search activities is performed by economic security and corruption prevention departments authorized to engage the whole range of such law enforcement activities.

Nowadays, apart from video surveillance systems, passwords and signals for regular visitors, informing about the gambling venue via cellphone and other methods, organizers of illegal gambling more often use residential premises, creating additional difficulties in detecting and protocolling criminal activities.

The following factors must be taken into account while detecting this type of crime:

- large number of persons capable of organizing and conducting illegal gambling and their characteristics;
- clandestine nature of illegal gambling facilities organized outside gambling zones;
- subjects of these crimes are often as educated and skilled as investigators and operatives.

Detection of illegal gambling organization and conduction has a specific structure. In general, this large and multi-aspect work can be divided into the following stages:

1) detecting attributes of crimes provisioned by Article 171.2 of Russian Criminal Code and the people involved;

2) preliminary verification of primary information;

3) making a decision basing on primary information.

In our opinion, the following main objects and directions of operational search can be applied to this category of crime:

- illegal gambling facilities (clandestine gambling rooms and casinos) using slot machines, poker tables and other equipment;

- gambling facilities operating under the guise of lotteries, including those using modified slot machines;

- internet cafes and computer clubs using online casino technologies for gaming, including special programs with Internet access;

- bookmaking agencies using modified slot machines under the guise of legal betting activities;

- persons who can be prone to organizing and conducting illegal gambling due to their qualification, skills and social conditions;

- persons who can participate in preparing and committing such crimes due to their criminal background (prior convictions for similar crimes); professional skills of gambling facilities' employees; connections to criminals (organizers of illegal gambling);

- persons engaged into conduction of illegal gambling activities.

While examining sources of operationally relevant information, special attention should be given to obtaining information from other agencies and law enforcement departments. Personnel of different agencies and department, apart from information relevant for their work, can obtain data directly or indirectly indicating on illegal gambling activities. However, the practice shows that such information is often underestimated in terms of its importance for other agencies or even colleagues from the same law enforcement department. As a result, additional data on objects of interest do not reach the addressee. This can be explained by the fact that workers of other agencies tend not to receive information irrelevant for their activities and even if they receive this information, in many cases they do not check it or submit to respective agencies.

Effective detection of illegal gambling also depends on tactical planning, cooperation between economic security and corruption prevention departments and state authorities supervising organization and conduction of gambling. This makes it possible to use the obtained data for opening a criminal case and getting investigation evidence on illegal organization and conduction of gambling.

The most problematic part of preliminary verification involves examining seized equipment

and classifying it as gambling ones. There is no official technical regulation that can be approved only by the Government of the Russian Federation, according to which gambling equipment can be classified and distinguished from lottery and other devices.

4 CONCLUSIONS

Improving legal regulation of gambling is partially complicated by necessity to quickly adapt to technological progress. Since the Internet appeared 25 years ago, gambling has become more diverse and available and social activity related to it has increased. Consequently, lawyers, legal theorists and practitioners have to deal not only with the issue of making clear legal provisions to address qualification issues but also of predicting development tendencies in the gambling industry and ensuring the law corresponds to the present-day situation, as organizers of gambling activities are always striving to benefit from discrepancies and uncertainties of current legislation.

Considering the facts mentioned above, it seems necessary to develop different models for resolving these challenges. For better understanding the ways gambling industry functions and develops, it is worth studying foreign legislative practices, as they can help to reveal the most possible qualification-related problems.

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