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Public Danger of the Individual and the Basis of Criminalization

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A b s t r a c t

Introduction: an analysis of the novelties of the Special Part of the Criminal Code over the past decade shows that the absolute majority of them are special norms, in fact, aimed not at establishing liability for a particular act, but at differentiating responsibility for already prohibited behavior depending on certain features, including characteristics of the subject of a crime. The revealed circumstance raises the question of taking into account of personality traits and their correlation with public danger as the basis for recognizing an act as criminal. *Purpose:* on considering criminal law, explanatory notes to draft laws, and the theory, to answer the question of taking into account public danger of the individual for the purpose of criminalization. *Methods:* formal logical and analytical methods, statistical method and interpretation method are used. *Results:* not only the question of understanding public danger is debatable in science, but also the question of the need to take into account public danger of the individual when determining the danger of an act. The analysis of explanatory notes to draft laws on the introduction of a prohibition in the Special part of the criminal law shows that when proving criminalization of an act, the content of the powers assigned to the person and the need to establish stricter liability are taken into account. This conclusion does not raise objections and, by and large, only confirms the positions expressed in science: if the subject of a crime is special, then public danger of the act increases due to its properties. Let us clarify that this is true for a special subject having an official, professional status, as well as a status arising from a special relationship with the victim. However, the issue remains open for acts with elements of administrative and criminal law prejudice, as well as for Article 210.1 of the Criminal Code of the Russian Federation. Conclusion: public danger of the act is recognized as the basis for criminalization, however, the question of whether public danger of the individual is included in its content remains debatable. The analysis of explanatory notes to draft laws, criminal law and theoretical studies allows us to conclude that the legislator obviously focuses attention on the personality of a perpetrator, including by giving his/her personal properties the meaning of a criminalizing element, including the only one. This is the case in acts with elements of administrative and criminal law prejudice, as well as in Article 210.1 of the Criminal Code of the Russian Federation, which, in general, indicates that the legislator takes into account public danger of a perpetrator due to his/her personal characteristics.

K e y w o r d s : public danger of crime and a criminal, criminalization, dangerous state of personality.

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5.1.4. Criminal law sciences.

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Introduction

Being one of the essential elements of a crime, the criminal legal category of public danger turns out to be somehow connected with other institutions of criminal law. The discussion of this issue in science by and large boils down to the question of the ratio of subjective and objective principles in understanding public danger. The same issue is considered when assessing the category in connection with the goals of criminalization. Traditionally, within the framework of the latter, the analyzed category is considered as a "decisive criterion" [1, p. 63], "the most important factor" [2] or the basis of criminalization [3]. Highlighting such a controversial category creates a paradoxical situation: on the one hand, the criminalization theory is designed to limit possible populism of the legislator in solving the issue of criminal and non-criminal and to give rationality to the use of criminal law enforcement by requiring the validity of the prohibitions imposed. On the other hand, this message is offset by the actual uncertainty and the lack of clear criteria or scales that make it possible to establish public danger as an objectively existing property of an act subject to criminalization.

In this regard, it seems quite logical to conclude that "it should be recognized as a given that at present a certain act or behavior of a person is recognized as a crime at the will of the legislator. The legislator determines whether this or that act (behavior) is dangerous and, as a result, criminal, relying on various circumstances and factor motives. Public danger in this system is derivative, secondary and gives this process a finite character and a legal justification" [4].

The analysis of legislative initiatives to novelize a special part of the criminal law over the last ten years confirms this idea in terms of criminal law prohibitions. Their origin is associated with the considerations of expediency, including political ones. At the same time, the basis for the appearance of another part of the novel, indeed, is the property of public danger as the actual or potential harmfulness of the act, which is reflected in the explanatory note in one volume or another and corresponds to the doctrine of criminalization.

The latter has a certain advantage of preventing a discussion about the distinction between crime and other offenses, depending on the presence or absence of public danger as an objectively inherent property of the act. Understood as harmfulness, public danger turns out to be inherent in any offense, including a crime, which, on the one hand, contravenes provisions of Part 1 of Article 14 of the Criminal Code of the Russian Federation. Its defectiveness is discussed in science in the relevant part and, on the other hand, clarifies the ease of legislative maneuvers in terms of intersectoral differentiation of liability. Decriminalization of slander and its return to the Special part of the criminal law after a short time is a striking example here.

Besides, this position corresponds to the provision expressed by the Constitutional Court of the Russian Federation that "a crime, unlike other offenses, must be characterized by criminal public danger" [5]. It is worth mentioning that in the criminal law theory there is a point of view that a crime has a certain degree (level) of public danger; it distinguishes crime from other types of offenses, "the specifics of the danger of a crime lies precisely in the nature and degree" [6, p. 25].

The indicated long-discussed approach to understanding public danger, however, does not eliminate the question of which elements and features of the composition of an act determine its actual or potential harmfulness.

Scientific discussion on correlation between public danger of an act and a perpetrator

Analyzing provisions of the 1919 Guidelines on Criminal Law of the RSFSR, which for the first time definitively reflected the material definition of a crime by indicating its public danger, V.N. Kudryavtsev notes that "the legislator took into account and reflected in the law all sides of public danger", meaning that "when determining the content of the criminal law prohibi-

tion, it considered not only objects of criminal encroachments, but also other elements of the composition in which public danger of the act was manifested" [1, p. 64].

However, there are other theoretical points of view, justifying the dependence of public danger of an act on any specific feature of the composition of a crime, such as an object of encroachment, a characteristics of the criminal consequence, a method of committing the act, a form of guilt and, finally, specifics of the criminal's personality [7, p. 28; 8–9]. In particular, L.M. Prozumentov indicates that "public danger of an act is determined only by its external expression ... The subject and the subjective side are not defining elements of its public danger" [10, pp. 26–28]. Guilt and the subject of a crime, according to the scientist, are only mandatory conditions for criminal prosecution. At the same time, the scientist associates the increase in public danger of crimes with a special subject with the "doubling" of the object of encroachment, when "encroachment violates two or more groups of public relations" [11].

This point of view has its supporters in the scientific community. However, modern criminal lawmaking seems to have other assessments, clearly shifting the emphasis from the act to the perpetrator and thereby drawing attention to public danger of the individual and his/her significance in the light of criminalization. As I. Gontar notes, "it must be recognized that the object enclosing, bearing the property of social danger, is precisely an individual with his/her own individuality. The act and behavior serve only as an indicator of social danger of an individual" [12].

In fairness, it should be noted that the issue has been discussed in literature for a long time. For example, in the above-cited work by V.N. Kudryavtsev "Grounds for a criminal prohibition", published in 1982, the scientist considers the dependence of public danger of individual acts on properties of a special subject of crime [1].

Taking into account public danger of the individual for criminalizing acts with a special subject

The resort to explanatory notes accompanying those bills that mediate criminalization of crimes with a special subject confirms the above-mentioned idea of the academician: in some cases, the legislator pays attention to those aspects of a particular status and role position of the subject, due to which public danger of the act reaches the degree necessary for criminalization. As a rule, we are talking about the emergence of special criminal law norms; strictly speaking, there is not criminalization, but differentiation of liability. However, we believe it is permissible to use this resource for research purposes.

Thus, according to the explanatory note to the draft law, through the adoption of which Article 286.1 "Non-fulfillment of an order by an employee of internal affairs bodies" appeared in the Special part of the Criminal Code of the Russian Federation and paragraph "o" of Part 1 of Article 63 ("commission of an intentional crime by an employee of internal affairs bodies") – in the General part, the proposed innovations are aimed "at strengthening protection of the rights and legitimate interests of citizens and organizations from illegal actions of employees of internal affairs bodies" [13]. This goal does not substantiate the assumption of the special criminogenicity of this status of cases with respect to the status of employees of other law enforcement agencies, hence the active criticism of novels in the scientific literature and citizens' appeals to the Constitutional Court of the Russian Federation in connection with the violation of their constitutional rights by these changes are not surprising. By and large, it is in the results of the consideration of these complaints that the official position regarding the consideration of the increased public danger of employees of this department in the criminal law is reflected – the position of the court, but not the legislator.

In particular, the Ruling of the Constitutional Court of the Russian Federation No. 1623-O-O of December 8, 2011 indicates that "commission of an intentional crime by employees of the internal affairs bodies, who are entrusted with an exceptional responsibility in terms of their scope and nature ... to protect the life and health of citizens, counteract crime and protect public order, testifies to their conscious ... opposition to the goals and objectives of the police, which contributes to the formation of a negative attitudes towards internal affairs bodies and institutions of state power in general, distort moral foundations of interaction between the individ-

ual, society and the state, and undermines respect for the law and the need for its unconditional observance" [14].

The Constitutional Court of the Russian Federation concludes that criminalization of this act stems from the content of the harm resulting from violation of the powers assigned to an employee of internal affairs bodies and manifested in negative personal characteristics, such as antisocial views and attitudes. In other words, attention is drawn to special characteristics of the subject, due to which it is called special, and to personal properties of the perpetrator, expressed in their criminal use. Strictly speaking, both these and other characteristics are features of the criminal's personality and in the relevant criminological teaching relate in the first case to the socio-demographic substructure of the personality, and in the second case to the value-normative, however, if the former acquire significance for the qualification of a crime, then the latter are necessary for other purposes unrelated to the qualification.

It should be noted that in the explanatory note to the draft law, which excluded paragraph "o" from Part 1 of Article 63 of the Criminal Code of the Russian Federation in June 2023, the eliminated feature is defined as "discriminatory", and the author of the draft law refers to the unfairness of separating these employees from representatives of other structures ensuring law and order in Russia, the minimum share of crimes committed by law enforcement officers from the total number (1%) and the need "to restore the logic of legislative regulation and thereby avoid emphasizing undeserved and unfair distrust to employees of the internal affairs bodies of Russia" [15].

So, the fact that decriminalization did not occur in relation to Article 286.1 of the Criminal Code of the Russian Federation, despite the legislator's position on the discriminatory nature of the norm of paragraph "o" of Part 1 of Article 63 of the Criminal Code and the need to restore the logic of regulation: the requirements of consistency and reasonableness easily ignored at the stage of supplementing the Criminal Code with the designated novels are no less easily "forgotten" when "correcting" previously made inaccuracies.

In another case, in support of establishing criminal liability for entering knowingly false information into a land survey plan, technical plan, survey act, land surveying project or territory map, the explanatory note indicates the content of the powers of the cadastral engineer as a special subject of the act, in relation to assessing the integrity of which special mechanisms are not provided by law. It is noted that "the cadastral registration authority enters information about a real estate object ... into the state real estate cadastre on the basis of documents prepared by the cadastral engineer containing the information necessary for such accounting. At the same time, the cadastral registration authority, in accordance with current legislation, is not entitled to conduct an examination of documents and information contained therein, except for checking for the existence of grounds for the cadastral registration authority to make decisions on suspension or refusal to carry out cadastral registration in accordance with the requirements of the Law on Cadastre. This allows us to conclude that "the Law on Cadastre has endowed the cadastral engineer with significant powers, which, in turn, must be accompanied by a high degree of responsibility" [16].

Apparently, public danger of this act is associated with the exclusive powers of a special subject of the crime. Current legislation does not have a mechanism with respect for checking conscientiousness of their execution. The question of the sufficiency of such an argument in order to substantiate the criminal level of danger of the act, in our opinion, remains open.

It should be noted that examples of criminalization of acts with a special subject, the criminality of whose status is justified in the relevant explanatory notes by indicating the content of the status and/or consequences of its unfair implementation are quite rare, since, as a rule, the justification (where it is presented) indicates either the inability to achieve the goal of prevention by the existing administrative prohibition or characteristics of harmful effects. Nevertheless, the examples given show that public danger of a number of acts is associated with certain characteristics of the criminal's personality related to his/her socio-demographic substructure and recognized as special characteristics of the subject. Being directly indicated in criminal law, these features become important for qualification and allow us to conclude that

public danger of the subject of the crime is taken into account for the purpose of criminalization, thus entering into the scope of its basis.

Reflection of public danger of a person in crimes with prejudicial signs and crimes provided for in Article 210.1 of the Criminal Code of the Russian Federation

At the same time, we believe that today the legislator considers characteristics of the perpetrator's personality as criminalizing elements of the composition of the crime. These characteristics are not related to the person's sociodemographic substructure in the system of public relations, the scope and content of powers and the liability severity degree, but reflect the state of his/her value-normative sphere and therefore are extremely close to the concept of a dangerous state of personality. If in terms of the practice of criminal lawmaking, consideration of criminogenic personal characteristics of the perpetrator for the purpose of criminalization is apparently quite acceptable, then, in terms of science, such a situation is disputable. It follows, in particular, from the appeal to the norms fixing responsibility for acts with prejudicial signs, the presence of which in the current criminal law is expanding.

The essence of the phenomenon of prejudice in the doctrine is associated with "specific recidivism" [17]. Thus, the Constitutional Court of the Russian Federation clarified correlation between features of the subject of a crime, formed by the repetition of his/her illegal behavior and the newly committed crime. The criminal record of a person which has not been removed or has not been extinguished is indicated as a qualifying feature of the crime, the antisocial nature of which is determined to a large extent by the systematic criminal behavior of a person and generates special public-legal relations with the state, which, when this person commits new crimes serve as a basis for assessing his/her personality and the crimes committed by him/her as having increased public danger" [18].

At the same time, speaking about administrative prejudice, the Constitutional Court of the Russian Federation notes that "public danger of an act may be due to the cumulative effect of unlawful encroachment" [19]. Nevertheless, along with the above thesis, in the same ruling, the Court proposes another idea, the content of which allows us to assert that specific antisocial personality traits are taken into account in order to criminalize acts with signs of administrative prejudice. Thus, it is stated that "repeated commission by a person of homogeneous (similar) administrative offenses objectively indicates the insufficiency of available administrative and legal means to effectively counter such acts, which, together with other factors, can be considered as a constitutionally significant reason for criminalizing relevant actions (inaction)" [2].

So, prejudicial signs of the subject of a crime are associated with repeated illegal behavior of a person, which in itself indicates such personal properties, the presence of which necessitates the use of more stringent measures of influence against persons who have committed illegal acts for the first time. In other words, the legislator takes into account such specifics of its value-normative component, which indicates the person's willingness to commit a new act, ignoring his/her personal experience of criminal or administrative-legal coercive influence imposed by the state. D.V. Miroshnichenko, speaking about criminal law prejudice, notes that "the legislative use of recidivism as a criminalizing or qualifying feature of the corpus delicti, in our opinion, modifies the nature of recidivism as a specific instrument of punishment, giving it qualitative significance in the form of a characteristic of the criminal's personality, important for qualification" [19].

In this case, in science there are concerns about actualization of the theory of a dangerous state in criminal law; however, some comments should be made on this issue. So, based on approaches to understanding public danger of the criminal's personality, it is possible to make an assumption about its genetic connection with the theory of a dangerous state of personality. For example, B.V. Volzhenkin notes that "a criminal act (both intentional and negligent) is to one degree or another a consequence and expression of the social essence of the offender's personality", defining it as "a real, concrete possibility of the same person committing a new crime" that exists "after the commission of a crime" [20, pp. 106–108]. Domestic representatives of the moderate trend of the theory of the dangerous state V.D. Nabokov, A.A. Zhizhilenko, E.Ya. Nemirovskii prove that the dangerous state of a person manifests

itself in a crime committed by him/her. So, A.A. Zhizhilenko based his reasoning on “the idea not about a dangerous person in general, but about a person who has committed a criminal act, which by virtue of certain conditions is recognized as dangerous” [21, p. 5]. The scientist proposes two criteria for personal danger, such as “repetition of the commission of known acts”, which indicates “inclinations... intolerant in the society”, and “certain crimes in which the perpetrator, indeed, causes particular concern of society” [21, p. 7]. In addition, it is proposed to take into account the connection of the encroachment “with certain inclinations of this subject that are harmful to society”, i.e. parasitism, debauchery and drunkenness [21, p. 8].

We believe that the consideration of public danger of the individual in the light of the real possibility of committing a new crime is extremely close to the interpretation of a dangerous state of the individual by representatives of the moderate trend of the relevant theory, which, however, should not cause concern. It seems that the rejection of the theory of a dangerous state in modern science is due to the position of supporters of its radical direction, expressed by A. Prince: “transformations in criminal law force us to recognize a dangerous state even where there is no criminal yet, and the right of state intervention even where there is no crime or offense” [22, p. 131]. There is an obvious difference with the positions outlined above and also expressed within the framework of the theory under consideration, which allows us to support the idea that the theory of public danger of the criminal’s personality, which has become widespread in our country, is a “kind” of the theory of a dangerous state of personality [23].

Another example of taking into account public danger of the perpetrator’s personality for the purpose of criminalization is Article 210.1 of the Criminal Code of the Russian Federation, which establishes responsibility for occupying the highest position in the criminal hierarchy. In particular, N.G. Kadnikov notes that the norm in question refers specifically to establishing characteristics of the personality instead of elements of the composition of the crime [24]. V.N. Borkov and G.E. Moskalenko conclude that “a special state of the person as a legal fact” serves as the basis for bringing to justice [25].

According to the explanatory note to the relevant draft law, the need for criminalization is caused by the fact that “criminal liability for the fact of leadership of such a person in the criminal hierarchy is not stipulated”, and the commission of an act by a person occupying the highest position in the criminal hierarchy is criminally punishable (Part 4 of Article 210.1 of the Criminal Code of the Russian Federation). At the same time, the “greatest public danger” of leaders of criminal communities (criminal organizations) is due to the nature of the actions resulting from this status, as well as the inaccessibility to law enforcement agencies [26]. Since the authors of the initiative do not specify criminalized actions, pointing only to danger of the status, the conclusion is quite unambiguous: liability in this criminal law prohibition is provided for the presence of a certain characteristic of a person’s socio-demographic substructure. Within the framework of current criminal legislation, this is the only example of giving criminal legal significance to features of a person as a basis for bringing to justice, which does not require the establishment of a committed act, which, by the way, corresponds to the point of view of adherents of the “radical” trend in the theory of a dangerous state. In the light of the topic of this work, it is correct not to talk about public danger of the crime provided for in Article 210.1 of the Criminal Code of the Russian Federation, but about the danger of a perpetrator due to the presence of a certain personal characteristic.

Conclusion

The analysis of criminal lawmaking in terms of documents accompanying draft laws and its results in the form of criminal law novels shows the relevance of taking into account public danger of the individual for the purpose of criminalization. The latter is traditionally not in doubt among the authors in the context of crimes committed by a special subject, however, it is overlooked that the characteristics to which the legislator attaches importance to special features of the subject, for the most part, represent a description of the status and role position of the individual. Within the framework of the criminological doctrine of the personality of a criminal, such features relate to the socio-demographic substructure of the personality, that is why for the purpose of qualification it is nec-

essary to establish the presence of personality characteristics of the perpetrator defined in law in the acts committed by a special subject. This also means that for the purposes of criminalization, personal characteristics of the perpetrator receive the meaning of special characteristics of the subject within the framework of the composition of the crime.

The appearance in the criminal law of Article 210.1 of the Criminal Code of the Russian Federation, on the one hand, confirms this idea, and on the other hand, indicates a completely new and previously unpracticed approach to criminalization, since here public danger of an act as its basis is fully replaced by public danger of a perpetrator, or more precisely, a dangerous state of personality.

Referring to acts with prejudicial signs allows us to conclude that in addition to personal characteristics of the socio-demographic substructure, the legislator takes into account other personal characteristics for the purpose of criminalization. Here we are talking about signs related to the value-normative substructure of the personality according to the doctrine of the personality of a criminal.

Thus, since criminalizing elements for the compositions of individual crimes are personal properties of the perpetrator, characterizing either the socio-demographic or value-normative substructure of the criminal's personality, the issue of the ratio of public danger of the crime and public danger of the criminal's personality has apparently been resolved unambiguously by the legislator. At the same time, the doctrinal controversy and the legal uncertainty of the concept of public danger itself do not prevent this.

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