III. CRIMINAL LAW AND PROCEDURE

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LAWMAKING IN THE SYSTEM OF CRIMINAL LAW REGULATION**D. N. Sergeev**

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Introduction: the article substantiates the necessity of a separate approach to criminal lawmaking. It covers specific features of criminal laws and the requirements for the laws these features imply. **Purpose:** to define an acceptable model of criminal lawmaking and its basic principles, based on the analysis of current criminal legislation in connection with the features of a criminal law. **Methods:** the article is based on specific juridical methods of cognition (technical method and comparative law method) as well as the method of modeling and a number of sociological and general scientific methods. **Results:** the current state of the Criminal Code of the Russian Federation is critical. The Code does not meet the basic requirements for the laws of this kind. **Conclusion:** the author suggests stabilizing criminal legislation, creating an independent committee for assessing the Code and framing criminal law policies, and also adopting a new model of criminal lawmaking. The author proves particular importance of law drafting documentation for subsequent interpretation of criminal law regulations. The grounding of a draft law must be complete, the law's objective, its major characteristics and the meaning of the terms applied must be fully explained. For this purpose, it is suggested to divide draft laws into three groups: acts aimed at criminalization of a deed; acts aimed at decriminalization of a deed; acts altering other provisions of criminal law. Each draft law is to undergo a linguistic, technical, criminological and anti-corruption expert review as well as to be discussed by an independent committee. The author proves the necessity of applying a “package” method of amending the Criminal Code, which implies that amendments should be adopted once a year at most.

Keywords: features of criminal law; criminal law regulation; criminal code; instability of criminal law; criminal lawmaking; grounding of a draft law; model of lawmaking; principles of criminal lawmaking

ЗАКОНОТВОРЧЕСТВО В СИСТЕМЕ УГОЛОВНО-ПРАВОВОГО РЕГУЛИРОВАНИЯ

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Введение: статья посвящена обоснованию необходимости особого подхода к уголовному законодательству. Рассматриваются специфические признаки уголовного закона и обусловленные ими требования к самому закону. **Цель:** на основе анализа текущего состояния уголовного законодательства во взаимосвязи с признаками уголовного закона сформировать приемлемую модель уголовного законодательства и его основные принципы. **Методы:** статья подготовлена на основе специально-юридических методов познания (формально-юридический метод и сравнительного правоведения), а также метода моделирования, ряда социологических и общенаучных методов. **Результаты:** современное состояние УК РФ является критическим. Кодекс не соответствует основным требованиям, предъявляемым к такого рода нормативным актам. **Выводы:** предлагается стабилизировать уголовное законодательство, создать независимую экспертную комиссию для оценки кодекса и выработки уголовной политики, а также принять новую модель уголовного законодательства. Обосновывается особое значение законопроектной документации для последующей интерпретации уголовно-правовых норм. Обоснование законопроекта должно быть полным, объяснять цель принятия акта, его основные характеристики и значение используемых при конструировании нормы терминов. Для этого законопроекты предлагается разделить на три группы: направленные на криминализацию деяния; направленные на декриминализацию деяния; направленные на изменения иных положений уголовного закона. Каждый законопроект должен проходить лингвистическую, формально-юридическую, криминологическую и антикоррупционную экспертную проверку и обсуждение независимой комиссией. Обосновывается необходимость введения «блочного» способа принятия поправок в Уголовный кодекс, при котором поправки должны приниматься не чаще одного раза в год при условии их широкого обсуждения до принятия.

Ключевые слова: признаки уголовного закона; уголовно-правовое регулирование; Уголовный кодекс; нестабильность уголовного закона; уголовное законодательство; обоснование законопроекта; модель законодательства; принципы уголовного законодательства

Introduction

The Criminal Code is one of two tens of codes of the Russian Federation and is one of approximately 5,500 federal acts. At the same time, we can say with confidence that the Criminal Code (hereinafter the CC) is significantly different from other legislative acts of the same hierarchical level not only by the subject of legal regulation but also by some special features.

The specific character of the Criminal Code is formed at the early stage of criminal law development. The stage of legislative development ("the birth") of the criminal act is often overlooked by legal scholars. Apart from legal drafting methods, theories of criminalization, decriminalization, penalization and depenalization are also quite fully elaborated in the sphere of criminal law making [8; 7]. The recent decade is focused on scrutinizing mistakes in the law making process in criminal law [3, p.94].

Matters of legislative work in developing criminal laws in the Russian science are not thoroughly elaborated, though it is obvious that such matters need special research. Firstly, the quality of the criminal act and its efficiency directly depends on the quality of legislative work. Second, the intent of the legislator and the objective of the criminal act cannot be ignored and must be taken into account. Third, lack of a model of passing new criminal acts causes negative consequences, thus affecting the importance of criminal law as a regulator.

A Comprehensive Overview of Specific Features of the Criminal Act

The Russian criminal law usually looks at the Criminal Code through the prism of its general features. Z. A. Neznamova distinguishes the following peculiarities of the criminal act in the hierarchy of normative legal acts: 1) it is solely a federal act;

2) it is adopted following a special procedure; 3) it is passed by higher bodies of power; 4) it has supreme legal force; 5) it is of normative character [10, pp. 56–58]. Taking into account the specific character of the subject of legal regulation, N. A. Lopashenko offers a different view on special features: 1) the criminal act contains criminal legal rules; 2) the criminal act is the result of the criminal law making process by the state; 3) the criminal act has the supreme legal force in the territory of the Russian Federation; 4) the criminal act is the only source of criminal law; 5) the criminal act is of a codified character; 6) the criminal act is based on the RF Constitution and generally recognized principles and rules of international law [8, pp. 52–54].

Most of the described features of the Criminal Code are typical for any code of any branch. But if to view the criminal act not only as a normative act, but as a part of the system of social control over crime, we can distinguish significant differences between the CC and other normative legal acts.

1. *The CC is a basis for considerable limitation of rights and freedoms.* By their nature, rules of the criminal act are paradoxical: on the one hand, they are designed to protect human rights and freedoms of citizens, their property, public order, public security and other public goods; on the other hand, such protection is provided by establishing criminal liability, which is a complicated mechanism of limitation of rights and freedoms of a person who committed a crime. Under part 3 of Article 55 of the RF Constitution, rights and freedoms of a person and a citizen can be limited by the federal law only to the extent necessary to protect the basics of the constitutional system, moral values, health, rights and legal interests of other persons, national defense and state security. The number of such limiting rights and freedoms of federal laws is quite big; however, none of them creates a legal ground for limitation of rights and freedoms to such an extent as it is stipulated by the criminal act. For this reason, there are many fundamental requirements to the CC, unlike to other legislative acts, which are accounted for by a fear of excessive limitation of rights and freedoms of a person. The list of such requirements is not exhaustive, it is endless: Art. 11 of the Universal Declaration of Human Rights (1948), Art. 7 of the European Convention for the Protection of Human Rights and Fundamen-

tal Freedoms (1950), Art. 9 of the American Convention for the Protection of Human Rights (1969), Art. 7 of the African Charter on Human and People's Rights (1995), Art. 49 of the EU Charter on Basic Rights (2000), etc.

2. *The CC has a direct impact on negative social processes in the society.* Any mistake, loophole, omission of the legislator or a collision of separate rules may provide fertile ground for committing crimes and pursuing such interests which are far from the tasks of the criminal act. M. A. Kaufman states, for example, that if deeds dangerous for the society and criminally liable are not recognized as such, it can lead to serious consequences, like to impunity of people guilty of crimes, and undermine the authority of the state power and rule of law [3, p. 95]. Excessive criminalization at the same time distorts the meaning and the content of criminal policy [3, p. 95].

3. *The CC is the only legislative source of the branch.* For this reason, the CC should be a comprehensive act without any collisions of rules. This feature has been formed for a long time and is considered as a fundamental one guaranteeing human rights and freedoms.

4. *The CC is the basic normative act of the whole group of branches of criminal cycle.* Due to its position among other normative acts, the CC should not be in conflict with the Criminal Procedure Code (CPC), the Penal Code (PC), and mixed elements of crime under the Administrative Offenses Code (AOC).

5. *The CC prohibits analogy of law,* which is not typical for any other branch of law. In this respect, rules of the CC must meet the test for completeness (sufficiency).

6. *The rules of the CC are socially and criminologically determined.* I. Ya. Kozachenko states that criminal law is a social value (spiritual realia), which to a certain extent is a litmus paper reflecting, on the one hand, steady moral values of the society against the attack of evil (crime) and, on the other hand, stern necessity and merciful ways of fight against crime by criminal law means [10, p. 19].

The said peculiarities of the criminal act dictate certain requirements to their content concerning the systematic character, causation, completeness and high quality of legal drafting methods. Unfortunately, the mentioned requirements are not

implemented in the Russian Criminal Code to their full extent.

For the last 25 years, criminal law of the Russian Federation has faced with another problem making the imperfection of law more vivid – its variability. At the very outset of “the time of change”, the regular upgrade of the Criminal Code was always welcomed positively by scholars who expected to move away from numerous amendments onto the way of modernization and depoliticization of legislation [5, p. 4]. But with a growing number of changes which did not cease even with the adoption of the CC in 1996, the CC has entered into another period of instability.

Impact of instability of the Criminal Code on efficiency of its application

Undoubtedly, criminal laws cannot be unchanged for a long time. New crimes, constant evolution of public relations, different views on criminal and societally dangerous activity lead to objective deterioration of law and require its modernization. However, its modernization “on the wheels” has given the Russian CC a special feature – its instability. “Excited by creative and legislative activity, the legislator is often taken away by immediate satisfaction and, therefore, is involved in chaotic cosmetics (retouch) of the CC instead of undertaking morally and economically justified long-term correction of the criminal law policy of the Russian Federation” [4, pp. 17–18].

Considering specific features and importance of the criminal legislation, L.D. Gaukhman states that instability of the CC is a threat to law and order [2, p. 87–88], and that constant change of the Code causes five major negative consequences: 1) violation of law by citizens due to its instability making citizens unaware of criminal prohibitions; 2) prolonged non-application of new rules of criminal law by law enforcement bodies and courts before the formation of such practice by higher courts; 3) difficulties in teaching criminal law and out-of-date literature; 4) difficulties in scientific research in criminal law subjects; 5) growing disrespect to the law in the society [2, pp. 105–107].

Indeed, the Code which is constantly amended is considered imperfect not only by specialists. 79 % out of 800 respondents – residents of the Ural Federal District – who took part in the poll conducted by students of the Ural State Law University (USLU) find the CC imperfect, and 87 % say that

the CC is not able to perform the tasks it is designed for. It shows disrespect to the Code by those subject to the preventive character of this normative legal act. The Code is professionally applied by many thousand operatives, investigators, prosecutors, judges and legal scholars. Constant review of the Code makes it difficult to apply it and leads to a permanent necessity to look for existing wording or the one to be applied to a certain case; as a result, there are mistakes, lengthy periods of time, and reviews of criminal case decisions already passed. 84 % out of 120 judges surveyed by the USLU students and 78 % out of 130 prosecutors of the Ural Federal District have encountered difficulties in application of the CC which occur due to the changeable character of criminal legislation rules.

What are the consequences of such instability of criminal law? In the letter on the necessity to change the legislator’s approach to criminal legislation reforms published in “Rossiyskaya Gazeta” (*Russian Gazette*) in 2010, leading criminologists declared that the Code is in its critical state [9]. The authors of the letter call for a complete review of the Code without changing its conception, because “it is impossible and even dangerous for the society to apply out-of-balance law on the fight against crime” [9]. “Manipulations” with the Code today may lead to probably not such evident consequences and, for example, contribute to the growth of crime in 10 or 15 years, and, in the short term, lead to unjustified limitation of human rights and freedoms.

We should understand that the CC will never be perfect and unaltered. Transformations in the society, economy and other spheres will inevitable have a considerable impact on criminal law. However, even in the conditions of change the Code may be stable, but for that reason it is necessary to review the current model of the criminal law making process.

New model of the criminal law making process

The law making model that exists today does not distinguish the CC among other acts. Considering the specific features of the CC, we need a comprehensive approach to the criminal law making process. A new model can be created by a few steps:

1. Stabilization of criminal legislation. It is possible by announcing the moratorium on introducing changes and amendments to the CC.

It is necessary to curb the desire of parliamentarians to adopt laws “in hot pursuit”, because anyway, such laws do not have retroactive power.

2. In-depth review of the current CC and the whole criminal policy of the state. For this purpose, it is necessary to establish a commission (a criminal law commission) on the independent assessment of the current CC which should be composed of judges, representatives of law enforcement bodies, legal scholars and representatives of legislative power. The commission should be vested with the power to collect all criticism of the CC and to elaborate the concept of criminal policy and further development of criminal legislation. Later, the commission may participate in the assessment of new bills on a regular basis.

The creation of special criminal law commissions is a usual practice in many states and territories. For example, the 1942 CC of Louisiana was prepared by the commission created at the College of Law in the state of Louisiana which included leading specialists in criminal law from different universities [13, pp. 127–128]. In Canada, reforms of the Criminal Code in the 1970s were made by a special commission composed of prominent scholars who prepared their recommendations on separate issues of criminal law [15, pp. 1–4; 16, pp. 2–3]. In Ireland, the codification of criminal law is made by a special commission composed of four leading specialists in criminal law and three representatives of law enforcement bodies [12, pp. 1–2]. The new codes in the Republic of Kazakhstan were created by the commission on reforming the CC and CPC.

3. The change in the procedure of introducing amendments to the CC. Certain steps in this direction have already been made; it proves that the Federal Assembly is aware of the problem [1]. Thus, on 13 July 2015 there was Federal Law No.266-FZ “On Introducing Changes to Article 8 of the Federal Law “On Enforcement of the Criminal Code of the Russian Federation” and Federal Law “On Enforcement of the Criminal Procedure Code of the Russian Federation”¹ passed under which changes to the CC are made only by separate federal laws

and cannot be introduced into the texts of federal laws changing (suspending, cancelling, terminating) other legislative acts of the Russian Federation or containing an independent subject of legal regulation, except for texts of federal laws which introduce changes to the CPC. The Law emphasizes the special position of the CC in the system of other rules, contributes to closer examination of amendments made to the CC, however, it does not change the scope of activities of the legislative body.

We consider that changes to the CC must be made on the basis of the following *principles of the criminal law making process*.

First, *draft laws must be thoroughly grounded and commented by the initiator* in the explanatory note. In particular, in criminalizing a new type of a deed it is necessary to prove the social danger of the deed in question (by statistical data, assessment of damage, experts’ views, foreign experience, etc.); to make a preliminary assessment of the impact of the new law on the deed in question and other crimes (it must be a criminologically grounded assessment); to give clarifications on the suggested wording of the elements of crime and explain the applied notions; to give reasons for the suggested sanction. V. D. Filimonov states that “the occurrence of new types of socially dangerous behavior does not always lead to the adoption of new rules in criminal legislation” [11, p. 71]. In his view, to solve the problem of criminalization it is necessary to establish the degree of social danger typical for crimes of these new types, and at the same time they must be rather widespread. The degree of incidence of such deeds sufficient for criminalization depends on the character and degree of their social danger: a more dangerous deed should not be widespread, and a less dangerous deed cannot be criminalized without a considerable number of corresponding deeds [11, p. 71]. These factors, however, are also not enough to solve the problem of criminalization of this or that deed. To begin with, we should see lack of a possibility to fight against antisocial deeds by non-criminal means. Criminal law is the last resort, the application of which in every separate case must be exclusive because it can cause a huge number of social, economic, moral and other consequences. If it is possible to effectively cope with this or that deed without criminal repression, such a deed should not be

¹ Federal Law of 13 July 2015 No. 266-FZ “On Introducing Changes to Article 8 of the Federal Law “On Enforcement of the Criminal Code of the Russian Federation” and Federal Law “On Enforcement of the Criminal Procedure Code of the Russian Federation”. *Collection of Legislations of the Russian Federation*. 2015. No. 29 (Part I). Art. 4392.

recognized as a crime. *The second factor*: the society must be ready for recognizing this or that deed a crime. Otherwise, the society will protest, thus contributing to a growing number of such crimes. A vivid example is the new wording of Art. 148 of the RF CC, the adoption of which was met differently by the society. After the adoption of this law, examples challenging the violation of the rule concerning religion-based insult reflected lack of consent in the society; the society is not ready to accept the deed criminalized by the legislator as genuinely criminal. The society must be prepared for the review of legal nature of such deeds, and the intention of the legislator to criminalize antisocial deeds should take into account this factor (to foresee gradual adoption of the rule or its suspension, to conduct public discussions of the draft law, public campaigns aimed at informing citizens, etc.). And, finally, *the third factor* is that the system of law enforcement bodies must be ready to discover, put an end and prevent such deeds. Otherwise, there might be a situation of random application of the rule, which will cancel its preventive significance.

In case of decriminalization of a deed, it is necessary to give reasons for its decriminalization (by statistical data, damage assessment, experts' views, foreign experience, etc.); to make a preliminary criminologically grounded analysis of the new law impact on the state of crime. Very often the legislator's approach to decriminalization is even less critical than to the imposition of criminal liability for this or that deed. As a result, the decision is made in a hurry, and then the situation is hastily remedied as it was with decriminalization of Art. 129 of the CC and, later, the return of the elements of slander / libel in Art. 128.1 of the CC.

In case of other changes of the Criminal Code, it is necessary to provide grounded clarifications on the necessity to make changes; to assess the impact of changes on crime and other factors.

If to analyze explanatory notes to the drafts of federal laws on introducing changes in the Criminal Code, we will see vivid examples of lack of understanding of the position of criminal liability in the system of social control and the mechanism of its impact on crime. For example, the justification of the necessity to adopt the so-called "anti-doping amendment" (Art. 230.1, 230.2, Federal Law of 22 November 2016 No. 392-FZ¹) is just one sen-

tence: "taking into account the increased number of violations of anti-doping rules as well as due to the necessity to adopt stringent measures of regulation by the state, the draft provides for the imposition of criminal liability for violation of anti-doping rules"². The explanatory note gives neither the analysis of the widespread character of the deed nor the conclusion concerning the social danger of the deed, nor clarifications of qualifying crime attributes and the chosen sanction. Instability and lack of thorough development of the act have led to the appearance of such a notion in the CC as "substance" which contradicts the notions like "matter" and "means" already used in Chapter 25 of the CC. Let us take another example. A famous package of amendments to the CC under the name Ozerov-Yarovaya provided for some amendments to 26 articles of the Code. The two-page explanatory note does not make any comments on the necessity to criminalize actions and make considerable changes in criminal law providing just general wording. For example, changing the sanction for some crimes is explained in the following way: "the analysis of law enforcement practice shows that for grievous crimes of the extremist and terrorist character the legislation provides for sanctions which are below the level of general liability imposed for grave crimes"³. The given explanatory note also contains terminology not typical for criminal law, for example, aid in an offence is said to be an active form of assistance, and terroristic activity is the most dangerous form of crime, etc.

Legislators underestimate the importance of law drafting documentation. If explanatory notes are written with high quality, they can be used to explain the purpose of adopting a law, understand the content of separate notions with their further clarification and application.

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tion and the Criminal Procedure Code of the Russian Federation (in the part concerning increased liability for violation of anti-doping rules)". *Collection of Legislations of the Russian Federation*. 2016. No. 48 (Part I). Art. 6732.

² Explanatory note to the bill No. 1027793-6. Available at: [http://asozd.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=1027793-6](http://asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=1027793-6) (accessed 01.12.2016).

³ Explanatory note to draft No. 1039101-6. Available at: [http://asozd2.duma.gov.ru/addwork/scans.nsf/ID/7ABA7463AC6322FB43257F8E004A6DF9/\\$File/1039101-6_07042016_1039101-6.PDF?OpenElement](http://asozd2.duma.gov.ru/addwork/scans.nsf/ID/7ABA7463AC6322FB43257F8E004A6DF9/$File/1039101-6_07042016_1039101-6.PDF?OpenElement) (accessed 01.12.2016).

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¹ Federal Law of 22 November 2016 No. 392-FZ "On Introducing Changes to the Criminal Code of the Russian Federa-

The content of the explanatory note should fully reveal the very essence of the rule of law. The Russian practice knows cases when the purpose and meaning of adopting a law does not correspond to the ones which have been crystallized in the practice of application or interpretation of this rule. For example, by Federal Law of 25 June 1998 No. 92-FZ, part 2 of Art. 24 of the RF CC was given a new wording to avoid ambiguity in understanding this rule. However, in practice, it made the discussion of this question in science and practice of interpreting this question even fiercer.

If the explanatory note were made completely, clearly and competently, it would be not just “an accompanying letter”, but a competent source for further interpretation of a rule of criminal law. In Finland, materials for draft laws which can be rather voluminous contain grounds for passing draft laws, i.e. the purpose of passing a law (the legislator’s intent). These grounds are used by courts in considering cases before judicial practice is formed; thus, explanatory notes are used as a source for interpreting a rule of criminal law [6, p. 12].

Secondly, the proposed draft must go through a linguistic, formally juridical, criminological and anti-corruption expert assessment and a thorough discussion by the criminal law commission. Assessments must be made in full accordance with the rules of experts’ activities. Conclusions on draft laws published on the site of “The automated system for legislative activities” (<http://asozd.duma.gov.ru>) are mostly made rather formally and their content is limited to a simple retelling of the text and quite rarely it is accompanied by any explanatory note. The involvement of the criminal law commission is very important for an independent assessment of a draft law. As I. Bentham – a founder of the theory of codified acts – mentioned, codes must be composed as harmonious and scientifically grounded systems by philosophers who have profound knowledge and are far from political processes [14, p. 1099]. Remoteness of experts from political processes will exempt random and populist amendments.

Thirdly, amendments must be passed by blocks, once a year at most. After going through the necessary procedures, the draft law must be referred to a corresponding parliament committee to

include the block of amendments into the Code, which will be discussed under general rules of adopting laws existing in the Russian parliament. The “block” method of adopting amendments is more correct and convenient because it excludes mistakes (the amendment is codified before being introduced in the Code and is placed in the system). By this method of changing a law, practice is also benefited because its representatives have time to get ready for changes to be made and study them before a draft law is passed. Many states introduce changes in criminal legislation by this way. For example, the existing Criminal Code was passed in the People’s Republic of China on 14 March 1997. Recently, there have been nine blocks of amendments: on 25 December 1999, 31 August 2001, 29 December 2001, 28 December 2002, 22 February 2005, 29 June 2006, 28 February 2009, 25 February 2011, and 29 August 2015. Project IX of amendments to the Code was published on 4 November 2014 and within a month every person could send his / her observations and proposals to the All-China Assembly of People’s Representatives (ACAPR). Later, these observations were considered by the commission of the ACAPR together with the main draft [17].

4. Representatives of legal science also indirectly contribute to the instability of the law. Proposals on improving legislation have become traditional for articles, dissertations, and reports at conferences. On the one hand, it demonstrates the imperfection of law, but, on the other hand, to a certain extent, it “whips up the legislative itch”. Nowadays, the science of criminal law is faced with a task to create instruments for experts’ thorough assessment aimed at practical application of developing matters connected with legal drafting skills.

Conclusions

Taking into account specific features typical for the criminal act in the system of other normative acts and corresponding to its position measures of social control over crime, the CC must be adopted and changed following a special order. This order must be built taking into account the features of the criminal act on the basis of the following principles of the criminal law making

process: draft laws must be explained and commented upon by the initiator; a proposed draft must go through a linguistic, formally juridical, criminological and anti-corruption expert assessment and a thorough discussion by the criminal law commission; amendments must be passed by blocks, once a year at most.

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