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Prohibitions in Legal Policy of Modern Russia: Social Foundations

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The article studies prohibitions serving as significant means of legal policy, analyses their place and role in the process of formation and implementation of the modern Russian legal policy. The thesis that prohibitions require support not only by legal means, but also by social norms, general culture, material resources for the adopting fully realised legal policy, is reasoned. The article states that the principle "not prohibited by law means permitted" is effective only in the presence of a moral basis, stable traditions of orderliness, culture, internal readiness for self-restriction. It is proposed to add the pointed formula with the following phrases: "everything is permitted that is not prohibited by law and not forbidden by morals".

Keywords: legal policy, aim, means, prohibition, restriction, lawmaking, legislation, law enforcement, legal development of society.

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Introduction

The problem of legal policy is especially topical nowadays. Legal policy is being researched at the level of general theory, developing in the projects of its conceptions in various branches of law. Well-planned legal policy in the modern society will ensure effectiveness and perfection of the legal system, orderliness of regulation by law relations.

Legal policy is a theoretically grounded, progressive and system activity of the governmental bodies and institutes of civil society on establishment of an effective mechanism of legal regulation, civilized use of legal means to achieve such legal aims as complete insurance of human rights, formation of the legal statehood and high level of legal life of the society and individuals¹.

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Due to the given definition, the purposes of the modern Russian legal policy are obvious. At the same time we should note the appropriate legal means to achieve the outlined legal aims.

Legal means for achieving legal policy objectives

Means of legal policy: the instruments and actions used to achieve the aims and objectives of legal policy for the real implementation of the strategic legal ideas. Legal policy means are dependent on the purposes, high-priority objectives and are aimed at ensuring the stated objectives and priorities. Various instruments (establishments) and actions (technologies), which help to achieve ideals of legal policy, appear as the legal means.

Legal policy instruments as means of legal policy include a variety of regulative establishments characterized by substantiality and statics: rights and duties, privileges and prohibitions, rewards and punishments, legal regimes and legal bases, legal acts and institutions of law, etc.

Prohibitions as legal policy means, which serve as the earliest legal regulation method, currently take on particular significance. Moreover, it can be said that the history of law, legal development of a particular society is largely the history of prohibitions, their establishment, amendment and cancellation².

By introducing a prohibition on certain actions the legislator imposes a duty of abstention of the determined designated actions on the subject of law. The prohibition, preventing the satisfaction of individual interests in respect of the certain action, is aimed at realization of the opposite interests. The prohibition itself is a public-power inhibitive means that prevents unfavourable and unlawful acts harmful for the personal and social interests under the threat of responsibility and punishment. Prohibitions are

mostly used in the criminal legislation, which are based on the moral standards such as: “thou shalt not kill”, “thou shalt not steal”, etc.

Involving prohibitions into legislation, the legislator pursues a restrictive policy, because a prohibition is a peculiar kind of legal restriction.

Prohibitions as the means of modern Russian legal policy

The Constitution of the Russian Federation has practically no mentions of prohibitions. Its rules contain a large list of human rights and freedoms, the powers of public authorities without any elementary limitations – such situation should be balanced with the help of legal prohibitions.

Despite the apparent simplicity, prohibition is a rather complicated legal policy tool, because its establishment requires taking a system of some actions: correction of a permissible behaviour based on the principle “not prohibited by law means permitted”, dissemination among citizens and business entities; designation of the responsible subjects for the violation of prohibitions (formation of measures ensuring the mentioned prohibitions: responsibility, punishment and other measures of state coercion, etc.).

However, in the process of realization of the legal policy, the prohibitions should be supported not only by legal means, but also other social norms, general culture, material resources, etc. It is fair to say that the principle “not prohibited means permitted” is effective only in the presence of moral principles, stable traditions of orderliness, culture, internal readiness for self-restriction. That is why the stated principle should be supplemented with the following phrase: “everything is permitted that is not prohibited by law and not forbidden by morals”³.

The attitude to prohibitions in Russia is rather complicated. On the one hand, the past has had an effect, when the prohibitions were actively used in order to ensure serfdom law, communist ideology,

vertical power, etc. In practice, prohibitions have become ingrained. On the other hand, taking into account the quantity of prohibitions people have learned their evasion. For example, the labour legislation prohibits employers to impose a fine on their employees. However, they quite legally evade the prohibition by the establishment of the minimum salary and a great part of the premium, from which the deductions are made. Employers explain the formation of the penalty system because of the dishonesty of their employees.

The situation with the implementation of prohibitions is quite a paradox because of “the Russian mentality”, which is expressed in the well-known adage: “if something is not allowed, but is much desired, it is allowed”.

J. Niva (French professor, Slavist) said in an interview, “Do you know the biggest paradox in Russia? It is a situation with prohibitions. <...> All of the restrictions and bans can be overcome. In France, it is impossible: if you cannot do something, you cannot do it. In Russia, all the problems and bans are possible to solve. Once me and my wife were in Pskov-Caves Monastery and wanted to get into the famous caves. A huge, severe-looking nun sat at the entrance and warned us, “You cannot go into the caves, you have not got a permit”. I explained her that we are from Paris and we really want to go into the caves. It did not work. My wife was confused and wanted to leave Pskov-Caves Monastery. <...> After some time, as if nothing was wrong, the strict nun told us, “Come in, my dear ...”. This is the Russian character. I have never met such a mentality”⁴. In this regard, it appears that it is not accidentally that Russian legal nihilism is a reaction to the hard and ubiquitous prohibitions.

The role of legal prohibitions in legal policy

Researching the bans as legal policy means, we should note that under the conditions

of the market system and development of entrepreneurship it is important to skillfully use such restrictive means in order not to turn them into administrative barriers for innovations. In other words, prohibitions should be applied in a reasonable range in order not to encroach on the economic freedom of the citizens and business activity, not to restrain entrepreneurship, not to harm business.

At the same time, we should not forget about the other extreme, when unfair restrictions, reflecting the benefits of certain social groups, are fixed in the legislation. In particular, the prohibitions, set out in the legislation by means of lobbying by some respective financial groups, can be used not in the interests of society in general, but in the interests of these groups. Therefore, when the state forbids downloading music files from the Internet, usually they protect profits of some business entities, not the authors’ rights of the musicians. “From the moment of formation of basic regulative principles, the regulation of intellectual property has become contradictory of that for which it was intended. The regulation was intended to protect the creators’ rights <...>, but it turned into the rules that protected the interests of profit gainers <...>. It seems to me, that it is time to think about changing the international legal regulation in this area”⁵.

Consequently, by establishing certain prohibitions the legislator refers to the undesirable behaviour of subjects of law, shows the legal development vector, criminalizes specific social relations, etc. It can be called as “participation” of prohibitions in the legal policy of the state. In point of this fact, the processes of introduction and abolition of prohibitions are related to the problems of criminalization and decriminalization of certain social relations. From this perspective, prohibitions become the means of criminal legal policy.

Furthermore, “the aim of criminalization <...> is to create an integrated system of criminal

law prohibitions”, and “the presence of socially dangerous behaviour that requires to apply a criminal law ban” is the basis for criminal legal policy”⁶. V.N. Kudryavtsev brought this thesis in the following system:

1) Necessity of an action’s interdiction (including extent of damage, prevalence, impossibility of prevention by other legal means);

2) Admissibility of prohibition’s appliance (political, moral, legal, international);

3) Practical possibility of prohibition’s realization (logical, legal, investigative, judicial, etc.);

4) Integral evaluation of prohibitions’ purposiveness (indirect consequences, psychological reaction, economic evaluation, perspectives)⁷.

Prohibitions in the Russian criminal legislation

In the period of reforms, the problems of criminalization and decriminalization become aggravated effecting the system of legal prohibitions. It stands to reason that constant (stable) prohibitions and changing (new) bans have existence in criminal law. Continuity of criminalization is preserved in the presence of prohibitions on constant crimes without distinction of social and political orders: murders, thefts, etc. However, during the codification of the Russian Criminal Code in 1996 pseudo-entrepreneurship (Article 173 of the Criminal Code), money laundering (Article 174 of the Criminal Code), illegal obtaining of credits (Article 176 of the Criminal Code), etc. were recognized as crimes for the first time⁸.

The process of criminalization (establishment of prohibitions and criminal punishments) is supplemented with the process of decriminalization (expunging of prohibitions and abolishment of criminal punishments). Sometimes

these two processes can take unjustified forms. For instance, infringement on human rights under performances of religious ceremonies was excluded in 1991 from the Criminal Code of the Russian SFSR: it was a mistaken decriminalization because it was the start of activization of some religious associations such as Aum Senrike, etc. As a result, the number of people involved in these associations increased, as well as the damage to their physical and mental health was increased too. That is why in 1993 the legislator was forced to reintroduce the mentioned prohibition and the corresponding criminal punishments⁹. Also defamation of the judiciary was earlier regarded as a crime against justice, nowadays this criminal act is decriminalized¹⁰.

In general, prohibitions are just the means that should “be exploited” for different purposes, and therefore they should be in accordance with the view of necessity of criteria and specific institutional establishment order of legal bans in a specific sphere of social relations¹¹.

The literature tells that “it is quite necessary to carefully examine the legal conceptualization regarding the criminalized acts in the society in each particular case before the introduction or abolishment of criminal law prohibitions”¹². Pointed requirement must be relevant to other varieties of bans.

Frequently enough the legislator underestimates the role of legal prohibitions. For example, in the regulation in the sphere of drug trafficking and drug abuse it would be more effective to use legal prohibitions. However, the analysis of the Federal Law No. 3-FZ “On Narcotic Drugs and Psychotropic Substances” and the strategy of the state anti-drug policy of the Russian Federation until 2020 shows that prohibitive rules are rarely applied. The legislator often regulates issues related to the consumption of drugs and psychotropic substances through the consolidation of the rights, powers for one

of the parties; prohibitions are used in the text inconsistently, but in fact they could become the main regulator protecting the society from unwanted negative manifestations.

Conclusions

On the one hand, we should not underestimate the role of prohibitions as the regulatory means in the development and regulation in the modern society. Limitless freedom is unreal; it is necessary to form a system of legal prohibitions in order to insure a secure and civilized level of the society's development. At the same time, the state should take the responsibility for creating high-quality laws useful for the society and their progressive implementation. Only under these circumstances

legal prohibitions will show their effectiveness. Each prohibiting norm should be enforced, insured and provided with the punishments for their violation.

An instrumental approach to the legal policy allows to reveal potential possibilities of this phenomenon and its individual types. It is time to look at the legal means' system (including legal prohibitions), which the modern Russian legal policy is developing and implementing. The change of the status of prohibitions depends upon the particular political and socio-economic situations in the society. One thing remains certain: the institution of prohibitions has a very noticeable effect on the strategy and tactics of the legal development of the state.

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Запреты в правовой политике современной России: социальные основы

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В статье исследуются запреты, которые выступают весьма значимыми средствами правовой политики; анализируется их место и роль в формировании и осуществлении современной российской правовой политики, заметно влияющей на правовое развитие общества. Аргументируется тезис о том, что при проведении полноценной правовой политики запреты нуждаются «в поддержке» не только со стороны юридических средств, но и других социальных норм, общей культуры, материальных ресурсов и т.д. В статье подчеркивается, что принцип «незапрещенное дозволено» эффективен лишь при наличии твердого нравственного фундамента, устойчивых традиций законопослушания, культуры, внутренней готовности к самоограничению. Предлагается вышеназванную формулу дополнить следующими словами: «разрешено все, что не запрещено законом и не порицается моралью», дабы не создавать ситуации, когда все можно, включая то, чего нельзя.

Ключевые слова: правовая политика, цель, средство, запрет, ограничение, правотворчество, законодательство, правоприменение, правовое развитие общества.

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