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PROBLEMS OF USING FOREIGN EXPERIENCE IN THE COUNTERACTION OF CRIME IN THE JUVENILE FIELD

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Analysis of results of numerous research devoted to the foreign experience of counteraction of crime in the juvenile area allows making several important in our view preliminary conclusions.

First of all, the issues of fight against juvenile criminality and criminal offenses against minors were considered in a relative isolation for a long time. The only area of intersection of these parallel research studies was possibly the juvenile victimology within the frameworks of which the mechanisms of transformation of a criminal teenager into the victim teenager were studied.

Secondly, among these numerous researches it is hard to find the papers that would be devoted exclusively or predominantly to the problem of applicability of a foreign experience in Russian reality. Alongside with that specifically this very problem is major and crucial in our view for any research devoted to the study of experience of the foreign legal culture. In our opinion any foreign experience of counteraction of criminality in the juvenile area shall be evaluated in terms of the following criteria:

1) relevance of the studied experience to the same legal system to which refers the legal system of the state looking to acquire the experience;

2) comparability (coordinate) of the extent and intensity of the registered crime (type of crime) of the state providing an experience and the state acquiring such experience. The comparison shall be supplemented by the data concerning real criminality if possible obtained from the commensurable sources (public opinion for instance);

3) “price” of the experience introduction. Availability of the required financial resources with the recipient state for introduction of the respective experience;

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4) availability of similar professional capabilities with the state acquiring the experience for implementation of the latter;

5) availability of the verified empirical data concerning the efficiency of a specific rule-making or law-enforcement experience that we consider for the purpose of repeating thereof under conditions of another state;

6) degree of disintegration, i.e. relative independence of the private rule-making and law-enforcement decisions (legal ideas, specific norms or elements of such norms) that can be acquired separately from the general decision (model).

Thirdly, the study of the foreign experience of counteraction of criminality in the juvenile area irrespective of the possibility and expediency of using it right away seems useful since the possibilities and expediency can appear later.

The history of occurrence and development of the systems of counteraction of criminality in the juvenile area (crimes encroaching on the minors and crimes performed by the minors) in the foreign states practically coincides with the known history of the state and law in terms of duration.

Thus, already the Code of the sixth king of the First Babylonian Dynasty of Hammurabi reigning in the ancient Babylon from 1792 BC to 1750 BC established a considerable number of penal prohibitions both on crimes against minors and juvenile crimes.

In particular, according to §155 of the Code "If a man have betrothed a bride to his son and his son have known her, and if he (the father) afterward lie in her bosom and they take him, they shall bind that man and throw him in the water." According to §194 of the Code "If a man gives his son to a nurse and that son dies in the hands of the nurse, and the nurse substitutes another son without the consent of his father or mother, they shall call her to account, and because she has substituted another son without the consent of his father or mother, they shall cut off her breasts."

Severe punishments were stipulated also for the minors encroaching on the family principles. In particular, according to §192 of the Code "If the adoptive son of a eunuch or the adoptive son of a sacred prostitute (*priestesses engaged in sacred*

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prostitution, i.e. prostitution in favour of the convent – N.V.) say to his father who has reared him or his mother who has reared him: "My father thou art not," "My mother thou art not," they shall cut out his tongue."

§195 of the same Code established a prohibition on blows inflicted by the son (including minor in modern understanding) to his father "If a son strikes his father, they shall cut off his fingers."

Studying the primary monuments of law of the ancient states one cannot but pay attention to the fact that practically each of them established special criminal law standards concerning liability for juvenile crimes that as a general rule established highly severe penalties and often mutilation that were just as harsh as penalties for adults. Thus, according to the Table VIII of the Law of the Twelve Tables of the Ancient Rome (451 - 450 BC) for pasturing on or for cutting secretly by night another's crops acquired by tillage a person under the age of puberty shall either be scourged or make composition by paying double damages for the harm done.

The tendency not only did not decline in course of time but on the contrary reached its climax in certain legal systems in form of strict liability of children for crimes of parents. Thus, the Criminal Code of the imperial dynasty of China - the Tang dynasty adopted in the early Middle Ages (624 - 653) and consisting of 12 sections and 502 articles alongside with the largely detailed fault-based liability of public officers for various crimes also stipulated in many cases strict liability of their children and grand-children based on the principle of a joint family liability. According to the Art. 248 of the Code "Everyone who designed Rebellion against (Mou Fan) or (committed) Great stubbornness (da ni) shall be beheaded. All their fathers and sons at the age of 16 and above shall be suffocated." At the same time, children at the age of 7 and younger in case of commission of a capital offense were not subjected to death penalty, and children at the age of 15 and younger in all the cases of commission of crimes to be punished with exile and less severe punitive measures were entitled to pay off the punishment. Rebels' sons ate the age of 15 and younger, and their grand-children were subjected to punishment in form of "confiscation to treasury". But if the family to be punished on the basis of

the principle of joint family liability had aged or sick people who were not liable, one of the rebel's sons could be released from penalty and left as a breadwinner of such persons.

The Code contained a considerable number of extremely severe prohibitions (from the point of view of modern ideas concerning the severity of punishment) for the minors encroaching on the family principles. Thus, according to the Art. 329 of the Code verbal abuse of a grandfather or grandmother through parental lineage, or of father or mother entailed suffocation.

At the same time the Code being considered also established special norms (privileged mostly i.e. stipulating lower liability for crimes pertaining to the minors). Specifically, if parents, grandfather or grandmother committed murder of children or grandchildren (if the latter did not follow their instructions) "using a hand, a leg or otherwise except for gun", the punishment was 2 years of hard labour in exile. If the murder was committed using a knife, the punishment increased up to 2.5 years of hard labour in exile.

Punishment was mitigated for the murder during a game, through error. Parents, as well as grandfather and grandmother were not subjected to punishment for the murder of their children or grandchildren through error. In all cases the punishment for the murder through error could be paid off, and the public officer was subjected to punishment in form of forfeiture of rank (Art. 338 of the Code).

Study of the numerous monuments of the foreign criminal law referring to the time of the ancient world, Middle Age and Modern Times that touched upon the issues of liability for crimes pertaining to the minors and juvenile crimes to a certain extent allows making the following conclusions:

1) the primary objective pursued by the lawmakers of all the past epochs in selection of criminal sanctions pertaining to the minors practically did not change for millennia and consisted in strengthening of family principles, authority and power of parents over children. Negligence of these principles, disobedience, disrespect, and abuse of parents and senior members of the family verbally or by action were often considered as more dangerous crimes as compared to the property crimes. At the same time, the lawmaker often extended

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mercy to the minors if internal and external circumstances permitted, which was undoubtedly a reflection of the idea about innocence or limited peccancy of young children shared by many religions;

2) defense of rights (including the right to life) and other legitimate interests of the minors was realized in the first place to the extent to which the child was considered as part of the family, propagation of the parents, and in number of cases as a special type of property, "a capital." Partly it probably explained the fact that violence on the part of parents with respect to their children was deemed as the lesser evil as compared to similar violence in terms of nature and intensity on the part of strangers. Apparently, the lawmaker in this case proceeded on the basis that parents (parents of parents) have special rights with respect to their children (grandchildren).

One also cannot but turn attention to the fact that only at the end of the Modern Times the lawmaker started to refuse of necessity from the exclusively oppressive (punitive, based on measures of legal liability) sanctions against criminality, including criminality in the juvenile sphere.

In modern juvenile criminology there is an opinion that the formation of systems for prevention of delinquency among minors qualitatively different from the criminal and administrative sanctions started in foreign countries at the end of the modern times - from 1846 when the first juvenile reformatory was established in Massachusetts (USA).

One can hardly agree with this statement if take into account the fact that the first institutions for "vicious orphaned children" were established in 1547 in Holland and in 1595 - in Germany. In 1656 the corrective labour institution for 600 "criminal and vicious" boys and girls was opened in Genoa, and in 1735 - in Rome. In England in 1557 during the reign of Elizabeth I (Bridwell) the house of correction was opened for the purposes of poverty and vagrancy alleviation (and specifically among children). 30 years after it was closed since the problem of cooperative labour of persons who committed crimes and vagrants and poor who did not commit crimes could not be settled. Later (in 1778) the Law was issued in England concerning the establishment of punitive

institutions where children could be placed upon request of parents for "disobedience and impudent conduct" for moral and religious correctional education, apprenticeship training and compulsory labour. A new step in the development of the British system for prevention of juvenile crimes was made in 1854 by adoption of a Law concerning reformatory schools. In 1897 the Law underwent essential changes aimed at ensuring of prevention of the first-time criminalization of teenagers.

In order to understand the main point of the new (not oppressive i.e. associated with application of criminal sanctions) approach to prevention of juvenile crimes that got widespread in Europe and USA in the latter half of the XIX century it is important to pay attention to the fact that appearance of state institutions for minors with abnormal behaviour designed to prevent crimes shall be deemed less as a considerable achievement on the way of search for more efficient juvenile crime-fighting tools as compared to punishment than as an evidence of decline of a family and probably of church into care of which children that turned out to be under social risk were traditionally given before.

That this approach did not bring the expected results signifies the fact that practically all of these institutions were closed soon thereafter or transformed into ordinary prisons.

One of the reasons for unstable performance of the first supervisory-preventive institutions according to analysis was an imperfect mechanism of differentiated identification of the minors with abnormal behaviour who could be sent to such institutions. In respect thereof the appearance of specialized juvenile courts shall be considered as a natural response of the state to the resulting situation.

As it is known the first such court was established in Australia in 1890. Thereafter juvenile courts were established in Canada (1894), USA (1899), Egypt (1904), England and Wales (1905), Germany (1907), Austria, Hungary and Italy (1908), Russia (1910), Portugal and Switzerland (1911), and Romania (1913). The tendency spread to the contemporary times as well which is traditionally understood to be the period from the Great October Socialist Revolution of 1917 to the present day

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according to historical and historical-legal literature. In our view, the establishment of the system of juvenile courts not only fixed the already existing ideas about the necessity to restrain to the uttermost the application of criminal sanctions (liability) pertaining to teenagers who committed socially dangerous acts, but also radically limited the idea prevailing for a long time that the family for a teenager-delinquent is the best environment as compared to the state or private correctional institution and can determine on its own the most effective correctional measures for the teenager. At the same time the juvenile courts enabled to combine in one procedure settlement of the issues of the minor's liability for criminal behaviour and the issues of elimination of factors (reasons and conditions) that were conductive to commission of a crime, or other delinquency and can be conductive to the abnormal behaviour of a teenager in future (including settlement of the issues of social rehabilitation of a teenager).

This tendency in our view should not be considered as an absolute inevitability and the only true direction for the development of the whole system of counteraction of criminality in the juvenile sphere. The already settled practice of recurring refusal of certain countries from juvenile courts testifies it. Thus, in the XX century the juvenile courts were repeatedly abolished and reestablished not only in Russia (USSR) but also in the USA (specifically in early 1980s juvenile courts were abolished in the majority of states of the USA). Presently the issue concerning the abolishment of juvenile courts is actively discussed again in the USA.

The present-day systems of counteraction of criminality in the juvenile sphere in foreign countries are basically based on the same principles and models as the Russian national system. The distinctive feature of these systems was disunity of legal and organizational mechanisms for prevention, suppression and liability for juvenile crimes and identical mechanisms applied pertaining to persons infringing on the rights and legitimate interests of the minors (including parents or other members of the minor's family, or lawful representatives). Specifically, juvenile courts established practically in all countries of the Europe, in majority

states of the USA and in Japan do not consider the cases concerning infringements pertaining to the minors despite the fact that any such infringement shall be evaluated as a potential factor of criminalization of a teenager's personality. Only the court can comprehensively evaluate the probability of realization of this factor upon determining the fate of one or both parents (which implies a family as a whole) who committed criminal offense pertaining to their child. The more judges realize the fact that tomorrow (in case of a wrong decision) they will have to consider a case with respect to the teenager himself the more justified will be the court decision.

One of the cornerstones of the modern policy of fight against criminality in juvenile sphere is the question of a minimum age of criminal liability, since the answer to it shows the true viewpoint of the state (as well as moral and spiritual condition of society) with regard to acceptable limits of criminal sanctions against the minors and with regard to the priority of measures not associated with sanctions.

Unlike the early times of the history of civilization today the lawmakers of the majority of states established a minimum age of criminal liability and by doing so fulfilled the appeal envisaged in section 3 Art. 40 of the United Nations Convention on the Rights of the Child dated 1989 to participant-states to establish the minimum age below which children shall be recognized as unable to violate the criminal legislation. This is with the exception of the very few countries and the majority of USA states where the issue concerning the age of the minor upon criminal prosecution is settled by the court.

Despite almost a universally recognized as of today idea that the criminal sanction does not rehabilitate juvenile offenders the legislation of many states (irrespective of belonging to one or another legal system) established a 7-year old minimum age of criminal liability (Barbados, Brunei, Gambia, Ghana, Egypt, India, Ireland, Cyprus, Kuwait, Libya, Liechtenstein, Maldives, Namibia, Nigeria, United Arab Emirates, Pakistan, Singapore, Syria, Sudan, Thailand, Tanzania, Republic of South Africa etc.). In dozens of states the age is from 8 (Indonesia, Iran, Scotland etc.) to 13 (Algeria, Monaco, Tunis, France

etc.). And only in comparatively small number of states the age exceeds the minimum age of criminal liability stipulated by the Criminal Code of the Russian Federation (14 y.o.) and makes 15 y.o. (Denmark, Iceland, Laos, Norway, Slovakia, Finland, Czech Republic, Sweden etc.) or 16 y.o. (Belgium, Republic of the Congo, Cuba, Portugal, Chili etc.).

As Dodonov V.N. fairly states in order to understand true nature of this tool of the criminal policy, it should be taken into account whether the minimum age of criminal liability established by the national criminal legislation of one or another country is single for all types of crimes and independent on any circumstances or differentiated depending on the type of crime or other circumstances. Thus, a single minimum age of criminal liability was established for example by the criminal code of Cuba, Salvador (16 y.o.), Denmark, Iceland, Norway, Finland, Czech Republic, Sweden (15 y.o.), Hungary, Latvia, Korea, Serbia (14 y.o.) and some other countries. However in the majority of countries just like in Russia the criminal legislation stipulates differentiated (multiple) minimum age of criminal liability based on the following criteria: 1) type of crime (criminal offense); 2) evaluated by the court ability of the minor to realize danger to the public of the actions committed (principle of understanding).

Mr. Dodonov also specifies the third criterion - availability of a special i.e. different from the one established by the criminal law legal mode of criminal liability of the minors. In our view it is reasonable to deem this criterion not as a criterion of differentiation of the age of criminal liability, but as a legal-technical method of legislative consolidation of this attribute of the crime subject.

This basically refers to a “parallel” criminal legislation for the minors extracted from the general criminal code. Such legal-technical method is specifically used by the lawmaker of Jordan (with respect to persons who committed socially dangerous acts at the age of 7 to 18), Switzerland (with respect to the persons at the age of 10 to 18); and Spain (with respect to the persons at the age of 14 - 18).

Another legal-technical method for settlement of the same objective was used by the lawmakers of Latvia,

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Macedonia, Slovenia and Ethiopia and some other countries which criminal laws establish minimum age of criminal liability but prohibit to apply criminal sanctions if the person who committed socially dangerous act did not reach lawful age (Lebanon) or limit the range of criminal liability measures by corrective and disciplinary measures which are actually not such, though are to be applied pertaining to the minor on the grounds of a socially dangerous act committed. For instance, according to the criminal code of Syria such measures shall be applied with respect to persons at the age of 7 - 15. In Guinea - with respect to persons at the age of 10 - 13, in Macedonia, Slovakia, Croatia - at the age of 14 - 16.

Differentiation of the minimum age of criminal liability depending on the type of the crime committed (the same as in the valid criminal code of the Russian Federation) is applied not only almost in all former USSR countries, but also in Vietnam, People's Republic of China, Mongolia, New Zealand, Peru, Poland, some USA states and some other countries. At the same time in some of these countries the lowered minimum age of criminal liability was established pertaining to 1-2 types of crimes (for instance, in New Zealand criminal liability for 10-13 year old teenagers is stipulated only with regard to the murder). Legal-technical methods of such differentiation can be different: from the direct reference in the text of the Article of the Special part of the criminal law to exclusion from the general rule to application of the entire ladder of lowered ages (for instance in the criminal code of Uzbekistan).

Another criterion for differentiation of the age of criminal liability is a principle of understanding, which is applied by the lawmaker of the majority countries worldwide. As it was already mentioned the main point of the criterion consists in identification of the age starting from which the person can bear criminal liability by the court not the lawmaker. In our view, in this case the question is not that the court substitutes the lawmaker and establishes the general rule for everybody instead of the lawmaker with respect to identification of the minimum age of criminal liability, but that with regard to the age limits specified by the lawmaker the court is entitled to resolve a question concerning full or partial age-specific

capacity for criminal liability. For instance, in Ireland such limits are from 7 to 14 years old, in India from 7 to 12 years old, in Great Britain and Australia from 10 to 14 years old and in France from 13 to 18 years old. In such a manner, it is referred to broader limits for judicial discretion upon resolution of a question concerning capacity of the minor established by the lawmaker itself. In our view such legal-technical method for regulation of the boundaries of application of criminal sanctions for the purposes of fighting against juvenile criminality can be considered as an optimal for the countries with very high level of trust of citizens to the judicial system, developed theory and practice of psychological expertise and detailed regulation of the court evaluation of expert conclusions with respect to the age capacity of the person.

Criminal legislation of some countries (including Russia) applies both principles of differentiation of the age of criminal liability (Art.20 of the Criminal Code of the Russian Federation, Art.20 of the Criminal Code of Azerbaijan, Art. 27 of the Criminal Code of Belarus).

Depending on the solution of the matter of minimum age of criminal liability for the minor, foreign lawmakers resolve differently the issues concerning the system and scope of measures of the state response to the socially-dangerous behaviour of a teenager.

Thus, according to the Law of Great Britain concerning children and teenagers dated 1969 the court was vested with authority to send previously unconvicted delinquents to the visit centre. This measure was generally applied pertaining to persons with no previous convictions.

The Criminal Justice Act adopted in Great Britain in 1982 established a rule according to which the minor is obliged to attend the centre once a week and be present there no longer than 3 hours. At that the teenager presence in such centre shall not coincide with school classes or job time. In case when the minor commits a crime with regard to which the law does not specify any specific type or size of punishment, the court is authorized to oblige the guilty to compensate the damage caused to the person (upon consent of the latter) or to society in kind, or issue an order concerning the plan of actions specifying forms and procedure of supervision over

the conduct of the minor and types of activities that the teenager shall and shall not perform. In accordance with the same Law the court is not entitled to deliver a judgment regarding confinement in prison of a person that reached 21 irrespective of the actions committed. In case of commission of socially dangerous acts such persons could be placed only in special centres for detention of the youth.

According to the Criminal Justice Act dated 1988 persons at the age of 15 to 21 who committed such acts by decision of a court could be sent to institutions for young offenders for up to 12 months with subsequent supervision till they reach 22 upon availability of one or several paired conditions from the specified ones: 1) nonfulfillment of the punishment not associated with deprivation of liberty and necessity to restrict freedom of such person for the purposes of society protection from the threat of serious harm caused by such person; 2) upon commission of grave offense which according to the law shall be punished only by custodial restraint.

Formalized in legislation limitations with respect to application of criminal sanctions pertaining to teenagers who committed socially dangerous acts made a contribution to the fact that predominantly non-punitive model of state response to the juvenile criminal activity settled in Great Britain by the beginning of a new millennium. It is specifically indicated by the fact that custodial sanction was applied only pertaining to 14% of teenagers (male) at the age of 15 - 17 y.o. For comparison in Russia this indicator pertaining to the group of 14-17 y.o. in 2016 was 30%.

The studies of the latest foreign experience in the sphere of counteraction of criminality in the juvenile sphere both by means of criminal and criminal procedure legislation and by criminological prevention measures allows making the following conclusions:

1. Settlement of the issues concerning the necessity or expediency of establishing juvenile courts at a national level shall be considered in the context of the total range of problems of formation and development of national systems of counteraction of criminality in juvenile sphere. The experience of creation, operation and abolition of such courts in foreign countries allows making a conclusion that availability of

such courts can no doubt be considered as desired, but not at all obligatory condition for efficiency of the national system of counteraction of criminality in juvenile sphere.

Proceeding from the position that the primary purpose of the juvenile court consists not in the vindictive punishment for the acts committed by the minor, but to provide as far as possible a comprehensive and reasonable assessment of the dangerous condition in which the minor and his/her family turned out to be, and select the most useful *measures for the child and his/her family* requiring in particular support from the state, the applicant deems it necessary upon formulation of the concept for the competence of such court to take into account *the expediency of obliging such courts to consider the cases of crimes and other delicts committed pertaining to the minors by parents, other members of the family, foster parents, curators or other legal representatives*. At that, the applicant deems that a highly spread in a number of foreign countries experience of criminal and administrative liability of parents or other legal representatives for nonfulfillment of the obligation established by court "to ensure good behaviour of the minor" pertaining to whom the court applied disciplinary measures does not deserve support.

2. Study of consequences of establishing in the criminal legislation of many foreign countries (including those having a highly developed system of early prevention of crimes and other social deviations among minors) the minimum age of criminal liability for certain types of crimes lower than in Russia (specifically from 12 y.o.) allows making a conclusion that such measure can be recognized reasonable with respect to terrorism offenses and especially serious violent crimes committed by minors as part of an organized group (particularly as part of a gang) or criminal organization. This measure in our view will help to protect interests of not only social security but of juvenile offenders as well.

3. An important tool for ensuring the priority of measures of early prevention of crimes and other types of social deviations among minors in many foreign countries is a widespread practice of vesting the law enforcement and regulating agencies (specifically public prosecution office) with quasi-

judicial authorities to apply measures not associated with restriction of rights but of disciplinary, rehabilitation and pecuniary nature pertaining to the minors who committed minor offenses.

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