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*Research Article*

# ARCHETYPES OF CRIMINALIZATION: IS IT POSSIBLE TO FIND RATIONALITY IN CRIMINAL POLICY?[1]

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*The author estimates the drawbacks of rationally normative approach to criminalization customary in the Russian doctrine. The article substantiates the importance of investigating the grounds and models of taking decisions on criminalization by the political actor. The author introduces the 'archetype of criminalization' concept for characteristic of a pattern characterizing typical oft-stated models of substantiation and taking decision on a new meaning of criminalization. The article describes a methodology of seeking archetypes of criminalization in Russian practice. The author articulates and discloses the following criminalization archetypes: precedent, accumulation, similarity and response. Moreover, the author highlights that the influence of the archetypes of the new criminalization in Russia has already been noted by representatives of legislative power. Therefore Federal Law No. 266-FZ 'On Amendments to Article 8 of the Federal Law 'On the Enactment of the Criminal Code of the Russian Federation' and the Federal Law 'On the Enactment of the Criminal Procedure Code of the Russian Federation" was adopted. However, the author points out his hope that the Russian legislative power will comprehend the importance of rationalization of decisions on new criminalization.*

***Key words:*** *criminal policy; criminalization; criminalization archetypes, crime, criminal legislation*

## Introduction

A rationalistic (or rationally normative) approach to criminalization became traditional for Russian criminal legal science. What lies behind, it is an insight into criminalization as the sociopolitical process determined by the rational reasons (Tobolkin, 1983; Korobeev, 1987; Koroveev, 2019; Lopashenko, 2009; Nechaev, 2018). However, the absence of any regard of political process irrationality comes forward in this case as a significant drawback of rationalistic approach. Whatever is the like-kind deviant behavior, which brings about undesirable changes in the society, its criminalization is impossible without a political will. The criminalization proper is unconceivable at that without political process, which cannot be rational on its own. A. von Hirsch believes that the '*theory can help to guide this process under favorable conditions* [criminalization process – *D.S.*[2]] *but the risks of legislative abusive practice and populist criminal policy will be always present*' (Peršak, 2007: 7). N. Peršak explains the evasion from acknowledging political character of criminalization prevailing among representatives of the criminal law doctrine by the fact that '*politics was never popular with criminal law scholars especially in* [European – *D. S.*] *the continent, since frequently it denotes the victory of power over law*'.

[1] The research was funded by the Russian Foundation for Basic Research (grant project No. 18-29-14028).
[2] Here it means Danil N. Sergeev.

The dominance of rationalistic approach has brought about a situation when the motives for taking not infrequently irrational political decisions on criminalization or, on the contrary, decriminalization of one or another crime were not specifically analyzed in the science (Kozachenko & Doronina, 2007). Meanwhile, the investigation of grounds and models of taking political decisions discloses not only the context of adopting this or the other criminal law standard but helps to provide its substantiated interpretation.

The term 'archetype' is used in many fields of knowledge with a similar meaning of the like-kind repeatedly reproduced image, model underlying this or the other social practice. Accordingly, the 'archetype' concept is not used in the normative theory of criminalization (Aranovsky, 2003; Tyurin, 2008: 193) since there is no need for it. However, the 'archetype' concept can be transferred to the philosophic and legal element of criminalization for describing actually existing prescriptions predetermining new legislative solutions on introduction of criminal responsibility for this or the other deed.

We will understand a peculiar implicit cultural code characterizing typical oft-stated models of substantiation and taking decision on new criminalization by archetype of new criminalization. We have decided to refer to 'archetype concept' due to a number of considerable circumstances.

First of all, the approaches to estimating criminalization existing in science are being built exceptionally on rationally normative perceptions of this phenomenon. The rationality of criminalization implies achieving a particular socially useful goal by means of instruments, knowledge and experience in this field appropriate for attaining it (Kulesza, 2017: 18). The models of criminalization used today are still very far from the ideal of rationality.

Secondly, the existing experience of new criminalization is estimated predominantly in the review and critical way in literature, in this case the irrational reasons of new criminalization are not investigated.

Thirdly, in case of estimating new criminalization exceptionally the content of a new standard is analyzed, but not that contributed to its acceptance, i. e. determined the lawmaker's will and, as a result, the standard content (Kozachenko & Doronina, 2007). Taking this into account it does make sense to carry out interdisciplinary (first of all political and legal) assessment of models of new criminalization in terms of individual archetypes.

The archetypes, or cultural codes, make a part of mentality as more complex category, however, they have independent meaning. Unlike the typologies of criminalization of rationally normative approach the archetypes of new criminalization correspond to typical motives and symbols underlying this social-and-legal and political process. The archetype determines the methods of response to identical public challenges; it is used as an implicit directive finding expression in various forms and manifestations of legal and political awareness. In this case the archetype is science-cognizable category.

At the same time the archetype is considered by us in the capacity of irrational source of criminalization, since the very adherence to this or the other archetype in legislative practice reflects aspiration to frame up externally the idea of new criminalization that for some unknown reason has become mature once. The archetype is used by the same as decorative, externally rational veiling of irrationality of decision being taken. There are certain grounds that give reason to evaluate the archetype of criminalization as something outwardly rational, since the archetype itself is based on a once successful experience. Whereas, experience is one of the components of rational criminalization. However, meaningfully the archetype is irrational, and, hence, any archetype-based criminalization is also irrational. In this case there is no inverse relationship: not every irrational criminalization is based on archetype. In all jurisdictions one can see multiple examples of voluntaristic, populist, and sometimes even anti-legal criminalization. The irrational criminalization is not always unsuccessful; however, its irrationality results in the positive effect, most probably, by chance.

## Materials and methods

In order to search and describe archetypes of new criminalization, we have made complete analysis of experience of new criminalization according to effective Criminal Code of the Russian Federation of 1996. It appeared to be rather extensive and labor-consuming task implemented in four stages.

*At the first stage* we have assessed the total volume of new criminalization. Let us recall that by new criminalization we mean only the cases of establishing legislative models of new crimes. Therefore, the cases of differentiating criminalization (including law supplementing with new parts not creating theoretically

new crimes, or distinguishing special elements) (Nechaev, 2018: 86)[3], re-criminalization (Nechaev, 2018: 87)[4], notable criminalization (Nechaev, 2018: 91)[5] have been excluded from total volume of criminalization (which is significantly bigger than a new one).

112 new crimes were introduced into effective Criminal Code of the Russian Federation by 73 federal laws over a period since January 1, 1997 till September 20, 2020. The new criminalization was absent only in 1997, 2000, 2005 and 2007. The growth of number of new types of criminalization began since 2010 and reached its maximum in 2014 (10 new types of criminalization), in 2019 the number thereof dropped to a minimum (two new types of criminalization).

*At the second stage* the reasons that compelled the lawmakers to select criminalization for protecting any spheres of public life were appraised. Apart from the texts of laws proper the explanatory notes[6], as well as media reports, comments on draft laws were analyzed. With respect to legislative proposals adopted from 1997 to 2007 attention was also paid to the position of authors of the thousand-page reference book with amendments to the Criminal Code of the Russian Federation over the first decade of its validity (Kozachenko & Doronina, 2007).

The analysis was made with respect to the following parameters: 1) rationality of criminalization; 2) purpose of law adoption (purpose as specified in the explanatory note, if it is reflected therein, as well as understood from the document content); 3) subject of legislative initiative (this criterion disclosed a political component of criminalization); 4) substantiation of legislative proposal – the main and additional assertions, which were correlated with one of revealed archetypes in the final version of analytical report.

*At the third stage* a conclusion was made on total irrationality of criminalization in the Russian practice and a hypothesis was advanced on the existence of at least four pronounced archetypes of new criminalization: *precedent, similarity, response and accumulation*.

*At the final stage* a new criminalization was generalized and legislative solutions were correlated with one of proposed archetypes. In a number of cases several archetypes influenced criminalization of deeds; however, we decided to refrain from describing complex archetypes due to the meaningful repetition of features of other archetypes in them. Collectively the search results are reflected in *Appendix*.

It is interesting that legislative proposals on new criminalization were initiated in the period from 1997 till 2020[7] by three entities only: President of the Russian Federation (20 legislative proposals), Government of the Russian Federation (24 legislative proposals), State Duma members and members of the Council of the Federation (29 legislative proposals[8]). The State Duma members initiated legislative proposals in 27 cases collectively, among other things collectively with the members of the Council of the Federation (in five cases). The members of the Council of the Federation have not initiated legislative proposals individually. In two cases the legislative proposals were initiated by the Parliament member individually. In three cases a deputy group consisted of two persons. The biggest group consisted of 253 State Duma members and 2 members of the Council of the Federation (Federal law No.121-FZ dated 20.07.2012, which brought art. 330.1 of the Criminal Code of the Russian Federation into force).

In six cases we failed to attribute new criminalization to at least one archetype (art. 144.1, 172.1, 200.1, 284.1, 330.1, 330.2 of the Criminal Code of the Russian Federation). All these laws are intrinsically

[3] Criminalization type, when the crime-forming factor pre-demining the boundaries of penal prohibition becomes qualifying or especially qualifying factor.

[4] Criminalization type, when the processes of criminalization and decriminalization go together.

[5] Criminalization due to entering a change into note in the text of criminal law.

[6] Explanatory notes in electronic form are available regarding majority of legislative proposals. The search was effected through the form of retrieval request on the website of Legislative activity support system: https://sozd.duma.gov.ru/oz#data_source_tab_b, the most convenient is to search by the number of adopted federal law. The cards of legislative proposals adopted before 2002 inclusive do not comprise appendices. The originals of such documents were not digitized since by the moment of establishment of Legislative activity support system (LASS) they were handed over to the State Archive of the Russian Federation (SARF). Beginning from 2013 the majority of cards of legislative proposals in LASS also comprise scan images of documents provided at introduction.

[7] It is interesting that 26 of 73 federal laws were adopted in July. The month regarding new criminalization is December (15 laws). A revealed objective law reflects the schedule of work of the lower chamber of the Parliament, when massive adoption of legislative proposals at the third reading takes place by the end of session.

[8] The most active participant of deputy groups is I. A. Yarovaya, the initiator of new criminalization – (10 legislative proposals of 29).

*regulatory*, and this is the reason why there is no substantiation of necessity of choosing criminalization as the method of implementing the norms either in explanatory notes or in publications. In seven cases the intrinsically regulatory norms were attributed nevertheless to one of archetypes. Thus, we have arrived at the conclusion on practically total irrationality of new criminalization in Russia in the period from 1997 to 2020.

## Results

The results of the study are reflected in the conclusions of this work.

## Discussion

***1. Precedent***

*If some act has been criminalized, then it provides grounds for criminalization of another act similar to the first one by one or several indicators.*

In order to avoid identification of this archetype with the legal precedent, it will be reasonable to refer to it as the *precedence of criminalization*. So, driving a power-driven vehicle while intoxicated is injurious to the public and constitutes a crime according to effective criminal legislation. Proceeding from this *precedent of criminalization* we can make a conclusion on public danger of driving flying vehicles while intoxicated, though there are no flying vehicles in the streets of our cities so far.

The example of precedent criminalization is provided by a situation with analogs of narcotic drugs, the so-called 'designer drugs'. The emergence of these drugs was triggered off in many respects by the peculiarity of criminalization of distribution of narcotic drugs and substances all over the world – the states began to include prohibited substances to special registers (lists) universally criminalizing the turnover of substances included into a list. In order to get around the statutory prohibitions, the illegal chemical laboratories started to create chemically similar but not identical substances, which reproduced the properties of a certain narcotic drug or psychoactive substance, included into the register. The emergence of every new substance demanded its inclusion into the register, i. e. the fabrication and implementation of such substances before including them into register were officially legal. In order to combat this phenomenon, a concept of analog of narcotic drug and psychoactive substance was introduced – this substances of synthetic or natural origin prohibited for turnover not included into the List of narcotic drugs, psychoactive substances and precursors thereof subject to control, which chemical structure and properties are similar to chemical structure and properties of narcotic drugs and psychoactive substances, which psychoactive action they reproduce. Thus, the turnover of substances that may or may not even exist, was criminalized.

The analysis of legislative proposals on new criminalization over a period of 1997 to September 20, 2020 gives us 24 examples of using archetype of precedent criminalization, in four cases from this number this archetype manifested itself in complex with the other one as auxiliary. In two cases only we encountered the precedence in legislative proposals initiated by State Duma members and members of the Council of the Federation. In overwhelming number of cases (22) this archetype was pointed out in legislative proposals arriving for consideration from the President of the Russian Federation and from the Government of the Russian Federation.

The peril of precedent criminalization lurks in its ability to justify extending subject of crime to many situations. It is well-observable in Russian practice, when regulatory norm is provided with supporting criminal prohibition during its initiation.

***2. Accumulation***

*The occurrence of plurality of same-type acts not being crimes can be used as the basis for criminalization of such an act.*

The idea of criminalization often comes into being in the midst of revealing a great number of reproducible deeds officially not being any hard-core offenses, but cumulatively forming a critical mass dangerous by its quantity. It is quite rational. Let us recollect the mentioned above new reading of maxima of N. F. Kuznetsova: *one hundred cats can cause harm, which cumulatively can be more massive than the harm caused by one tiger*. The quantitative factor, for instance, serve as the basis for criminalization of facts of registering enterprises to counterfeiters. These acts have been committed during one and half decades and have not been estimated as criminal ones. However, the conglomeration of a number of such

enterprises ('wildcat ventures') resulted in massive tax evasion, disruption of government contracts and fraudulent business.

We counted 36 cases during analysis of new criminalization according to the Criminal Code of 1996, when accumulation became the basis for taking decision on criminalization. In all cases it was used for substantiation of legislative proposal. The multiplicity of events may consist of various acts: from officially unpunishable, from disciplinary infractions or administrative offences, as well as from their combinations of various types.

Let us consider a particular example of criminalization with respect to specified archetype. New article 215.3 was introduced into Criminal Code by Federal law No. 283-FZ of December 30, 2006. The legislative proposal initiator has given the following substantiation:

*…The actions of criminals who made tie-in at 238.9 km of trunk oil pipeline 'Almetyevsk-Kuybyshev' in Samara region became the reason for oil spillage taking place on 12.10.2004 and pollution of Padovka river along the length of 3 km downstream causing loss amounting to 3 million 100 thousand rubles. In April of the last year a criminal tie-in at 93,4 km of trunk oil pipeline 'Kuybyshev-Lisichansk' in Samara region became the reason for spillage of 86 tons of oil, the incurred damage reached 2 million rubles; the greater part of damage constituted expenses for elimination of soil contamination. A motor vehicle passing in Krasnodar Territory in September 2004 damaged a branch pipe from unauthorized tie-in at 157.7 km of trunk oil pipeline 'Tikhoretsk-Tuapse', which resulted in oil spillage and soil contamination over an area of 2.5 thousand sq. meters, while the expenditures for restoration works, including construction of temporary earth dike, collection and disposal of spilled oil and ground contaminated with oil amounted to 2.5 million rubles.*

The focus of criminal intent of criminals predominantly on stealing oil or the products of processing it does not exclude faulty tie-ins into gas pipelines, which are located not infrequently at insignificant distance from oil pipelines and oil-products pipelines. The probability of explosion in such-like cases increases many times, which can cause a wide-scale accident at pipelines located in close proximity to the crime scene[9].

We see here a classical example of describing accumulation of many events. Further, the legislative proposal initiator underlines a danger of transition of quantitative changes to qualitative ones, which should affect the severity of the crime:

*At the same the effective criminal legislation does not comprise the norms adequate to a high degree of public danger of crimes and other unlawful acts committed at the facilities of oil pipelines and oil product pipelines. Moreover, the changes introduced into the Criminal Code of the Russian Federation by Federal law No.133-FZ of 31.10.2002 attributed the case of thievery of transported products from the pipelines to the category of crimes of medium gravity and equated them with pocket-picking*[10].

The archetypes of precedent criminalization and accumulation are closely connected with the *rational doctrine of public danger accumulation*. Both archetypes developed on the basis of rational experience in this sphere. A decision on criminalization of this or the other deed should be taken and not without reason. In order to understand that a new potentially dangerous deed should be criminalized, i. e. considered crime, a concept of its possible public danger should be formed.

The indicators of the frequency and prevalence of certain offences influence the process of criminalization indirectly only, act as a dangerous background indicating negative dynamics in the sphere of counteracting criminal infringements of the individual, society and state.

Resorting to the criminalization of a particular act (misconduct) in such a situation, the legislator must remember that there are other ways of counteracting crime, besides the criminal law, both a state and a social phenomenon. And one more thing: a problem of keeping record of accumulation of public danger during criminalization has nothing to do with the short-sighted policy of fear mongering among the population, with the help of which something that is not criminal is recognized as criminal.

A rational doctrine of accumulated public danger demands a scrupulous account of the number of acts, the harm they cause, and the costs of preventing them. This hard job unfortunately is oversimplified

[9] Explanatory Note to Legislative Proposal No. 288967-4 'On Introducing Amendments to the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedure Code of the Russian Federation'. Available at: https://sozd.duma.gov.ru/bill/288967-4 [Accessed: 09 October 2021].

[10] Ibid.

by archetypes of precedent and cumulative criminalization. A danger of accumulation as the model of criminalization also lies in the fact that the reasonableness of criminalization of frequently repeated acts can only be due to their real danger. Otherwise, the abundance of such acts should on the contrary be used as the basis for excluding them from the list of criminally liable acts.

***3. Similarity***

*If like-kind act has been criminalized in other jurisdiction, then it can be criminalized in the national criminal legislation.*

The case is not on the similarity of law or justice, but on spreading criminalization practice borrowed from foreign states or from international documents. The similarity is used quite frequently for substantiating the need of new criminalization. The similarity can be traced in our study in 22 cases of criminalization, at that, in half of the cases it plays an auxiliary role in line with other archetype.

For example, art. 185.2 was introduced into the Criminal Code of the Russian Federation by Federal law No.151-FZ of October 30, 2009. The experience of other states is laid down in detail in the explanatory note: *international experience and practice accumulated by the leading foreign states in the sphere of administration of criminal liability for offences in the securities market were taken into account in the process of legislative proposal development. So, according to legislation of the USA, where the securities market is most developed, the provisions on criminal liability in the Law on securities of 1933 and the Law on stock market of 1934 provide for that a willful violation of any provision of the laws, or any rule or regulation adopted in accordance with these laws constitutes an offence. <…> Sarbanes-Oxley Act adopted in 2002 establishes fine up to 1 million USD or penal custody for a period up to 10 years. <…> In Great Britain a failure to provide notification within specified time limits to the public company with information with respect to holding shares of the company by the given person is a criminal offence. <…> The criminal liability for manipulating the prices in the securities market is established practically in all countries (for instance, in Germany, Italy, Croatia, Poland, Great Britain)*[11].

At that, the legislative proposal comprises no other supporting points substantiating a necessity of introducing a similar norm into legal environment of the Russian Federation. In the legal consciousness of the initiators of the draft laws, thus, the analogy of foreign experience replaces the need to find a justification for the effectiveness of the application of the norm in the domestic legal system. The danger of such an archetype lies most often in the inefficiency or senselessness of Russia's direct borrowing of norms from other legal systems. Precisely that is how some constituent elements have penetrated into the Criminal Code of the Russian Federation in terms of 'mediation', which as before could be well appreciated in the framework of joint participation institution. Every legal system has passed its own historical way, therefore, rather-legal similarity can be used as a supporting example only, but not the authority for criminalization.

***4. Response***

*The events spurring a great public response can bring about determination to criminalize these acts 'for future'.*

The archetype of response anticipates an answer to a single event or a group of several irritating events. This archetype is encountered less frequently than the other in the national legislative practice. However, for instance, in the American legal system we see more often than not the 'personalized' laws named after the victims of those or the other crimes.

We have found six cases in the practice of new criminalization apparently associated with archetype of response according to the Criminal Code of the Russian Federation of 1996. It is curious that nothing is said, however, about such a single event in law-project documentation in any of the revealed cases, however, the development and adoption of laws proper have been related thereto.

It is important to stress characterizing this archetype that a single event can appear in this capacity only in case of its such significance that can be expressed in public response, active deliberations of the event in the mass media, in political circles. The power of this archetype just consists in dashing situation development, when the law is being adopted here and now. Except that the event singularity does not mean

[11] Explanatory Note to Legislative Proposal No. 288967-4 'On Introducing Amendments to the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedure Code of the Russian Federation' (on the issue of imposition of penalties for the deeds inflicting essential harm to the rights and interests of people and legal entities in the securities market). Available at: https://sozd.duma.gov.ru/bill/288967-4 [Accessed: 09 October 2021].

that some single act of human behavior was committed and caused an instant legislative reaction. It can be several different actions carried out in a short period of time, but due to the high resonance they attracted increased public attention.

Let us consider a couple of characteristic examples. On November 10, 2015 WADA leveled accusations against Russian Anti-Doping Agency (RUSADA). On December 17 of the same year the top management of RUSADA resigned. On January 14, 2016 the second part of report of WADA independent commission was published providing new facts of evidence of corruption in the International Association of Athletics Federations (IAAF), which helped conceal doping manipulations. On March 6, 2016, the third episode of the exposing film-investigation about doping in Russian sports 'Russian Distraction' was released. The doping scandal reached the peak of public debate. On March 25, 2016 a legislative proposal on establishing responsibility for inducement of sportsmen to use substances and methods prohibited in sport, was brought to the State Duma.

Another example. On May 16, 2016 a publication of G. Mursalieva 'Groups of death' appeared in 'Novaya Gazeta' paper, which comprised information saying that 130 child suicides were registered in Russia from November 2015 to April 2016, at that, almost all children were the members of the same groups in social media. New deaths have been announced also on the pages of social media[12]. A peak of mass media stories about this 'game' fell on February 2017. The Investigation Committee and the Ministry of Internal Affairs of the Russian Federation paid attention to the 'groups of death'. On February 14, 2017 the Investigation Committee in Moscow region initiated a criminal case pursuant to Article 'forcible suicide' on suicide attempt of two teenage girls: according to the investigators the 'unidentified persons put psychological pressure on the girls, gave them assignments dangerous to health through accounts in the social media'. On February 17, 2017 four coordinators of the 'groups of death' were taken into custody in North Ossetia[13]. Despite the fact that the objective evidence of 'game" reality has never been ascertained so far, the same as the influence of the 'groups of death' on adolescent suicides, not later than March 9, 2017 a legislative proposal was presented to the State Duma on introduction of new mechanisms of opposing activity aimed at inducement of children to suicidal behavior. This legislative proposal corrected edition of Art. 110 of the Criminal Code of the Russian Federation, as well as introduced new elements of crime – 110.1, 110.2, 151.2 of the Criminal Code of the Russian Federation.

Events related to the adoption of the Federal Law of April 1, 2020 No. 100-FZ, which established criminal liability for violation of sanitary and epidemiological rules and introduced new elements of crimes were Art. 207.1 and Art. 207.2 of the Criminal Code of the Russian Federation. The bill was adopted in an extremely short time: from the moment of its introduction to the moment of its adoption, only six days passed. The reason for such haste was the onrushing pandemic of new coronavirus.

A single event, on the one hand, gives an opportunity to respond promptly to changing social, political, economic and other conditions of public life, and on the other hand – it gives no chance to reveal adequately a real necessity of entering corrections into criminal legislation. The use of this archetype can be traced also in the earlier history of our country. For example, Decree of the Presidium of the Supreme Soviet of the Soviet Union 'On strengthening criminal responsibility for violating the rules of currency operations' was adopted on July 1, 1961 in the wake of high-profile case of 'speculators in foreign currency' Rokotov, Faibishenko and Yakovlev[14].

Public opinion, which largely predetermines the strength of the analyzed archetype of new criminalization, has rarely entered the field of scientific research. Probably, the greatest work in this respect is the monograph (Efremova et.al., 1984) 'Public opinion and crime' issued by the Institute of economics and law if the Academy of Sciences of the Georgian Soviet Socialist Republic in 1984. One of its authors underlined the following:

*A complex problem is arising: to what extent the public opinion should be taken into consideration in the course of adopting, changing, or cancellation of criminal law. After all, the public opinion is a derivative*

[12] Mursalieva, G. (16 May 2016) Groups of Death. Novaya Gazeta. Available at: https://novayagazeta.ru/articles/2016/05/16/68604-gruppy-smerti-18 [Accessed: 20 September 2020].

[13] Meduza (17 February 2017) City Legend. What Stands behind the Game 'Blue Whale' and Explosion of Interest to 'Suicide Publications'. Available at: https: https://meduza.io/feature/2017/02/17/gorodskaya-legenda-chto-stoit-za-igroy-siniy-kit-i-vspleskom-interesa-k-suitsidalnym-pablikam [Accessed: 09 October 2021].

[14] This decree, of course, was not a new criminalization, but it fully demonstrates the power of the archetype of a single event.

*of two values: everyday awareness and theoretical knowledge. In everyday consciousness and public opinion, as a way of its functioning, false or erroneous views, judgments and ideas are often widespread, which, however, can have deep roots in collective experience and in socio-historical practice* (Efremova et.al., 1984: 228–229).

A danger of following the public opinion in case of criminalization lies not only in possible erroneous concepts of the essence of those or the other phenomena (as in example with the 'groups of death'), but also in traditionally overrated punitive claims of the society.

The problem of this archetype is a combination of responsiveness with respect to an event that has taken place already (after all there is no certainty that it will be repeated) and commitment to future events in it. We believe that owing to this archetype of response is the most dangerous archetype of new criminalization, which should not be followed under any circumstances. A haste of legislative decisions can be devastating and cause more harm than benefit. The irritant event should not be given consideration as the authority for criminalization, but can be used only as a rational cause for beginning estimation of opportunity of future response to such events by the efforts of criminal law.

## Conclusion

Any archetype is formed according to common rules of social evolution, which are based on experience and custom. The successful, less successful, or even negative experience predetermines selection of social practice, which is most suitable for this or the other situation. The customs, which are transferred through training and learning of acceptable and convenient social practices, can be not based on rational experience, but get formed as an irrational preference, repeated many times without realization or aspiration to realize possible viciousness of this custom. This is the reason why all archetypes of new criminalization are extremely viable.

At that, it is impossible to categorically assert that archetype is harmful or just dangerous. Its harmfulness or danger can be ascertained in that case only, when the decision on new criminalization was adopted exceptionally under the influence of such archetype. We have shown above that a danger of precedent criminalization lies in its ability to justify extension of subject of criminal offense to many situations. This is especially clearly confirmed by the currently widespread practice of reinforcing the regulatory norm with a criminal law prohibition, which, in the opinion of the legislature, will contribute to the strict observance of this, and often unpopular, norm.

The static character of archetypes is predetermined by very nature of this phenomenon, especially by its implicitness. It is not obvious to everyone that this or that action of the legislator is due to an essentially irrational archetype, but not a rational perception of social reality. One cannot but say that the influence of the archetypes of the new criminalization in Russia has already been noted by representatives of legislative power.

So, on July 13, 2015, on the initiative of the State Duma Committee on Civil, Criminal, Arbitration and Procedural Legislation, Federal Law No. 266-FZ 'On Amendments to Article 8 of the Federal Law 'On the Enactment of the Criminal Code of the Russian Federation' and the Federal Law 'On the enactment of the Criminal Procedure Code of the Russian Federation'', according to which amendments to the Criminal Code can be carried out only by separate federal laws and amendments to the Criminal Code cannot be included in the texts of federal laws that change (suspended, canceled, invalidated) other legislative acts or containing an independent subject of legal regulation, with the exception of the texts of federal laws amending the Code of Criminal Procedure at the same time.

An explanatory note to this unique for our legal system federal law says:

*The relevance of the presented legislative proposal is conditional upon a necessity of comprehensive and detailed study of the arising problems on the expediency of introducing alterations and amendments into effective criminal and criminal procedure legislation proposed by this or the other draft federal law, since introduction of changes into one legal act (Criminal Code of the Russian Federation) most frequently demands corresponding changes in the other one (Code of Criminal Procedure of the Russian Federation). It is also important to point out that the design of new corpus delicti, the strengthening of responsibility for already existing crimes cannot be accomplished without taking into account provisions of General part of the Criminal Code of the Russian Federation, since the General and Special parts are closely connected with each other. However, in practice there are cases of introducing changes into the Criminal Code of the*

*Russian Federation by independent draft federal laws at the stage of preparing these laws for consideration by the State Duma in the second reading through introducing amendments, according to which initially (at the stage of development and/or in the course of consideration by the State Duma in the first reading) it was not supposed to introduce amendments into criminal legislation. Such legislative proposals do not get due, impersonal legal evaluation, and, as a result, the adopted laws can create a threat of impairment of rights, freedoms and legal interests of citizens and organizations*[15].

After adopting this federal law the aspiration of legislative power to new criminalization has somewhat decreased. It gives us faith that decisions determined exceptionally by archetypes of new criminalization will be taken more and more rarely. In this case the very archetypes will change following comprehension of importance of rationalization of decisions on new criminalization by legislative power.

## References

Aranovsky, K. V. (2003) Arkhetipy natsional'noi kul'tury i gosudarstvennoe pravo [Archetypes of National Culture and State Law]. *Akademicheskii yuridicheskii zhurnal* [Academic Law Journal], (4). (in Russian)

Efremova, G. K., Lezhava, G. S., Ratinov, A. R. & Shavgulidze, T. G. (1984) *Obshchestvennoe mnenie i prestuplenie* [Public Opinion and Crime]. Tbilisi, Metsniereba. (in Russian)

Korobeev, A. I. (1987) *Sovetskaya ugolovno-pravovaya politika: Problemy kriminalizatsii i penalizatsii* [Soviet Criminal Policy: Problems of Criminalization and Penalization]. Vladivostok, Izd-vo DVU. (in Russian)

Korobeev, A.I. (2019) *Ugolovno-pravovaya politika Rossii: ot genezisa do krizisa* [Criminal Policy of Russia: from Genesis to Crisis]. Moscow, Yurlitinform. (in Russian)

Kozachenko, I. Ya. & Doronina, E. B. (2007) *Zigzagi evolyutsii Ugolovnogo kodeksa Rossii v labirintakh ugolovnoi politiki: Zakony, khronika, kommentarii, suzhdeniya* [Zigzags of Evolution of the Criminal Code of Russia in the Labyrinths of Criminal Policy: Laws, Chronicle, Commentaries, Judgments]. Yekaterinburg. (in Russian)

Kulesza, J. (2017) *Problemy teorii kryminalizacji. Studium z zakresu prawa karnego I konstytucyjnego*. Łydź, Wydawnictwo Uniwersytetu Łydzki.

Lopashenko, N. A. (2009) *Ugolovnaya politika* [Criminal Policy]. Moscow, Wolters Kluwer. (in Russian)

Nechaev, A. D. (2018) *Kontseptual'nye osnovy kriminalizatsii i dekriminalizatsii deyanii* [Conceptual Fundamentals of Criminalization and Decriminalization of Acts]. Moscow, Yurlitinform. (in Russian)

Peršak, N. (2007) *Criminalising Harmful Conduct: the Harm Principle, its Limits and Continental Counterparts*. New York, Springer.

Tobolkin, P. S. (1983) *Sotsial'naya obuslovlennost' ugolovno-pravovykh norm* [Social Determination of Criminal Law Standards]. Sverdlovsk. (in Russian)

Tyurin, M. G. (2008) *Arkhetipy natsional'noi pravovoi kul'tury* [Archetypes of National Legal Culture]. Abstract of Ph. D. thesis. Rostov Law Institute of the Ministry of Internal Affairs. (in Russian)

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