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CONTRADICTIONS OF JUDICIAL CRIMINAL POLICY

Yury E. Pudovochkin, Mikhail M. Babayev
Russian State University of Justice, Moscow, Russia

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The subject of the study is the criminal policy in the context of contradictions in the functioning of the courts.

The purpose of the study is to investigate, which contradictions of criminal policy are generated by a multi-level system of courts, and which mechanisms for overcoming them in order to optimize criminal policy could be found out.

The methodology. In modern conditions of diversification of methodological approaches to organizing and conducting political-legal research, it is important not to discard, but to rethink and rediscover the epistemological possibilities of the methods of classical science, especially the method of dialectical analysis.

The main results and scope of the study. The use of the category "dialectical contradiction" for the purpose of studying the problems of the functioning of the courts in terms of the interpretation and application of criminal law provisions opens up new possibilities in the study of criminal and judicial policy, as well as determining the prospects for its development. In the study, the law enforcement contradictions of criminal policy refer to the rela- tions between courts of various types and levels that develop in the course of their func- tioning and reflect the opposite approaches of law enforcement bodies to the interpreta- tion and application of criminal legislation. Considering the level and type of legal proceed- ings, these contradictions can be summarized in the following groups: (a) between national and international courts; (b) between superior courts of the national legal system; (c) be- tween the courts of various instances of the system of courts of general jurisdiction.

The contradictions between national and international courts, emerging in the field of protection of human rights and freedoms, are an objective source of development of judicial practice and policy. The resolution of these contradictions is based on the consensus of various courts and compromise. If the position of the European Court of Human Rights does not contradict the provisions of the Constitution of the Russian Federation, the state adjusts its legal practice in the direction set by the authoritative international instance by means of: (a) direct application of national legislation with due regard for the ECHR's legal posi- tions; (b) the application of national legislation in its constitutional interpretation by the Constitutional Court of the Russian Federation, which does not differ from the decisions and positions of the ECHR; (c) amending national legal acts in pursuance of ECHR judgments. In exceptional cases, when the position of the European Court touches upon issues of the country's constitutional identity, the contradiction between the international and national legal order is resolved by the Constitutional Court of the Russian Federation on the basis of the priority of constitutional norms.

At the level of the superior national courts the contradictions are represented by the differ- ing positions of the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation on the assessment and interpretation of criminal law provisions. Such contradictions can be thought of as latent until they are not revealed in constitutional proceedings. The identification and resolution of these contradictions is the most important direction of legal policy in the country; it reflects the consistent solution of the aim of constitutionalization of the criminal law.

At the level of the system of courts of general jurisdiction, the concept of "contradiction" can only be applied to those differing approaches of the courts to solving criminal cases that do not go beyond the rule of law. Contradictions arise only when, having correctly estab- lished the factual circumstances of the case, the courts disagree in the choice of the legal provision to be applied, although any such choice can be explained and motivated. These contradictions may or may not be related to the quality of criminal legislation. Therefore, the mechanism for their resolution includes not only law revision. It is important to use the capabilities of the judicial system itself to develop a consensual understanding of the textual content of the criminal law and the rules for its application.

Conclusions. Overcoming the contradictions of the judicial criminal policy is possible only in the process of communication and dialogue between the courts of different levels on the basis of differentiation of jurisdiction, respect for authority and independence.

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1. Introduction. Problem statement

According to the dialectical theory of the world cognition, emergence, existence and development of any phenomena are based on contradictions. Criminal justice policy is no exception. Contradictions in criminal policy are an objective fact, a given circumstance, the study of which should be considered one of the essential directions of the criminal-political discourse. Be it as clear as it may, we have to admit that the criminal law theory pays insufficient attention to the search of a solution for it. The very cognitive subject. i.e. “the contradictions in criminal policy”, is examined in the criminal law literature very fragmentarily and unsystematically, which can to some extent be explained by the general condition of criminal political science [1; 2], the priorities and topical directions of scholar research, the persisting complexity and unclearness of the contradictions themselves as the subject of intellectual efforts. This explanation, however, cannot serve as an excuse for the current situation in the field of cognition of the contradictions in criminal policy. On the contrary, it is designed to stimulate academic research in a given direction and to stimulate scientific thought.

2. The notion and types of contradictions at the law-application level of criminal policy.

An inherent feature of the law-application level of the of criminal policy is that it is expressed in the practical activities of a wide range of subjects: the investigative and prosecutorial bodies, bar association and lawyers, courts, the penitentiary bodies [3]. Meanwhile, not all relationships between these subjects can be viewed from the standpoint of contradictions. In particular, the relationship between the investigation and the prosecutors, between the investigation and the lawyers (advocates), between all these subjects and courts at the level of the law-application process do not fit into the classical notions of dialectical contradictions. Different views of the prosecution and defense parties, as well as of the court on the content, goals, directions (etc.) of the criminal policy, of course, are important, but as contradictions characterize the source of criminal policy at the level of conception of its ideas and regulatory framework. Here they reflect the different approaches of the subjects of criminal policy to understanding this very policy, their varying interests [4]. In a situation where the legal rules are developed and adopted, the differences between the subjects of law-application practice which are determined by their functional purposes, merely reflect the mechanics of the law-application process, but do not reflect the essence of criminal policy, do not constitute the source of its development.

Another thing is the contradictions that arise between the subjects of one functional group in the process of application of law, in particular, between the courts. Here a complex configuration of relations between international and domestic courts arises, between the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation, between the Supreme Court of the Russian Federation and the lower courts, between the courts of the same level of different regions (until recently, this should have been supplemented by the relationship between the Supreme Court of the Russian Federation and the Supreme Commercial Court of the Russian Federation). These relations manifest themselves not only and even not so much in the context of a specific criminal case. They determine the content, condition, prospects and general assessment of the application of Criminal Law, serving as an important internal source of the development of criminal policy, which allows to consider relations between courts of various types from the standpoint of the concept of contradictions.

The relations between courts of various types and levels, which develop in the course of their functioning and reflect the opposite approaches of law enforcement authorities to the interpretation and application of criminal legislation, are called by us contradictions of judicial and criminal policy. These contradictions can be summarized in the following groups: a) between national and international courts; b) between the highest courts of the national legal system; c) between courts of various instances of the system of

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courts of general jurisdiction.

3. Contradictions between national and international courts

Considering the interaction between international and national courts from the standpoint of the theory of contradictions, we believe it essential to note the following. Firstly, our analysis will concern only to the relations of the Russian courts with the European Court of Human Rights (hereinafter - the ECtHR), given that Russia has withdrawn its signature under the Rome Statute of the International Criminal Court, and other international courts do not have jurisdiction either over the criminal law conflicts (WTO Dispute Settlement Body, International Court of Justice), or over the Russian Federation (ad hoc international tribunals, Inter-American Court of Human Rights). Secondly, the analysis should be, as far as possible, differentiated, depending on whether we are talking about the interaction of the ECtHR with the Constitutional Court of the Russian Federation or with the Supreme Court of the Russian Federation, taking into account the specifics of the competence of both the Strasbourg court and the national courts.

This limitation clearly defines the subject of possible contradictions between the international and national courts. It consists in the interpretation and assessment of the provisions of the European Convention on Human Rights, since, on the one hand, the domestic courts are obliged to follow its provisions and apply them, thus having the opportunity to independently interpret the Convention and to determine its meaning in specific cases, and, on the other hand, the only body authorised for the official, and most importantly, for the evolutive interpretation of the Convention, is the ECtHR.

In such situation, the relationship between the international and the domestic courts cannot develop linearly. Experts distinguish three possible types of such relations: (1) “mirror approach”, when domestic courts act as if they were bound by the Strasbourg jurisprudence (it is applied, as a rule, where there is a clear, well-established Strasbourg case-law or when the domestic courts consider that there is or should be a consensus or uniformity in the interpretation of the provisions of the European Convention); (2) “dynamic approach”, when the domestic courts provide a broader and more progressive interpretation of the Convention (it is applied within the margin of appreciation of the domestic courts where there is no established Strasbourg case-law); (3) “municipal approach”, when the domestic courts generally refuse to follow the case-law of the European Court in a particular case, seeking instead to develop an internal interpretation of the rights set forth in the Convention rights [5].

Obviously, none of these approaches define the dominant type of relationship between the domestic courts and the ECtHR. In real life, they coexist and act not as tendencies in the development of relations, but as a possible type of reaction to discrepancies in legal positions, which is determined not by political or opportunistic circumstances, but solely by differences in methodological, historical, cultural and other approaches to the interpretation, understanding and the application of the European Convention on Human Rights.

In general, it must be admitted that relations between the ECtHR and the national courts are developing in a spirit of harmony and cooperation, and the differences arising in the assessments of the compliance with the human rights standards in the process of legal regulation and the application of law are always the basis for a reasoned and respectful discussion, a search for compromises. In many cases, difficulties in interpretation of human rights standards of legal regulation directly concern Criminal Law, the social relations in the respective sphere, and the criminal law policy. The most typical problems in this area concern the establishment of the limits of the criminal legislation application, the interpretation of the concept of “criminal punishment”, the definition of the scope of human rights guarantees triggered by the “criminal charge”, the administration of evidence in a criminal case, the observance of the rights of convicts, and some others.

Behind each relevant decision of the ECtHR lies a difference in the approaches of the domestic courts and the international court to the problem of application of legislation that reflects the political and legal decision of the State in the area of

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Criminal Law. By reflecting the opposite views of the courts on the essence of the problem, this difference, in fact, always signifies the existence of contradictions between them. Another question is that before the proceedings in the ECtHR this contradiction is not obvious, it develops and exists latently. An individual application to the ECtHR brings this contradiction "out of the shadows", making it public.

At the same time, however, one should not think that the latent contradiction is completely unknown to specialists. The Plenary of the Supreme Court of the Russian Federation[1] recognised that jurisprudence in Russia should be formed "taking into account" the opinion of the ECtHR on certain problems, even if this "opinion" is not formally obligatory for Russia. This means that potential conflicts in the interpretation of the law between the ECtHR and the domestic courts, which are foreseen by the Supreme Court of the Russian Federation, should be the subject of constant monitoring by courts of general jurisdiction. The highest court not only points out to the necessity of identifying of these conflicts, but also offers a reasonable way to prevent them, that is to "take into account" to the Strasbourg interpretation of criminal and other legal provisions and practice in situations similar to those that have already been the subject of the ECtHR assessment.

There are two points to note here; firstly, the very phrase to "take into account", and secondly, the subject of this accounting, that is the whole array of the ECtHR jurisprudence. This approach to organization of the interaction between the domestic and international courts has a special content, and is not specific exclusively for Russia. British experts, for example, also point out: UK courts should "take into account" any judgment of the ECtHR to the extent necessary, and to take into account the entire jurisprudence of the Court, not just the cases against the United Kingdom. At the same time, they specifically stipulate that "taking into account" is not the same as "following", "implementing" or "being bound". The case-law of the ECtHR is not strictly binding, although the courts must, with certain specific exceptions, follow the clear and consistent case-law of the Strasbourg Court [6, p. 116; 7].

Such an ambivalent attitude to the jurisprudence of the ECtHR, which implies giving a due consideration to its positions, but allows at the same time to disagree with them, inevitably fraught with the risks of the emergence and persistence of contradictions between the domestic and international courts.

When and if a conflict between the domestic courts and the ECtHR occurs and becomes the subject of special debate, then in a significant number of such cases the States side with the approaches of the ECtHR, admit their mistakes in interpretation of the domestic law or even in determining its content and, following the logic of the ECtHR's ruling, either adjust the existing regulations, or amend the established approaches to their interpretation. The human rights law conflict between an individual and a state, thus, becomes exhausted, the grounds for its reoccurrence are excluded, and the relations between the ECtHR and the domestic courts are harmonised.

The "victory" of the ECtHR in its conflict with the domestic courts cannot be perceived as a "defeat" of the latter. The very terms "victory" and "defeat" in this case are unacceptable, since both sides benefit from the resolution of the conflict. After all, the case before the ECtHR is not a dispute between the domestic and international court, but a dispute between the State and a national, in which the international court acts as an arbiter. And the resolution of this dispute, although it reveals different positions of the domestic courts and the ECtHR, is based on the complementary jurisdiction of the ECtHR, which is not intended to "punish" the state, to develop, in cooperation with it, an optimal approach to the interpretation of law and the protection of human rights.

Considering this aspect of the relationship between the ECtHR and the domestic courts in the area of the criminal law policy, an important circumstance should be noted. As a general rule, the

[1] Resolution of the Plenary of the Supreme Court of the Russian Federation of 27 June 2013 No. 21 "On the application by courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto" (paragraph 2) // Bulletin of the Supreme Court of the Russian Federation. 2013. No. 8.

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ECtHR does not aim to assess the provisions of the domestic criminal or other legislation. It only examines how the application of these laws is correlate to the human rights guarantees provided for by the European Convention. In this regard, there could be (and there are) situations when the ECtHR finds a violation of human rights in the facts of the application of a legitimate legislation. Here, issues arise not with the quality of the laws themselves to be applied, but with the quality of jurisprudence, which, by virtue of the of the ECtHR rulings, must be adjusted in order to ensure the utmost fulfilment of human rights.

However, in some, rather rare cases, the discrepancy between the approaches of the ECtHR and the domestic courts to the observance of human rights is based on a negative assessment of the provisions of the domestic law by the Court. Here, the issue of assessing the content and interpretation of legal provisions develops into a genuine conflict, when the domestic courts refuse to perceive, accept and execute the judgments of the ECtHR containing a negative assessment of the legislative acts, which serve for the domestic courts as an indisputable basis of the jurisprudence and the application of law.

The emergence of conflicting approaches is inevitable and quite predictable, especially in a situation where a single human rights standard of is established for states that have differences, sometimes significant, at the level of economic development, in the history of the formation and consolidation of democratic institutions, in spiritual values, legal infrastructure, and traditions, etc. However, the problem is that when these contradictions relate to the assessment of the content of legal acts, there is a conflict of jurisdictions and powers, on the one hand, those of the ECtHR, and on the other hand, those of the highest national courts and, above all, the Constitutional Court, in the assessment of the legitimacy of the domestic law.

When a conflict between international and domestic courts stems from an assessment of the national jurisprudence, which, in its turn, was recognized by the Constitutional Court of the Russian Federation to be in compliance with the national Constitution, its resolution is relatively clear: by adjusting the jurisprudence (both through supervisory review of the existing decisions, and "for the future" in relation to all other decisions). In this case, there is no possibility to challenge jurisprudence at the Constitutional Court, because pursuant to the legislation regulating its competence, it assesses not the application of law in a specific situation (as the ECtHR does), but the applicable law itself.

But when the conflict concerns the assessment of the applicable law the problem becomes much more complicated, acquires a political connotation and is discussed not only in the categories of human rights protection, but also in terms of interference in the internal affairs of the state.

When the ECtHR concludes that a violation of human rights in a given case is related to the content of the national legislation which is incompatible with the provisions and principles of the European Convention, and prescribes general measures to remedy the situation, it is always necessary at the domestic level to consider the amendments to the current legislation. In such case, the situation can develop in three directions.

Firstly, the State can accept the position of the Court and carry out a legislative reform in order to execute the judgment of the ECtHR. One example of such situation is the inclusion of the adversarial component in the administrative offence proceedings in the draft of the new Code of Administrative Offences of the Russian Federation, as well as the possibility of free legal aid to an accused in such proceedings, which were made as part of the implementation of the ECtHR judgment in the case of "Mikhailova v. Russia" (19 November 2015); creation of a mechanism that provides sufficient guarantees of the impartiality of courts examining administrative-offence cases by adding the prosecution (a representative of the prosecutor's office or other state bodies) in the oral hearings, as part of the implementation of the ECtHR judgment in the case of "Karelin v. Russia" (20 September 2016) [8].

Secondly, the State can revise and correct its position regarding the assessment of certain legal provisions, through the constitutional review. Thus, for example, the Constitutional Court of the Russian

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Federation in its initial practice did not find grounds for constitutional disqualification of the provisions of the Code of Execution of Sentences, which prohibited the conjugal visits for lifers during the first ten years of their sentence.[2] However, in the light of the position of the ECtHR, formulated in the judgment of 30 June 2015 in the case of "Khoroshenko v. Russia", it reconsidered its position and, acknowledging that the interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms by the ECtHR provided for increased guarantees of the rights of a certain category of citizens, without encroaching on other values protected by the Constitution of the Russian Federation, it delivered a different decision, recognising the relevant provisions of the Code of Execution of Sentences unconstitutional.[3]

Thirdly, the State can forestall a conflict through the constitutional interpretation, when a constitutional and legal meaning of certain legal provisions of legislative acts is revealed, which will not depart from the opinion of the ECtHR expressed in other cases, and which will be binding for the domestic courts and will not require amendments to the legislation. This situation took place when the Constitutional Court found the domestic law to be in compliance with the Constitution of the Russian Federation, inter alia with reference to the judgment of the ECtHR of 23 March 2016 in the case of "Blokhin v. Russia" (application no. 47152/06), and extended the rules on damages caused by an unlawful court decision the cases of unlawful temporary detention of minors.[4]

However, in extremely rare situations when the Constitutional Court of the Russian Federation finds the provisions of the domestic law compliant with the Constitution of the Russian Federation, and when the current judicial practice of is developing in accordance with the constitutional and legal meaning of these provisions identified by the Constitutional Court, the position of the ECtHR, in which it asserts the discrepancy between the domestic law and their application and the provisions of the European Convention, gives rise to a painfully sharp confrontation between the international and the domestic courts and, in general, between international and domestic legal order. A vivid illustration of this situation is the well-known judgment of the ECtHR of 4 July 2013 in the case of "Anchugov and Gladkov v. Russia" (applications nos. 11157/04 and 15162/05), in which the Court found that not only the provisions of the Russian Code of the Execution of Sentences, but also the restriction on the convicted prisoners' right to vote provided for by Article 32 § 3 of the Constitution of the Russian Federation lies contrary to the individual right to take part in elections guaranteed by Article 3 of Protocol No. 1 to the Convention.

In such situations, a conflict over the interpretation of human rights and the appropriate measures for their protection develops into a dispute about the priority of international law and the rulings of the international courts over the

[2] Decision of the Constitutional Court of the Russian Federation of 24 May 2005 No. 257-O "On refusal to accept for consideration the complaints of citizen Andrey Anatolyevich Khoroshenko on violation of his constitutional rights by the provisions of Article 412 § 1 of the Code of Criminal Procedure of the Russian Federation, Article 125 § 3 and Article 127 § 3 of the Code of Execution of Sentences Code of the Russian Federation"; and Decision of 9 June 2005 No. 248-O "On the refusal to accept for consideration the complaint of citizens Valery Alekseevich Zakharkin and Irina Nikolaevna Zakharkina on violation of their constitutional rights by Article 125 § 3 (b) and Article 127 § 3 of the Code of Execution of Sentences of the Russian Federation". Hereinafter, the texts of decisions of the Constitutional Court of the Russian Federation are cited from the database of decisions posted on the Court's website, URL: http://www.ksrf.ru/ru/Decision/Pages/default.aspx

[3] Judgment of the Constitutional Court of the Russian Federation of 15 November 2016 No. 24-P "In the case of reviewing the constitutionality of Article 125 § 3 (b) and 127 § 3 of the Code of Execution of Criminal Sentences of the Russian Federation in connection with the request of the Vologda Regional Court and the complaint of citizens N.V. Korolev and V.V. Koroleva".

[4] Judgment of the Constitutional Court of the Russian Federation of 29 November 2019 No. 38-P "In the case of the review of the constitutionality of the provisions of Articles 1070 and 1100 of the Civil Code of the Russian Federation and Article 22 of the Federal Law "On the Fundamentals of the System for the Prevention of Neglect and Juvenile Delinquency" in connection with the complaint of citizen A."

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domestic legal decisions [9; 10; 11; 12]. Only recently the methodology for resolutions of these disputes was determined by the Constitutional Court of the Russian Federation[5] and regulated in Chapter XIII.1 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation".[6]

Possible contradictions between the domestic and international courts in the interpretation and the assessment of the domestic regulations should be resolved from the standpoint of the compliance of these acts with the Constitution of Russia. As noted by the Chairman of the Constitutional Court of Russia, Valeriy Zorkin, "the constitutional text in any case retains its highest methodological value in the process of interpretation of legal provisions affecting or restricting human rights, but at the same time, there remains an opportunity for a constructive dialogue between the domestic superior courts and the supranational jurisdictional bodies, since it is obvious that there could be no direct clashes between the Constitution or the basic law and the international treaty binding on a particular state." He also admitted that refusal to execute judgments of the ECtHR is possible only in exceptional cases, as a last resort, which is provided for by the Constitution, as a kind of its self-defense against a supranational interpretation of the provisions of the Convention, which differ from the provisions of the Constitution [13].

This approach is driven by a common understanding of two important circumstances. Firstly, the ECtHR is not the "final arbiter" in the assessment of the provisions of the domestic law and jurisprudence, and, secondly, common European law does not have an unconditional priority (primacy) over the domestic law of each national state. Although this understanding is disputed by some experts [14; 15; 16], nevertheless, the theory of "constitutional pluralism" appears to be quite authoritative theory which explains a relationship between the European and national courts; [17; 18], suggesting that "possible conflicts between the domestic law and the European jurisdiction should be resolved with recourse to the principle of genuine cooperation based on mutual respect", and proposing "autocorrection" as a mechanism for resolving these conflicts, systems, preventing the outbreak of conflicts between all constitutional jurisdictions involved in the judicial architecture of the Council of Europe, based on the awareness by all actors of the advantages of a pluralistic attitude in conflict management and control [19].

4. Contradictions between the superior domestic courts

The existence of several superior courts within the domestic judicial system, even if there is a legal delimitation of their competence, cannot but create conditions for diverging approaches to certain issues of the application of law. It is no coincidence that the decision to dissolve the Supreme Commercial Court of the Russian Federation, based on the official intentions of the legislator, was dictated by the need to "ensure the unity of approaches in the administration of justice both in relation to citizens and in respect of legal entities, to exclude the possibility of denial of justice in the event of a jurisdiction dispute, to establish general rules for organising legal proceedings, to achieve uniformity in jurisprudence."[7]

[5] Judgment of the Constitutional Court of the Russian Federation of 14 July 2015 No. 21-P "In the case of review of the constitutionality of Article 1 of the Federal Law "On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto", Article 32 §§ 1 and 2 of the Federal Law "On international treaties of the Russian Federation", Article 11 §§ 1 and 4, Article 392 § 4 (4) of the Civil Procedure Code of the Russian Federation, Article 13 §§ 1 and 4, Article 311 § 3 (4) of the Commercial Procedure Code of the Russian Federation, Article 15 §§ 1 and 4, Article 350 § 1 (4) of the Code of Administrative Procedure of the Russian Federation and Article 413 § 4 (2) of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of members of the State Duma".

[6] Federal Constitutional Law of 21 July 1994 No. 1-FKZ (as amended on 9 November 2020) "On the Constitutional Court of the Russian Federation" // Official website of the Constitutional Court of Russia, URL: http://www.ksrf.ru/en/Info/LegalBases/FCL/Documents/FCL_EN.pdf.

[7] Explanatory note to the amendments to the Constitution of the Russian Federation concerning the Supreme Court and the prosecutors' service of Russia.

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In the area of implementation of criminal policy, the relationship of the superior courts should be analysed separately: the relationship between the Supreme Court and the Supreme Commercial Court, on the one hand, and the relationship between the Supreme Court and the Constitutional Court, on the other.

It should be noted at the outset that the dissolution of the Supreme Commercial Court of the Russian Federation and the transfer of its functions to the Supreme Court of the Russian Federation at the institutional level eliminated the basis for the opposition between these courts and transferred the possible contradictions arising from commercial and criminal proceedings into the category of internal contradictions in the jurisprudence of a single body. In addition, one must clearly realise that in the sphere of regulation of the criminal-law relations, there was no (and could have been none) opposition as such between commercial and "general" jurisprudence, in view of fundamental differences in the functional purpose of the respective courts. Nevertheless, difficulties in the functioning of commercial courts and courts dealing with criminal cases have been and remain in the area of legal regulation, which is associated with concerns misconduct in the economic sphere, the potential possibility of legal classification of the same facts as an economic dispute and as an economic crime, the establishment of the *res judicata* significance of a judgment in a commercial case for the consideration of a criminal case, and, on the contrary, an effect of the criminal judgment for the resolution of a commercial case.

Without delving into this very specific and extremely complex area, realizing that a number of special studies are devoted to it [20; 21; 22; 23], we can only state in the context of our topic that the existing contradictions were raised to the level of the constitutional review, and the mechanism for overcoming them was concretized by the Constitutional Court of the Russian Federation.[8]

No less complicated in theoretical and applied terms and more closely related to the problems of criminal policy is the problem of the relationship between the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation. Taking into account the specifics of the competence of these bodies, the contradiction between them can be conceived only in the matter of interpreting the provisions of the criminal legislation.

The court of general jurisdiction makes its decisions in accordance with both the generally binding constitutional and legal meaning of criminal law provisions[9], and the clarifications provided by the Supreme Court of the Russian Federation[10]. However, the situation is complicated by the fact that when applying criminal law, courts of general jurisdiction do not always have at their disposal a document that officially reflects its true constitutional and legal meaning, but at the same time they are not entitled to apply a law that, in their opinion, is unconstitutional.

The current legislation provides, on the whole, a reliable mechanism for resolving the problem. A court of general jurisdiction, if it questions the constitutionality of a particular provision of the criminal legislation, including in the sense formulated by jurisprudence, shall suspend the proceedings and request the Constitutional Court of the Russian Federation to resolve its doubts.

If the court does not have such doubts, it is guided by the presumption of the constitutionality of the Criminal Code and the clarifications provided by the Supreme Court of the Russian Federation.

URL: https://sozd.duma.gov.ru/bill/352924-6 (retrieved on: 10.10.2020).

[8] Decision of the Constitutional Court of the Russian Federation of 23 July 2020 No. 1898-O "On refusal to accept for consideration a complaint of a citizen Kantemir Feliksovich Karamzin on a violation of his constitutional rights by Articles 90 and 125 of the Code of Execution of Sentences of the Russian Federation".

[9] Judgment of the Constitutional Court of the Russian Federation of 16 June 1998 No. 19-P "In the case of the interpretation of certain provisions of Articles 125, 126 and 127 of the Constitution of the Russian Federation."

[10] Judgment of the Constitutional Court of the Russian Federation of 23 December 2013 No. 29-P "In the case of review of the constitutionality of Article 1158 § 1 (1) of the Civil Code of the Russian Federation in connection with the complaint of citizen M.V. Kondrachuk".

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The results of the application of the law in such case enforcement, however, can be challenged before the Constitutional Court of the Russian Federation by the persons concerned.

The current jurisprudence knows a lot of examples when the constitutional meaning of the provisions of the criminal legislation identified by the Constitutional Court of the Russian Federation differed significantly with the interpretation of the law that was common among the courts of general jurisdiction and on which the courts based their decisions. Let us recall the cases on the procedure for determining the size of the money transferred by way of smuggling for the purposes of Article 188 of the Criminal Code of the Russian Federation, on the definition of the subject of the crime under Article 226.1 of the Code, on the interpretation of the elements of crime under Article 212.1 of the Code, on the procedure for applying Article 199 of the Code, on the assessment of the danger of a crime under Article 324 of the Code, on the interpretation of elements of corpus delicti under Article 159 of the Code, etc.

All of them demonstrate fundamental differences in the approaches of the Constitutional Court of the Russian Federation and the courts of general jurisdiction, including the Supreme Court of the Russian Federation, to resolving the issue of the constitutionality of the provisions of the criminal legislation. This problem is almost not discussed at all in academic literature through the concept of "contradiction". It can be explained by the fact that there could not be, as such, the position of the Supreme Court of the Russian Federation on the constitutionality of the applicable criminal legislation. The Supreme Court of the Russian Federation, like any other court of general jurisdiction, is not entitled to determine the constitutional meaning of laws. However, it must be admitted that the very fact of the application of the criminal law in court "by default" reflects the absence of doubts about its constitutionality, or, in other words, confidence in its constitutionality.

Contradictions in the constitutional legal assessment of the provisions of the criminal law between the Constitutional Court of the Russian Federation and the courts of general jurisdiction (including the Supreme Court of the Russian Federation), thus, can be thought of as latent until they are revealed in constitutional proceedings. The identification and resolution of these contradictions is the most important direction of legal policy in the country, which reflects the consistent solution of the global task of constitutionalization of Criminal Law.

Assessing the situation as a whole, it must be said that the very fact that there are contradictions between the Constitutional and the Supreme Court of the Russian Federation in the assessment of the constitutionality of the provisions of the criminal legislation is, in principle, an inevitable and objective phenomenon. They should be treated, so to speak, "absolutely calmly", considering the existence of an effective mechanism for resolving the contradictions and the generally binding nature of the decisions of the Constitutional Court of the Russian Federation emphasised in the law.

At the same time, it should be noted that in some situations the decisions of the Constitutional Court of the Russian Federation invade an area that is far from the function of interpretation of the constitutional legal meaning of the criminal legislation. Along with that, the relevant passages, being included in the text of a decision of the Constitutional Court of the Russian Federation, can confuse jurisprudence.

Thus, for example, the Constitutional Court of the Russian Federation indicated that Art. 212.1 of the Criminal Code of the Russian Federation "implies the possibility of imposing a prison sentence only on the condition that the violation of the established procedure for organizing or holding an assembly, rally, demonstration, procession or picketing entailed the loss of a peaceful nature by a public event (...) or infliction of or a real threat of causing significant harm to the health of citizens, property of individuals or legal entities, the environment, public order, public safety or other constitutionally protected values".[11] While being

[11] Judgment of the Constitutional Court of the Russian Federation of 10 February 2017 No. 2-P "In the case of review of the constitutionality of the provisions of Article 212.1 of the Criminal Code of the Russian Federation in connection with the complaint of citizen I.I. Dadin".

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seemingly logical and rational, it must be admitted that this statement, does not directly follow from the text of the criminal law, but essentially "binds" a court in its choice of a criminal sanction, providing for restrictions not established by Article 212.1 of the Criminal Code of the Russian Federation, nor by the provisions of the criminal law establishing the rules for the imposition of a criminal punishment.

In another decision the Constitutional Court of the Russian Federation, indirectly, but quite clearly, gave an assessment to the provisions of Article 24 § 2 of the Criminal Code of the Russian Federation, establishing the procedure for determining the form of guilt with which a criminal offence was committed. The Constitutional Court of the Russian Federation recognises that since the disposition of the relevant articles does not contain an indication of the commission of an act by negligence, it is therefore assumed that it can only be committed intentionally.[12] At the same time, the Plenary of the Supreme Court of the Russian Federation adheres to a different interpretation: "Based on the provisions of Article 24 § 2 of the Criminal Code of the Russian Federation, if in the disposition of the article ... the form of guilt is not specified, then the corresponding ... offence can be committed intentionally or through negligence, provided that this is evidenced by the content of the act, the methods of its commission and other elements of *actus reus* of the corpus delicti of an environmental crime".[13]

Such discrepancies in the interpretation of the provisions of the criminal legislation cannot have a beneficial effect on jurisprudence and must be overcome. It seems that the main source of their emergence is the Constitutional Court's overstepping its competence and intruding into the area of interpretation, not related to the identification of the constitutional legal meaning of the Criminal Code of the Russian Federation. Especially questionable are situations when the opinion of the Constitutional Court of the Russian Federation is formulated as if "in passing", without immersion in the topic and not as the result of specific proceedings (as is the case with the interpretation of Article 24 § 2 of the Criminal Code of the Russian Federation). Therefore, it remains only to recall the need to show and observe the very "restraint" that the Constitutional Court of the Russian Federation regularly reminds of in connection with the discussion of the expansionist aspirations of the European Court of Human Rights.

5. Contradictions between courts of various levels within the system of courts of general jurisdiction

The structure of the system of courts of general jurisdiction, if considered in a broad context, is objectively such that it includes many elements, both subordinate in the order of the levels of jurisdiction (courts of the first, appeal, cassation, supervisory instances) and non-subordinate (courts of various regions of the country, judicial chambers in the courts of the same level, judges themselves). This circumstance, taking into account the principle of independence of judges, naturally gives rise to the possible inconsistencies in approaches in assessing both the facts of a case and the content of criminal legislation in different areas of the judicial system. This "discrepancy" is a very interesting and complex subject of analysis, which, it seems, has not yet been fully comprehended in legal theory. Meanwhile, its research is of particular importance, since it exposes the issue of ensuring the unity of judicial practice, understanding of such a constitutionally significant phenomenon as "established jurisprudence", and identifying contradictions in it.

The Constitutional Court of the Russian Federation in one of its decisions indicated that "to recognize the existence of the established jurisprudence, it is not necessary to have an absolute unity of legal positions of [the domestic

[12] Judgment of the Constitutional Court of the Russian Federation of 31 March 2011 No. 3-P "In the case of review of the constitutionality of part three of Article 138 § 3 of the Criminal Code of the Russian Federation in connection with complaints of citizens S.V. Kaporin, I.V. Korshunov and others."

[13] Ruling of the Plenary of the Supreme Court of the Russian Federation of 18 October 2012 No. 21 "On the application by courts of legislation on liability for violations in the field of environmental protection and the use of natural resources" // Бюллетень Верховного Суда РФ (Official Journal of the Supreme Court). – 2012. – № 12

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courts]".[14] Thus, it is presumed that in practice it is possible and, apparently, also inevitable, a certain variability. It is sometimes thought by some authors as desirable, since "a rational and orderly conflict within the limits set by the rule of law is a healthy sign" [24, p. 29]. On the other hand, one of the most important tasks of the Supreme Court of the Russian Federation is to clarify the issues of jurisprudence "in order to ensure the uniform application of the legislation of the Russian Federation."

The line between acceptable variability and the unity of jurisprudence, on the one hand, and unacceptable divergencies in the application of criminal legislation within a single judicial system, on the other, is a separate and important area of analysis of judicial policy, which should be examined from the standpoint of the category of "contradiction".

When starting the analysis, one must immediately take into account that the concept of "contradiction" can only be applied to those diverging approaches of the courts to solving criminal cases that do not go beyond the rule of law. In this regard, it is important to distinguish contradictions from errors of jurisprudence. Contradictions arise where and when, having correctly established the facts of a case, the courts disagree in the choice of the applicable legal provision, and both of choices can be explained and are based on the relevant reasons.

The reasons for such discrepancies may be different, and this should also be taken into account when analysing the contradictions in jurisprudence.

Firstly, there are situations when the reason for contradictory practice is created by the contradictions of the actual criminal law itself.

For example, Article 58 § 1 (a) of the Criminal Code of the Russian Federation determines that persons convicted of negligent crimes serve a sentence of imprisonment in a colony-settlement. At the same time, Article 58 § 1 (b) of the Criminal Code establishes that males sentenced to a prison term for grave crimes, who have not previously served prison sentence, are assigned to a general regime correctional colony. This distinction was unambiguously perceived in practice until 2019, when only intentional crimes were included in the category of "serious crimes". However, in 2019, Article 15 § 3 of the Criminal Code was amended and the category of grave crimes was expanded by including, among others, a number of negligent crimes. This led to ambiguous approaches in the interpretation of these provisions in terms of determining the place of serving imprisonment by males convicted of serious reckless crimes. Some courts in deciding this issue rely on the provisions of Article 58 § 1 (a) of the Criminal Code of the Russian Federation, while others base their decisions on Article 58 § 1 (b) of the Criminal Code.

An example from the same area is the compatibility of the general provision on aiding and abetting (Article 33 § 5 of the Criminal Code of the Russian Federation) and the special rule on responsibility for aiding and abetting in terrorist crimes (Article 205.1 § 3 of the Criminal Code of the Russian Federation). If aiding and abetting as a type of complicity necessarily requires the existence of a perpetrator of a crime by virtue of the accessory principles of the complicity, then with regard to aiding and abetting as an independent crime, this issue has no legislative solution. On the question of whether the existence of a perpetrator of a terrorist crime is required in order to hold an accomplice liable under Article 205.1 § 3 of the Criminal Code, the courts may give conflicting answers. Some believe that due to the unity of the General and Special parts of the criminal legislation, the accessory requirement applies to the aider under Article 205.1 § 3 of the Criminal Code, while others, based on the fact that the independent criminalization of aiding and abetting "brought" aider out of the framework of the complicity, suggest that in order to prosecute under Article 205.1 § 3 of the Criminal Code the very fact of a terrorist crime and the existence of its perpetrator are not required.

Each decision in the above situations is based on the relevant provisions of the legisaltion

[14] Judgment of the Constitutional Court of the Russian Federation of 12 October 1998 No. 24-P "In the case of review of the constitutionality of Article 11 § 3 of the Law of the Russian Federation of 27 December 1991 "On the foundations of the tax system in the Russian Federation".

and is reasoned with reference them. However, in the general array of jurisprudence, this generates visible divergenices.

Secondly, contradictions in judicial practice can be generated by "ordinary" legal provisions, which in themselves are not in a state of contradiction, but give rise to ambiguous interpretation, which leads to contradictory jurisprudence.

The jurisprudence is full of such examples. As the most famous and vivid, one can recall the criminal law classification of a sleeping person killing. In one case, the highest court considered it correct to classify a murder of a sleeping victim under Article 105 § 2 (c) of the Criminal Code of the Russian Federation as a murder of a person in a helpless state[15], whereas in another case it found such approach incorrect. [16] Another example is the classification of the actions of a "general subject" who, together with a person with special characteristics of a subject, fulfills *actus reus* of a crime with a special subject: in some cases, the courts classify the actions of such persons as aiding in crimes with a special subject, whereas in other cases it is classified as a perpetration of an ordinary criminal offence without the element of a special subject.[17]

These contradictions, either caused by the quality of criminal legislation, or unrelated to it, determine the state of the current judicial practice, and form various approaches that are obviously in a state of contradiction, which is undesirable and affects the general state of legality and the fulfillment of a single standard of human rights. It is clear that they should be avoided.

The mechanism for resolving them involves not only the legislative amendments, which is the most obvious and, for all its complexity, the easiest way. An equally and possibly more important,way is to use the capabilities of the judicial system itself. As noted above, it is the Supreme Court of the Russian Federation, which studies and analyses judicial practice, and develops generally binding recommendations on the application of the criminal law, which are aimed at the unification of judicial practice, eliminate its internal contradictions, and ensure the uniformity of the jurisprudence. These recommendations are implemented, first of all, through the resolutions of the Plenary of the Supreme Court of the Russian Federation, the consistent and generally binding application of which eliminates the contradictions in the judicial practice. But in a certain number of cases, the unification of practice is achieved without the resolutions of the Plenary, in a "softer" way, through the consistent review and correction of court decisions, as well as the publication of Reviews of judicial practice containing, in the opinion of the highest court, examples of the application of the law, including the decisions of the Presidium of the Supreme Court itself delivered in criminal cases. It should be recalled that the special status of resolutions of the Plenary of the Supreme Court and decisions of its Presidium in the Russian legal system was recognized by the Constitutional Court of Russia, which emphasized both the official and generally binding nature of these documents.[18]

The position of the Supreme Court of the Russian Federation, which, in fact, is the official choice of one of the possible interpretations of the criminal law, is, of course, not arbitrarily formulated, but is developed based on a certain consensus using the principles and technologies of the communicative understanding of law [25; 26, p. 258].

The approach, which is considered correct by the highest court, is gradually replacing all others, which are now recognized as a manifestation of the

[15] Decision of the Chamber of the Supreme Court of the Russian Federation No. 75-097-19 in the Revin case // Бюллетень Верховного Суда РФ. – 1997. – № 12.

[16] Decision of the Chamber of the Supreme Court of the Russian Federation in the Bychenkov case // Бюллетень Верховного Суда РФ. – 2000. – № 8.

[17] Review of jurisprudence in cases of crimes against military service and some crimes against the office committed by military personnel of 01/03/2002.

[18] See: Judgment of the Constitution Court of Russia of 23/12/2013 No. 29-P "In the case of the review of the constitutionality of Article 1158 § 1 (1) of the Civil Code of Russia in connection with a complaint of citizen M.V. Kondrachuk"; Judgment of the Constitution Court of Russia of 17/10/2017 No. 24-P "In the case of the review of the constitutionality of Article 392 § 4 (5) of the Code of Civil Procedure of Russia in connection with the complaints D.A. Abramov, V.A. Vetlugayeva and others".

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erroneous application of the law. This does not mean that the approach of the Russian Supreme Court remains unchanged. It can be corrected over time. But in situations where the court's approach to assessing a particular crime changes over time, the contradiction does not look obvious. And the changes themselves are perceived not so much as contradictions, but as a manifestation of the dynamics of the judicial practice [27].

Ensuring the unity of jurisprudence on the basis of the interpretation of the criminal law, which is developed by the Supreme Court of the Russian Federation, necessarily raises a large theoretical question about giving such an interpretation the status of a judicial precedent. It is known that this status implies, firstly, the obligation of all subordinate courts to follow the rules established in a decision of the Supreme Court of the Russian Federation, and secondly, endowing this decision with the characteristics of a source of Criminal Law. The arguments in favor and against the introduction of judicial precedents into the domestic jurisprudence of Russia are well known, and we will not delve into the discussion on this matter. We state only as a matter of fact that irrespective of the experts' positions formulated in the academic criminal legal literature, the judicial practice actually shows that all courts follow, or at least strive to follow, the interpretation of the law provided by the highest court. This is a natural and, apparently, inevitable and necessary process of the unification of jurisprudence, preservation of the unity of the legal space and uniform standards of human rights, in particular, in the sphere of Criminal Law. This is a quite reliable mechanism for overcoming and preventing contradictions within the judicial system on the issues related to the application of the criminal law. Moreover, the higher the degree of recognition and the binding force of the decisions of the highest court, the less controversial the judicial practice will be.

At the same time, there are some circumstances that force us to return to the discussion on the issue of unity and contradictions in jurisprudence, even in a situation of a recognition of the precedent and generally binding nature of the decisions of the Supreme Court of the Russian Federation. Here we talk about the need to predict and to model the consequences of the reform of the judicial system that took place in Russia (in terms of the formation of appeal courts and cassation courts) for the substantive criminal law.

Their creation pursued not only the obvious goal of enhancing the independence of judges examining appeals and cassation appeals, but also the implicit goal of optimizing and redistributing the judicial workload. Based on the results of the reform, it can be stated, firstly, that part of the previous workload of the highest court was "transferred" to the level of the cassation courts, and secondly, that the distance between the trial courts and the Supreme Court of the Russian Federation has significantly increased. The predicted consequence of these changes can be considered the fact that the number of criminal cases examined by the Supreme Court and on which it will express its position, will significantly decrease. This, in turn, will actualize and enhance the role of decisions made by the courts of cassation and courts of appeal. The fact of "jurisprudence shaping" in cassation or appeal districts cannot be denied or underestimated; moreover, such practice should be recognized today as a completely independent subject of academic analysis.

In the absence, for objective reasons, of an official position of the Supreme Court of the Russian Federation on a particular issue of interpretation or application of criminal law, the existence of a verbalised position of the cassation or appeal courts may become a "point of attraction" for other subordinate courts. This, in turn, may give rise to significant issues, firstly, concerning the recognition of the binding nature of the "precedents" of the cassation and appeal courts for the lower courts of the relevant districts, secondly, concerning the possibility of courts located outside this district, to follow such decisions, and thirdly, concerning the possible discrepancy in the interpretation of the law between the cassation and appellate courts of different districts.

From a purely theoretical point of view, these questions may seem far-fetched. All courts apply the same criminal law (its content does not differ in various judicial districts), function under the same procedural rules, and are guided by the same

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positions of the Supreme Court of the Russian Federation. This, ideally, should exclude any possible discrepancies in the interpretation and assessment of the criminal law provisions. However, this is only in theory. Practice is always richer and more unpredictable, and discrepancies in the assessments of the law and the resulting contradictions in judicial practice are quite predictable, since, in particular, any court is, first of all, judges, specific people with their own perception of the ideals of law and justice.

In this case, ensuring the unity of judicial practice and eliminating regional divergencies in the interpretation and application of the law can be carried out not only through "interference" (which is, by the way, very limited procedurally) on the part of the Supreme Court of the Russian Federation, but also require the development of new procedures and methods. In a comparative aspect, a situation close to the one examined arises, for example, in the United States, when a State court is examining a case on the application of federal legislation in the absence of established precedents of the Supreme Court, but with appropriate decisions in an appellate court or in other State courts. Special studies show that there are at least four main approaches here: (1) refusal to recognize such decision as binding and treat it as nothing more than a "convincing authority"; (2) possible, but not mandatory, adherence to the precedent of the court of the appellate district where the State is located, in order to develop harmonious relations between the courts; (3) recognition that the court is always bound by decisions of similar courts, but only when these decisions are "numerous and consistent"; (4) the perception of the interpretation of the federal law, provided by the courts of appeal, as mandatory, if only for reasons of administrative convenience [28, p. 934 – 936]. It is clear that these approaches, "grown" in a different legal system, with a different configuration of courts and the regional powers, cannot be blindly transferred to the Russian domestic soil. However, their existence and wide discussion in the literature [29; 30; 31] cannot but be taken into account when considering the topic. Let us note, by the way, that plunging into the topic of the formation of judicial practice in the absence of precedents of the highest court, some authors emphasize the advantages of the fourth of the described approaches, based on the doctrine of "lockstep". Acceptance and adherence to the practice of courts at the intermediate level of the judicial hierarchy, in their opinion, will not only increase the consistency, predictability and, ultimately, the uniformity of the practice of applying of the federal legislation, as well as enhance the regional courts' contribution to the formation of the position of the highest court [28, p. 945]. This approach, among other things, will also help to minimize disputes related to the determination of the jurisdiction over criminal cases, if the judicial practice in courts belonging to various appellate or cassation districts differs [24; 32].

6. Conclusion

Contradictions of judicial and criminal policy, taking into account the structure of the judicial system itself, can be represented by relations: a) between domestic and international courts; b) between the highest courts of the national legal system; c) between the courts of various levels of jurisdiction. The contradictions that arise are based on various circumstances, both related and unrelated to the imperfect legislation. In the latter case, we are talking about the problems arising from the hierarchy of courts, the establishment of the limits of their competence and powers, as well as the principle of independence of judges as a fundamental basis for the functioning of the judicial system.

Due to the specifics of the judiciary, authoritarian disciplinary measures cannot be applied to resolve emerging contradictions. Such contradictions should be overcome by means of a mechanism that includes two main blocks: first, a clear, non-ambiguous delimitation of jurisdiction of courts of various types (first of all, international and constitutional, constitutional and courts of general jurisdiction, courts of general jurisdiction and commercial courts); secondly, readiness for compromises and agreements, the purpose of which should be the effective protection of human rights as a legal value that determines the functional purpose of all courts.

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INFORMATION ABOUT AUTHORS

Yury E. Pudovochkin – Doctor of Law, Professor, Chief Researcher – Head, Department of Criminal Law Research, Center for the Study of Justice Problems
Russian State University of Justice
69, Novocheremushkinskaya ul., Moscow, 117418, Russia
E-mail: 11081975@list.ru
RSCI SPIN-code: 5775-0242; AuthorID: 416470
ORCID: 0000-0003-1100-9310

Mikhail M. Babayev – Doctor of Law, Professor, Honoured Scientist of the Russian Federation, Chief Researcher, Department of Criminal Law Research, Center for the Study of Justice Problems
Russian State University of Justice
69, Novocheremushkinskaya ul., Moscow, 117418, Russia
E-mail: babaevmm@yandex.ru
RSCI SPIN-code: 4238-1889; AuthorID: 77172
ORCID: 0000-0003-1656-2529

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