

THE "CRIMINAL LAW OF VICTIM" AS A CRIMINAL LAW MODEL

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The subject. The article is devoted to analysis of the basic models of criminal law and the impact of victim's legal status on the criminal legal theory.

The purpose of the paper is to substantiate the existence and the importance of "criminal law of victim" as basic model of criminal legal theory.

The methodological basis of the research includes general-scientific methods (analysis and synthesis, system-structural approach) as well as academic methods (formal-legal method, method of interpretation of legal texts).

Results and scope of application. The definition of the role of the victim, the importance of his legitimate interests in the implementation of criminal liability is complicated by the fact that the basic models of criminal law developed by science – "criminal law of the offender" and "criminal law of the crime" – do not consider the victim as a subject of criminal legal relations. The theoretical models of criminal law are embodied in the criminal law, specific legal relations, law enforcement acts, etc., in connection with which there are specific indicators – the parameters by which it is possible to determine which model of criminal law is implemented.

If the question of the criminal legal personality of the victim is controversial, in my opinion, there is no doubt that the victim is a party to the criminal law conflict, which often begins to unfold long before the crime.

Conclusions. Recognizing the victim as a subject of criminal legal relations, as well as a participant in the criminal law conflict, it is possible to talk about the formation of a new model of criminal law – "the criminal law of victim".

1. Development of the basic models of criminal law.

The legal status of the victim in criminal law is a very complex theoretical issue considered in a number of scientific papers [1-4]. Determining the role of the victim, the importance of his legitimate interests in the implementation of criminal liability is complicated by the fact that the basic models of criminal law developed by science - "Criminal law of a criminal" and "criminal law

of a crime " - are not considered on the basis of a criminal legal relationship that has suffered as a subject.

Thus, the classical school of criminal law, focusing on the formal legal structure of crime, guilt as well as forms and signs of a criminal act, served as the doctrinal basis for the formation of the idea of "criminal law crimes," assumes a priori study of crime as a legal entity [5, p. 23]. The representatives of this school did not confine themselves to studying only a simple act, but at the same time focused attention on it, while noting the theoretical and practical harmfulness of leveling the criminal legal significance of the person who committed the crime [6, p. 79].

Sociological Criminal Law School offered a vector of development and considered criminal as a social creature. Thus, the criminal became the main character of the criminal legal relationship [2, p. 658; 7, p. 435].

2. The account of the person of the criminal.

The positivist school of criminal law, which appeared in the last quarter of the XIX century, has set his contemporaries and future generations of lawyers and intractable problem is the need for registration and identity of the person who committed the crime when sentencing. In particular, this problem was illuminated F. List, who assumed that the penalty should be determined according to characteristics of the offender [8, p. 70-71].

Long-term attempts to implement in practice the idea of accounting for the identity of the perpetrator gave rise to a number of empirical studies [9, p. 240; 10, p. 32-34]. As a result of the author of a sociological study of 40 judicial acts of courts of general jurisdiction, made in criminal cases during the period from March 2006 to November 2010, the courts indicated the following data on the identity of the perpetrator: characteristics from the place of residence, work - in 72.5%; health status - 37.5%; presence of dependents - 35%; presence / absence of previous conviction - 22.5%; age - 20%; the marital status and the availability of work, in 17.5% of cases. However, the concept of a person, including a criminal, is much broader in content and includes stable socially conditioned psychological characteristics that manifest themselves in social ties and relationships, determine the moral actions of a particular person and are of significant importance to the person and to others [11, p. 471; 12, p. 335-336].

Thus, the establishment of only certain signs, such as age, state of health, family situation, etc., taking place in judicial practice in criminal cases, does not cover the whole set of multifaceted properties of the individual and testifies to the account of the person of the offender not in full volume in the appointment of punishment.

At the same time, some countries have nevertheless achieved positive results in the issue of registering the identity of the offender when imposing punishment, thereby realizing the model of the "criminal law of the offender". An example of such a positive practice can serve as the juvenile criminal law of Germany, actually aimed at maximum recording of the personality of a juvenile offender, which is realized by the interaction of the court and the special help service in juvenile court (Jugendgerichtshilfe). This service employs professional educators and psychologists who compose for the court a report containing the necessary information to get an idea of the identity of the adolescent and to predict his further behavior [13, p. 37-40].

3. Parameters of the basic models of criminal law.

Theoretical models of criminal law are embodied in legal norms, specific legal acts, etc., in connection with which there are peculiar indicators or parameters by which it is possible to determine which model of criminal law is being implemented.

One of these indicators is the focus of criminal legal regulation on a certain subject of a criminal legal relationship. In other words, within the framework of the criminal law model of the criminal, the application to specific measures of criminal responsibility is carried out, proceeding from the personal characteristics of the person who testifies to the possibility of correction, the expediency of applying this or that type of punishment, etc., which in practice means recording the identity of the offender when imposing punishment. The "criminal law of the crime", on the contrary, assumes the use of specific criminal liability according to the different characteristics of the offense (the situation, the severity of the offense, wine, theme, etc.). In practice, this means the

imposition of punishment in accordance with the nature and severity of the crime committed, without regard to the personality of the figure, and in this connection the state has the highest importance as the subject of criminal legal relations, entitled to establish in the criminal law the legal elements of crimes and determine their severity depending on the public danger of the deed. This circumstance is due to the fact that, traditionally, in the science of criminal law were isolated only two subjects angle Foot relationship: the state and the perpetrator [14; 15]. At the same time some authors express an opinion on the need to identify the victim as an independent sub- object of a criminal legal relationship [16; 3, p. 55-59; 17 , p. 29-34; 18 , p. 25] .

4. The idea of the criminal personality of the victim.

If the question of the legal personality of the criminal used the victim is controversial, then, in my opinion, there is no doubt the fact that the victim is a party to the criminal conflict that has often been started long before the crime was committed. S.V. Kudryavtsev notes on this occasion that a crime where victims are present-specific persons, as a rule, creates a conflict situation or a direct interpersonal (intergroup) conflict, then resolved through the efforts of private individuals, including victims themselves, and also with the help of state institutions in the process of criminal proceedings [1, 9, p. 165-166; 20, p. 13-14]. Thus, the victim is in one way or another present in a criminal conflict, which, starting from the general theory of legal conflictology, will enable him to use his interests and efforts in resolving the conflict that has arisen.

A new constitutional model of the relationship between the state and the identity of th served as an incentive to increase the relevance of the issue of the criminal personality of the victim. And the change in the strategy of legal regulation, which was talked about before the adoption of the current Criminal Code of the RF [21, p. 44-45], has led to a reassessment of the value of such goals of criminal punishment, as social justice because it did not generate positive externalities to the victim.

The emergence of the legal position of the Constitutional Court of the Russian Federation, according to which the public character of the criminal law and the relations that develop on its basis, does not exclude the development of the idea of criminal personality of the victim, its significance in determining the measure of responsibility , is also conducive to the establishment of the public danger of an act infringing upon the rights and legitimate interests of a particular person, one should take into account both the materiality of the violation of these rights and legitimate interests for the victim himself, and his assessment of the gravity of his own damage to it and the adequacy of legal measures to be applied to the perpetrator.

5. Justification of the model of "criminal law of the victim".

As the victim is a subject of criminal legal relations, as well as a participant of criminal legal conflict is possible to speak of a new model of criminal law - "the criminal law of the victim".

The justification of this model can be considered a theory, appeared in the 70-ies. XX century in the US and named restorative justice [22, p. 324; 23, p. 162-171; 24, p. 320]. It is noteworthy that the stimulus to the emergence of this theory was changes in public life, such as in the creation of various public associations: in the United States, in order to develop peaceful methods for resolving disagreements, in 1972, The Society of Dispute Resolution Professionals was created (The Society for Professionals in Dispute Resolution - SPIDR) [24, p. 34]; in England in 1979 the National Association of support of victims was established, and in 1984 - the public organization "Mediation of Great Britain" [25, p. 110].

The basis of restorative justice is the provision of the fact that the crime, first of all, generates the obligation of the person who committed it to make amends for the damage caused. This reaction is appropriate for the needs of victims, offenders and resocialization, and the interests of society as a whole [26, p. 115]. At the same time, it is possible to diminish the issue of compensation for material damage by concentrating on the psychological consequences of a criminal act for each of the participants in the conflict [25, p. 113]. In view of the foregoing, so close attention to the figure of the victim is not accidental, tk. the very idea of restorative justice is aimed at "restoring the rights", first of all, of the victim, and also using additional funds to resolve the emerging criminal legal conflict.

To date, in many countries, whose criminal legislation has adopted innovations in the theory of restorative justice, punishment ceases to be a classical and unconditional reaction of the state to a crime. There are a number of reasons for this, including long-term attempts by various countries to reduce the number of prison population, reduce the costs of the penitentiary system and prevent stigmatization of the individual, when it is possible to resolve the criminal conflict in other ways (mediation, reconciliation, active repentance, etc.). Thus, in 1985 the Committee of Ministers of the Council of Europe noted, essentially pointing out the drawbacks of models "criminal law of the crime" and the "criminal law of the offender", that the objectives of the criminal justice system were expressed in terms of terms that mainly relate to the relationship between the state and the offender, but later the work of this system sometimes tended to be summarized rather than reduced problems of the victim, and therefore Council of Europe members were advised to explore the possible advantages of reconciliation and mediation schemes, referring to the mechanisms of restorative justice, as well as to promote research on the effectiveness of the provisions affected by boiling the victims and encourage them.

6. Conclusions.

Every year every tenth citizen of Russia becomes a victim of a crime and is recognized as a victim. Immediate damage from crimes for the period from January to November 2010 is amounted to 217.56 billion rubles, while up to 50% victims are unwilling to bring civil action in criminal proceedings. These circumstances testify in many respects to the ineffectiveness of protecting the rights of victims of crimes within the framework of existing models of "criminal law of crime" and "criminal law of the offender". In this connection, the urgency of the problem of the formation of a new model of criminal law focusing on the victim, his role and significance in criminal relations, the model of the criminal law of the victim, is growing.

REFERENCES

1. Anoshchenkova S.V. *Criminal law doctrine of victim*. Moscow, Wolters Kluwer Publ., 2006. 248 p. (In Russ.).
2. Pryanishnikov E. Victim of the crime. *Zakonnost'*, 1994, no. 12, pp. 35–37. (In Russ.).
3. Pudovochkin Yu.Ye., Genrikh N.V. On the status of the victim in criminal relations. *Ugolovnoe pravo = Criminal Law*, 2009, no. 6, pp. 55–59. (In Russ.).
4. Fargiev I.A. Theory of victim in Criminal law of Russia: The criteria of scientific level and perspectives of development. *Gosudarstvo i pravo*, 2005, no. 8, pp. 25–30. (In Russ.).
5. Ferri E. *Criminal Sociology*. Moscow, INFRA-M Publ., 2005. 658 p. (In Russ.).
6. Tagantsev N.S. *Russian criminal law. Lectures. General part*, in 2 volumes. Moscow, Nauka Publ., 1994. Vol. 2. 380 p. (In Russ.).
7. Chubinskii M.P. *Essays on criminal policy: The concept, history and main problems of criminal policy as an integral part of the science of criminal law*. Moscow, INFRA-M Publ., 2008. 435 p. (In Russ.).
8. von Liszt F. *Textbook of criminal law. General part*. Moscow, A.I. Mamontov Publ., 1903. 358 p. (In Russ.).
9. Burlakov V.N. *Criminal law and criminal personality*. St. Petersburg, St. Petersburg State University Publ., 2006. 240 p. (In Russ.).
10. Ovcharenko Z.V. To the question about the study of the personality of minors guilty. *Rossiiskii sud'ya = Russian Judge*, 2008, no. 9, pp. 30–35. (In Russ.).
11. Maklakov A.G. *General psychology*. St. Petersburg, Piter Publ., 2010. 583 p. (In Russ.).
12. Nemov R.S. *Psychology*, in 3 volumes, 4th ed. Moscow, VLADOS Publ., 2003. Vol. 1. 688 p. (In Russ.).
13. Bibik O.N. *Introduction to juvenile criminal law in Germany*. Omsk, Dostoevsky Omsk State University Publ., 2009. 83 p. (In Russ.).

14. Filimonov V.D., Filimonov O.V. *Legal Relations. Criminal legal relations. The penal legal relationship*. Mos-cow, YurlInfoR-Press Publ., 2007. 335 p. (In Russ.).
15. Inogamova-Khegai L.V., Komissarov V.S., Rarog A.I. (eds.). *The Russian criminal law*, in 2 volumes. Moscow, INFRA-M Publ., 2003. Vol. 1. 623 p. (In Russ.).
16. Kozachenko I.Ya., Neznamova Z.A. (eds.). *Criminal law. General part*. Moscow, NORMA Publ., 2000. 623 p. (In Russ.).
17. Kvashis V.Ye., Genrikh N.V. The subject-matter of criminal relations (conceptual model). *Ugolovnoe pravo = Criminal Law*, 2010, no. 4, pp. 29–34. (In Russ.).
18. Sumachev A.V. *The victim as a subject of criminal legal relationship*, Cand. Diss. Thesis. Ryazan, 1997. 25 p. (In Russ.).
19. Kudryavtsev V.N. (ed.). *Legal conflictology*. Moscow, The Institute of State and Law of The Russian Academy of Sciences Publ., 1995. 316 p. (In Russ.).
20. Kudryavtsev V.N. Legal conflict. *Gosudarstvo i pravo*, 1995, no. 9, pp. 9–14. (In Russ.).
21. Modern trends in the development of criminal law and criminal law theory (Conference in the IGP RAS). *Gosudarstvo i pravo*, 1994, no. 6, pp. 44–76. (In Russ.).
22. Zehr H. *Changing Lenses. A new focus for crime and justice*. Moscow, Tsentr “Sudebno-pravovaya reforma” Publ., 2002. 328 p. (In Russ.).
23. Sessar K. Punitive Attitudes of the Public: Reality and Myth. *Izvestiya vysshikh uchebnykh zavedenii. Pravovedenie = Proceedings of Higher Education Institutions. Pravovedenie*, 1998, no. 4, pp. 162–171. (In Russ.).
24. Nosyreva E.V. *Alternative dispute resolution in the United States*. Moscow, Gorodets Publ., 2005. 320 p. (In Russ.).
25. Golovko L.V. Alternatives to Prosecution in the Contemporary English Law. *Izvestiya vysshikh uchebnykh zavedenii. Pravovedenie = Proceedings of Higher Education Institutions. Pravovedenie*, 1998, no. 3, pp. 103–113. (In Russ.).
26. Karnozova L.M. The place of reconciliation and mediation in the doctrine of criminal justice (Expert seminar, held by the Sector of problem of justice of the Institute of State and Law of the Russian Academy of Sciences together with Social Center "Judicial Law Reform"). *Gosudarstvo i pravo*, 2006, no. 9, pp. 115–122. (In Russ.).

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