DOI: 10.7256/1811-9018.2016.2.17613
При цитировании этой статьи сноска на doi обязательна



Shakhbazyan S.V.

# CRIMINAL LAW AND CRIMINAL PROCEDURE ASPECTS OF THE APPLICATION OF PART 6 OF THE ARTICLE 15 OF THE CRIMINAL CODE OF THE RUSSIAN FEDERATION

***Abstract:*** *This article examines the criminal law and criminal procedure aspects of the application of Part 6 of the Article 15 of the CCRF. The author carefully examines such aspects as consequences of the conciliation of parties in the case of changing the category of a crime; application of the positions from Article 11 of the CCRF in cases of changes in the category of a crime; limits of the authority of the cassation court during implementation of Part 6 of the Article 15 of the CCRF; changes to the category of a crime during criminal hearing in accordance with Chapter 40.1 of the Criminal Procedural Code and during execution of the verdict, and the issue of changes to the category of a crime should be resolved via cassation or supervisory method. The main conclusion of the research is the fact that due to the application of the Criminal law and criminal procedure aspects of the application of Part 6 of the Article 15 of the Criminal Code of the Russian Federation arises a number of criminal law and criminal procedure issues, which can produce corruption in the work of the courts during the assessment of the gravity of a crime. Criminal law and criminal procedure aspects of the application of Part 6 of the Article 15 of the CCRF expands the boundaries of the principle of judicial discretion and defines a dispositional regulation of the criminal legal relations.*

***Keywords:*** *Court of cassation, reconciliation of parties, convict, suspended sentence, factual circumstances, correctional institution, probationary early release, judicial discretion, crime category, criminal record.*

***Аннотация:*** *В статье рассматриваются уголовно-процессуальные и уголовно-правовые аспекты применения части 6 статьи 15 УК РФ. Автор подробно рассматривает такие аспекты темы как последствие примирение сторон при изменении категории преступления, применение положений главы 11 УК РФ в случае изменения категории преступления, пределы полномочий суда кассационной инстанции при применении части 6 статьи 15 УК РФ, изменение категории преступления при рассмотрении уголовного дела в порядке главы 40.1 УПК, а так же при исполнении приговора и решать вопрос об изменении категории преступления в кассационном или надзорном порядке. Методологическая основа статьи представлена комплексом методов научного познания, присущих современной уголовно-правовой науке. В качестве основополагающего использовался диалектический метод познания, метод аналогии, формально-логический и системно-структурный метод. Основным выводом проведенного исследования является то, что в связи с применением части 6 статьи 15 УК РФ возникают ряд уголовно-правовых и уголовно-процессуальных проблем, которые могут порождать коррупционные проявления в деятельности судов при оценке степени тяжести преступления. Части 6 статьи 15 УК РФ расширяет границы принципа судебного усмотрения и определяет диспозитивное регулирование уголовно-правовых отношений.*

***Ключевые слова:*** *Категория преступления, судейское усмотрение, кассационный суд, примирение сторон, осуждённый, фактические обстоятельства, исправительное учреждение, судимость, условное осуждение, условно-досрочное освобождение.*

In connection with the enactment of the Federal Law N 420-FL "On Amendments to the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" (December 7, 2011) in Article 15 of the Criminal Code appeared part six, according to which the court has the right to change the category of crime to less severe in the presence of mitigating circumstances and the absence of aggravating circumstances, but not more than one category taking into account the actual circumstances of the offense and the degree of public danger.

It is worth mentioning that according to some specialists in criminal and procedural law the application of this provision entails some criminal and procedural problems.

DOI: 10.7256/1811-9018.2016.2.17613
При цитировании этой статьи сноска на doi обязательна


Namely, some procedural questions arise in connection with the content of the sentence.

It is known that the judge resolves the question of changing crime category only after the imposition of penalty. In the judgment the question of the type and the scope of punishment is considered in the resolutive part, whereas the factual social danger of the offense (along with the resolution of other issues) is estimated in the descriptive-motivating part of the sentence. So, there is a compound dependence between the imposition of punishment and the resolution of the issue of changing crime category. In case of explicit circumstances, which indicate on reasonability for mitigating the punishment, they may also justify the necessity for changing the crime category. Similarly, the decision of the court on the reasonability of changing the category of a crime can influence also the decision about the type and the scope of the punishment, which is enshrined in the resolutive part of the judgment. [1]

Sergey Nikulin says that it is not enough to make a reference on part six of Article 15 of the Criminal Code in the descriptive-motivational part of the sentence without justification. Secondly, the court should in each case consider whether there are grounds (conditions) for changing crime category and should motivate the refusal of applying the part six of Article 15 due to the lack of formal reasons (conditions) taking into account the requirements of clause 6.1 of part one of Article 299 of Criminal Procedure Code.

Since the application of the provisions of part six of Article 15 deals with the merits of the sentence and also taking into account that the requirements of clause 6.1 of part one of article 299 of Criminal Procedure Code there arises the question whether it is possible to solve the issue of changing crime category in the court of cassation and during the execution of the sentence.

Sergey Nikulin suggests solution based on the Article 379 of the Criminal Procedure Code ("Grounds for Revoking or Amending a Court Decision in accordance with the Cassation Procedure"), which mentions that one of the grounds for revoking or amending a court decision in accordance with the cassation procedure is a wrong application of criminal law (clause 3 of part one). In turn, the wrong application of the criminal law (according to clause 1 of Article 382) is a violation of the requirements of the General Part of the Criminal Code of the Russian Federation. Thus, the application of part six of Article 15 by court of cassation is admissible. According to Article 409 of the Criminal Procedure Code the grounds for cancellation or for an amendment of the sentence, ruling or resolution during the examination of criminal case by way of supervision, shall be the grounds stipulated in Article 379 of the Code. Consequently, Sergey Nikulin believes that the incorrect application by the court of first instance, court of appeal and court of cassation of part six of Article 15 is an unconditional basis for reconsideration of the case.

As to the possibility of applying this article during consideration issues related to the execution of the sentence, we should be guided by the fact that according to Article 397 of the Code of Criminal Procedure among the issues that should be considered by the court during the execution of the sentence is the question of exemption from punishment or mitigation of punishment as a result of the enactment of criminal law with retroactive effect in accordance with Article 10 of the Criminal Code (clause 13). Part six of Article 15 unconditionally improves the situation of the convict and, therefore, according to Article 10 of the Criminal Code, has retroactive effect. So, during execution of the sentence the court should consider the issue of changing crime category at the request of the convict. [2]

Another important procedural question relates to what the judge should do if, while changing crime category, the parties reach reconciliation and ask the judge to dismiss the criminal case since it is not allowed by law to award a sentence on termination of criminal proceedings during the same court session. This problem was solved after the adoption of Resolution N 19 of the Plenum of the Supreme Court. According to clause 26 of the Resolution N 19 of the Plenum of the Supreme Court "On Application by Courts of Legislation Regulating the Grounds and Procedure for the Relief from Criminal Liability" the court releases the convict from punishment while changing crime category in accordance with part six of article 15 of the Criminal Code, for which there are grounds provided by articles 75, 76, 76.1 and 78 of the Criminal Code. Thus, if the court changes the category of a crime and the parties were reconciled, the court should pass a sentence with imposition of penalty and exemption from penalty (clause 2 of part five of Article 302 of the Code of Criminal Procedure). However, part eight of Article 302 of the Code of Criminal Procedure does not provide for an opportunity to award a judgement of guilty with the release from punishment.

According to Natalya Mullakhmetova, changing the crime category should be distinguished from the reduction of the scope of charges in connection with the requalification of the offense in court. In case of reconciliation of the parties the criminal case on charges of committing a grave crime can be terminated if during the trial the judge comes to the point that it is necessary to requalify the crime to a crime of a little or average gravity, because the court makes a decision in accordance with factually established prosecution. [3]

There is another practical problem concerning part six of Article 15: Namely, the issue of application of the provisions of Chapter 11 of the Criminal Code in case of

DOI: 10.7256/1811-9018.2016.2.17613
При цитировании этой статьи сноска на doi обязательна


changing crime category. According to part six of Article 15, changing the category of crime is possible only after the imposition of penalty and in accordance with Article 299 of the Code of Criminal Procedure, this issue is resolved only in the decision room, when the judge awards judgement. In connection with this, the mechanism of realization of provisions of part six of Article 15 of the Criminal Code and implementation of Chapter 11 of the Criminal Code without the consent of convict is unclear, since receiving the consent of convict is possible only before the judge goes to the decision room. While deciding this issue we should take into consideration that according to part two of Article 27 of the Code of Criminal Procedure the consent of the person is required only in case of termination of case or in case of criminal prosecution. Thus, when the circumstances which leading to the application of the provisions of Chapter 11 of the Criminal Code are found after the judge moves to the discussion room, the court should pass a judgement of guilty, impose the penalty and release the convict from penalty without asking his/her consent. [4]

Anastasiya Kravtsova points out that the issue of changing crime category should be resolved by the court for each defendant separately. The court determines the role and degree of participation of each defendant in committing the crime.

However, the right of cassation court is limited and the cassational proceeding cannot begin only on the basis of necessity for application of part six of Article 15 of the Criminal Code. There must be other grounds. On the basis of part three of Article 401.16 of the Code of Criminal Procedure the cassation court can reduce a punishment or apply criminal law on a less grave crime (including the application of part six of Article 15 of the Criminal Code).

According to clause 33 of the Resolution N 2 of the Plenum of the Supreme Court "On the Practice of Imposition of Penalty by Courts of the Russian Federation" ( January 11, 2007) the courts of first instance, court of appeal, court of cassation and court of supervisory instances have the right to reclassify the criminal act from one article to several other articles or parts of articles of the criminal law, which provide responsibility for less serious crimes, if it does not deteriorate the position of convict and does not violate the right of defense.

Thus, acting within the framework of the powers granted by clause 6 of part one of Article 401.14, part three of Article 401.16 of the Code of Criminal Procedure and taking into account the explanations given in clause 33 of Resolution N 2 of the Plenum of the Supreme Court, N 2 the court of cassation has the right to change the sentence if it has not been appealed in court of appeal and has come into force. Besides, in case of presence of conditions specified in part six of Article 15 of the Criminal Code, the court of cassation has right to apply this provision if, along with the demands of changing the category of less grave crimes, there are other demands in the complaint aimed at requalification of convict's actions. [5]

Furthermore, in criminal procedural law it is not clear whether it is admissible to change crime category, while considering criminal case in order Chapter 40.1 of Code of the Criminal Procedure.

Anna Kudryavtseva and Yury Voronin say that crime category can be changed in case of absence of direct examination of the factual circumstances and evidences since during consideration of the case in a special procedure, in accordance with Chapters 40 and 40.1 of the Criminal Procedure Code of the Russian Federation the court and the parties mutually agree towards factual circumstances that are established in the indictment in terms of presumption of proof. [6]

Lev Vinitsky and Mariya Kubriakova conclude that, taking into account the aspiration of the legislator to humanization of criminal law, it is admissible to change crime category, while considering criminal case in order Chapter 40.1 of the Code of Criminal Procedure. [7]

In addition to the procedural issues, there are also several criminal ones, which will be considered below. It is noticeable that some of those problems concerning the application of part six of the Article 15 were solved by Resolutions of the Plenum of the Supreme Court, such as the Resolution N 19 of the Plenum of the Supreme Court "On Application by Courts of Legislation Regulating the Grounds and Procedures for the Relief from Criminal Liability" and Resolution N 2 of the Plenum of the Supreme Court "On the Practice of Imposition of Penalty by Courts of the Russian Federation".

According to Clause 26 of Resolution N 19 of the Plenum of the Supreme Court "On Application by Courts of Legislation Regulating the Grounds and Procedures for the Relief from Criminal Liability", in case of changing crime category and presence of grounds provided by Articles 75, 76, 76.1 and 78 of the Criminal Code, the judge releases the convict from punishment.

Before making this decision the Presidium of the Supreme Court (in June 27, 2012) gave the following response to the question related to the application of part six of Article 15 of the Criminal Code: changing crime category, by all means, entails such consequences as the running of the limitation period, the determination of the type of recidivism of the crime, the regime of enduring the punishment, release from criminal liability in connection with reconciliation with the victim. [8]

The Presidium of the Supreme Court has not mentioned in this list of criminal consequences the release

DOI: 10.7256/1811-9018.2016.2.17613
При цитировании этой статьи сноска на doi обязательна


from penalty. In case of committing a grave crime and the presence of active repentance, the decision of changing crime category is made after the imposition of penalty: the convict cannot be released neither from criminal responsibility (because it has already taken the form of punishment), nor from penalty (because the criminal law does not provide for such type of release).

Andrey Ivanov concludes that for realization of this recommendation of the Plenum of the Supreme Court it is necessary to create an additional legal mechanism; the other recommendation, which affects the limits of application of Part 6 of Article 15 of the Criminal Code, is excessive. By paragraph 12 of Resolution N 6 of the Plenum of the Supreme Court (April 2, 2013), Resolution N 2 of the Plenum of the Supreme Court ( January 11, 2007) "On the Practice of Imposition of Penalty by Courts of the Russian Federation" has been supplemented by provision according to which When imposing less severe punishment according to rules of Article 64 of the Criminal Code the court should take into account restrictions for imposition of penalty (restrictions concerning the number of convicts, category of crime and so on), which are provided by the relevant articles of the General Part of the Criminal Code.

If imposing penalty for grave crime, the judge comes to the point that it is important to impose less severe one provided by Article 64 of the Criminal Code, he/she can identify the restriction of freedom as primary type of punishment only in case of changing crime category to less grave. Ivanov mentions that such explanation is doubtful because, firstly, before the supplement of Part 6 of Article15 of the Criminal Code there was no limitation in the explanation of Plenum of the Supreme Court in connection with the Article 64 of the Criminal Code. Secondly, the requirement to apply the restriction of liberty as the primary type of penalty only for crimes of little gravity and average gravity (part two of Article 53 of the Criminal Code) is a general rule, the exclusion of which is provided by Article 64 of the Criminal Code.

If we follow the logic of the Plenum of the Supreme Court's provision the application of such punishment as compulsory labor can also be enforced after changing crime category. Thirdly, it is reasonably stated in paragraph 3 of clause 12 of the Resolution of the Plenum of the Supreme Court that "any less severe type of primary punishment, which is not indicated in the sanction of the relevant article of the Special Part of the Criminal Code of the Russian Federation may be applied taking into consideration the rules of Article 64 of the Criminal Code." Therefore, the main issue for imposition of less severe punishment than provided for the crime is the existence of exceptional circumstances, significantly reducing the degree of public danger of the crime regardless of its category. The limitations for the application of Article 64 of the Criminal Code are exhaustively defined in part three of that article. [9]

Furthermore, the theory and the court practice lack clarity on the basis of what factual circumstances of the crime and the degree of public danger the judge makes a decision of changing crime category. The factual circumstances of the crime, which should be considered when changing the category of crimes, are not clear. According to Aleksandr Grinenko "factual circumstances of the crime" are the real circumstances which are mentioned in Article 73 of the Criminal Code. They indicate about the relatively small public danger of the crime compared with the similar one, provided by the same article (part, clause) of the Criminal Code of the Russian Federation. For example, if the harm is relatively small, if parties have reached reconciliation, but a criminal case was not terminated in accordance with Article 25 of Code of the Criminal Procedure, etc. In any case, however, the criterion of presence of special "factual circumstances of the crime" is subordinated to the criterion of the presence of the circumstances mitigating the punishment, as the second criterion is necessary and required for changing crime category, whereas the first one is an additional condition, which should also be taken into account. [10]

In accordance with part six of Article 15 of the Criminal Code the factual circumstances of the crime are independent bases (conditions) for changing crime category (along with conditions such as taking into account the degree of public danger of the crime, the existence of mitigating circumstances, the absence of aggravating circumstances, the scope of penalty).

The factual circumstances of the crime should not be confused with the circumstances that were recognized by court as mitigating (in accordance with Article 61 of the Criminal Code), otherwise there will be a double counting of the same circumstances, which is inadmissible according to part three of Article 61 of the Criminal Code.

Sergey Nikulin suggests that the factual circumstances of the crime can be the following objective and subjective elements of crime:

- Secondary role in committing crime,
- Failed voluntary refusal from committing crime (Articles 5 and 31 of the Criminal Code),
- Bad financial condition of the convict,
- Clemency towards the victim,
- Altruism, the desire to help a person in distress,
- Trigger action of the victim. [11]

In relation to the factual circumstances of the crime Albert Khaydarov proposes the following guidelines:

- Change of crime category is acceptable when legal proceeding was hold in full volume and is inadmis-

sible in the case of special proceeding. This is justified by the fact that the judge should establish the factual circumstances of the crime and the fact of reduction of the degree of public danger, which is possible only within the framework of the oral and direct investigation of the circumstances of the case.

- In the decision the judge should indicate that the factual circumstances of the crime were taken into account and the reasons the judge considers that the public degree of that crime is reduced.
- The provisions of part six of Article 15 of the Criminal Code should be applied only in the presence of mitigating circumstances provided by part one of Article 61 of the Criminal Code. At the same time, the provisions on the mitigating circumstances provide by part two of Article 61 should not be used.
- The obstacles for application of this provision are the aggravating circumstances provided by the corresponding article (part of the article) of the Criminal Code as a qualifying (aggravating) element of crime. [12]

It is important to note that mitigation of crime category affects the choice of type of correctional institution. If the convict should serve the punishment in correctional colonies of general regime as provided by the general rule for committing grave crime, then the convict can serve penalty also in settlement colony in case of changing crime category. The same situation is with especially grave crimes. Changing the category from especially grave to grave crime enables the court to impose correctional colonies of general regime instead of correctional colonies of strict regime, which significantly facilitates the position of convict. [13]

Supreme Court of the Russian Federation has mentioned its position regarding the type of the correctional institution in clause 15 of Resolution N 9 of the Plenum of the Supreme Court (May 29, 2014) "On the Practice of Determination and Change by Courts the Type of Correctional Institutions" according to which in case of changing the category of a crime the type of the correctional institution is prescribed taking account the changed crime category. [14]

Another important practical question is how changing of the crime category influences on the position of convict if we recall such institutions as "suspended sentence", "conditional early discharge", "putting off the execution of the sentence", or "cancellation of a criminal record". In case of changing crime category from especially grave to grave the offender appears in an unfairly privileged position, because conditional early discharge and cancellation of a criminal record are determined by the rules related to grave crimes. The offender should serve 1/2 of the imposed punishment instead of 2/3 in case of conditional early discharge; the criminal record should be expunged upon the expiry of eight years instead of ten. At the same time, the position of convict should not be improved in case of changing crime category from average gravity to little gravity, because terms mentioned above are the same for both categories of crimes (respectively, one third both in clause "a" of part three of Article 79 of the Criminal Code and clause "c" of part three of article 86 of the Criminal Code). Thus, Tamara Ustinova concludes that by this change the legislator has not only taken into consideration the system approach, but has substantially improved the position of persons, who have committed grave and especially grave crimes.

The Article 86 of the Criminal Code, which establishes the terms of expunging of criminal record, talks about persons convicted to deprivation of liberty for the crimes of a certain category. As the terms of deprivation of liberty, which had already been imposed by court, are obligatory conditions for changing crime category, we should not be guided by changed crime category, while determining the terms of expunging of criminal record. In this case, the meaning of the innovation contained in part six of Article 15 of the Criminal Code, the aim of which is liberalization and humanization of criminal influence, it is not entirely clear.

Consequently, according to Tamara Ustinova along with putting into effect part six of Article 15 of the Criminal Code it is necessary to make amendment in Article 86 of the Criminal Code with the following content: in case of implication of part six of 15 article, the terms of expunging of a criminal record for conviction of crime of average gravity should be the reduced period (for example 2,5 years), and in case of conviction for grave and especially grave crimes the terms should also be reduced to a certain limit (for example, up to 7 years and 9 years, respectively).

As for conditional early discharge, it is also unclear what category of crime ("old" or "new") should be taken into account. Ustinova believes that it should be the old one which reflects the degree of public danger of the offense, because part three of Article 79 of the Criminal Code clearly mentions that certain part of the term of penalty must be served. As in the case of expunging of a criminal record, it is necessary to make the appropriate amendment in Article 79 of the Criminal Code.

Accordingly, Ustinova points out that the new provision of Article 15 of Criminal Code is in conflict with the real public danger of the offense, because its arbitrary reducing violates the principle of legality. [15]

Furthermore, there are other negative aspects of part six of Article 15. Firstly, according to Natalya

Mullakhmetova the new provision of Article 15 of the Criminal Code does not take into account the interests of the victim, because the law does not contain a rule according to which the essential conditions for application of Part 6 of Article 15 are the compensation of the harm caused by the crime, as well as the consent of the victim. [16]

Secondly, it allows reducing crime category only in the absence of aggravating circumstances. This condition is contrary to the well-known rule, according to which aggravating circumstance cannot be counted twice. The aggravating circumstance should be taken into account only during the imposition of punishment. Why the court should consider it a second time while changing crime category?!

Thirdly, why is it the right, and not the duty of the court to change the category of crime in accordance with its real public danger and embody the principle of equity in each specific case in full volume?! The court should eliminate potential imbalances between the public danger of the crime, specifically, and formal belonging of it to a more grave category, ensuring the principle of equity in full volume. Moreover, Vadim Piatetsky proposes to bind over the judge to change crime category not on one level, but on category which is corresponds to the danger of the crime. [17]

According to Valery Piatetsky this provision is an attempt of the legislator to eliminate those deficiencies, the logical contradictions, which have emerged as a result of changes in the lower limits of sanctions for grave and especially grave crimes and partially restore the principle of equity. [18]

Despite this, some scientists think that the new provision is a positive change.

First of all, it should be noted that any classification of human acts, including crimes, is relative and conditional, since the factual circumstances have big significance. Therefore, when considering a particular case, the court is called not only to follow the formal assessment of the category of crime established by the criminal law, but also to penetrate deeper into the essence of the deed, taking into account the circumstances, which give opportunity to establish the degree of public danger of the deed more accurately and to impose a fair punishment (parts 2 to 5 of Article 15 of the Criminal Code).

The next positive side is that part 6 of Article 15 is aimed at the expansion of the grounds for individualization of criminal responsibility and that punishment conforms to the principle of equity and humanism (Articles 6 and 7 of the Criminal Code) as well as corresponds to such direction of the criminal policy as the economy of criminal repression.

As Sergey Nikulin points out that the legislator establishing the right of the court to change crime category was guided by new ways (bases) for differentiation and individualization of criminal responsibility and punishment. Each of the four categories of crime is determined only formally, without taking into account the circumstances of committing crime. For example, a person involved in the committing of a especially grave gang crime, despite the minimal degree of participation, is recognized convicted of committing of that category of crime along with other criminal participants; or, a person convicted for an incomplete offense has record of conviction for the same crime category as the person who has committed completed offence. In order to solve this problem the legislator made such change in the Criminal Code.

On the one hand, some specialists think that this change has nothing in common with discrete power of the court, which is defined as an objective necessity to make decisions on his/her own if the law does not allow a unique solution or does not contain a well-defined algorithm of actions or the rule of law is formulated with the use of so called assessed concept. The discreteness underlines the court decisions relating to the individualization of criminal responsibility and punishment since the criteria that the court should be guided while ensuring the fairness of the criminal law enforcement is not always very clearly and comprehensively defined by law. [19]

On the other hand Galina Trofimova points out that this innovation, of course, extends the boundaries of the principle of judicial discretion and determines dispositive regulation of criminal relations. The term “discretion” means to come to a definite conclusion [20] whereas the judicial discretion is relatively free choice of possible legal decisions, which are restricted by law and the authority of the judge. [21] The essence of the principle of judicial discretion is the analysis of the materials of the case by judge in order to compare the facts with his/her own notion on the adequacy of those facts to impose penalty, determine whether the correction of convict is possible without conviction or without the enforcement of punishment, whether the chosen type of punishment is fair, etc.

Own notion (subjective opinion of a judge about a particular phenomenon, the circumstances of crime, personal qualities of offender and victim and other elements of objective reality) makes it possible for the judge not only choose the penalty, conclude about culpability and the degree of culpability, correction capabilities, but also reclassify the offense in line with the Part 6 of Article 15.

However, it should be noted that the dispositive method of legal regulation of relations is typical mainly to branches of private law, where the legislator gives the participants an opportunity to define their own relation-

ship. But the criminal law is not the branch of private law. In criminal law the judge as a representative of law (and not a creator and reformer of legal norms) decides in the name of the state whether the convict is guilty, whether there are grounds for offender's correction and means of punishment should be imposed. While changing crime category, the court defines the content of law, which is inadmissible [22]. Consequently, according to Arslan Dzhagrunov this provision directly leads to the violation of principles of criminal law such as principles of justice and equality of citizens, because the judge has right to apply common version of the rule of law in relation to one person, or not to apply in relation to another one. As regards the mitigating circumstances of the punishment Dzhagrunov believes that changing crime category inevitably leads to the "double counting" of mitigating circumstances of the punishment firstly when the judge makes decision on the type of punishment and punitive measure in accordance with Article 60 of the Criminal Code and then while motivating the decision to change crime category. Thus, the legislator allows the possibility of direct application of double standards in relation to some offenders.

Besides, there is a threat for full realization of such principles of justice as the autonomy and independence of the judge. Extension of the boundaries of the principle of judicial discretion is inversely to the pressure on the judge and his/her safety. According to Dzhagrunov rating the offense to a particular category, along with the object of crime and concrete circumstances of committing crime, has a significant impact on imposition of punishment. The application of Part 6 of the Article 15 violates the natural interconnection between the imposition of punishment, the results of its imposition and legal consequences of conviction. The legislator has factually established that the public danger of crime depends on the imposed punishment, which according to Dzhagrunov is absurd. [23]

Thus, the right of judge to change the category of a crime entails the violation of the system for distribution of individuals depending on the severity of the offense, the degree of individual's public danger, distorts the rules about the recidivism. As the category of crime affects not only the imposition of penalty and the application of other criminal measures, but also defines the criminality of deeds, the delegation of the power to change crime category means that the judge defines the criminality of the deed. But according to Part 1 of the Article 3 of the Criminal Code the criminality of deed should be determined only by the criminal law. [24]

That is why some scholars conclude that the application of the principle of judicial discretion has some negative aspects, particularly:

- The imposition of penalties more often at lower limits set by the legislator, including application of Articles 64 and 73 simultaneously,
- Excessive and groundless application of the provisions of Article 64 and Article 73 of the Criminal Code and at the same time the gravity of the crime is not an obstacle for application of suspended sentence and imposition of less severe penalty than that provided for that offense,
- Violation of the principle of equity, [25]
- As a rule, the requirement to take into account the circumstances specified in the Article 60 of the Criminal Code during making decision is not kept by the court or is used formally. [26]

As a result, such judicial discretion only leads: "to a violation of human rights protected by the Constitution of the Russian Federation". [27] Thus, the extension of the boundaries of the principle of judicial discretion is not consistent with the fundamental principles of criminal law, distorts the system of crime categorization, significantly affects the independence and autonomy of judges, reduces the safety of judges and promotes the growth of corruption, and as a result – has a negative impact on the objectivity of the decisions handed down by the court. [28] Moreover, this provision can give rise to corruption in the activity of courts. Taking into account that the provisions of the Criminal Code, providing for exemption from criminal liability due to expiration of limitation period and conditional early discharge from penalty are closely related to the categorization of crime, Yury Syomin and Sergey Plokhov indicate that category of crimes should be determined only by law. [29]

In conclusion, we agree with Sergey Nikulin that changing by the court the crime category should have prejudicial importance, i.e. influence the criminal relations in future in case of committing a new crime. If the court decides to change the category of a crime, it can be taken into account when applying the rules and institutions that are not related to the factual (original) category of the crime. Consequently, changing crime category may be taken into account while determining the type of correctional institution (Article 58 of the Criminal Code), counting the period for expunging the criminal record (Article 86 of the Criminal Code), as well as applying the institutions regulating exemption from punishment and from serving the penalty (Articles 80, 80.1, 82, 83, 92 of the Criminal Code).

Changing crime category cannot be a ground for application of the provisions of Part 2 of the Article 30 of the Criminal Code, for changing the punishment imposed under cumulation of crimes (Article 69 of the Criminal Code), for changing the punishment imposed on

DOI: 10.7256/1811-9018.2016.2.17613
При цитировании этой статьи сноска на doi обязательна


juvenile (Article 88 of the Criminal Code) and application of rules on the release from criminal liability (Articles 75, 77, 78, 90 of the Criminal Code). Changing crime category cannot affect the application of conditional early discharge (Article 79 of the Criminal Code) and replacing the unserved term of punishment with milder penalty (Article 80), since in all cases mentioned above the court must take into account the factual degree of public danger of the crime, i.e. factual, and not modified, crime category defined by the court.

So, it is noticeable that there are some criminal procedural and criminal issues concerning Part 6 of Article 15 which lead to violation of human rights and difficulties during the application of this provision.

**Библиография:**

1. А.В. Гриненко. Категоризация преступлений и положения общей части уголовного кодекса РФ в свете гуманизации законодательств. СПС «КонсультантПлюс».
2. С.И. Никулин. Вопросы применения ч.6 ст. 15 УК РФ. СПС «КонсультантПлюс».
3. Н.Е. Муллахметова. Примирение сторон при изменении судом категории преступления. СПС «КонсультантПлюс».
4. А.Л. Иванов. Рекомендации Пленума Верховного Суда РФ о применении ч.6 ст. 15 УК. СПС «КонсультантПлюс».
5. А.Н. Кравцова. Пределы полномочий суда кассационной инстанции по применению части 6 статьи 15 УК РФ. СПС «КонсультантПлюс».
6. Кудрявцева А.В., Воронин Ю.А. Уголовно-процессуальные аспекты изменения категории преступлений в соответствии с ч. 6 ст. 15 УК РФ // Вестник Южно-Уральского государственного университета. Серия «Право». N 20(279). Вып. 30. С. 50.
7. Л.В. Виницкий. М.Е. Кубрикова. Возможно ли изменение категории преступления при рассмотрении уголовных дел в порядке главы 40.1 УПК РФ? СПС «КонсультантПлюс».
8. Бюллетень Верховного Суда РФ. 2013. N 8.
9. А.Л. Иванов. Рекомендации Пленума Верховного Суда РФ о применении ч 6 статьи 15 УК. СПС «КонсультантПлюс».
10. А.В. Гриненко. Категоризация преступлений и положения общей части уголовного кодекса РФ в свете гуманизации законодательств. СПС «КонсультантПлюс».
11. С.И. Никулин. Вопросы применения ч.6 ст. 15 УК РФ. СПС «КонсультантПлюс».
12. А.А. Хайдаров. Право суда изменить категорию преступления на менее тяжкую. СПС «КонсультантПлюс».
13. М.Ф. Мингалимова. Неясность в практическом применении новых положений общей части УК. СПС «КонсультантПлюс».
14. Постановление от 29 мая 2014 г. N 9. О практике назначения и изменения судами видов исправительных учреждений. СПС «КонсультантПлюс».
15. Т.Д. Устинова. Общественная опасность и ее влияние (учет) при конструировании норм общей части УК РФ. СПС «КонсультантПлюс».
16. Н.Е. Муллахметова. Учет мнения и получение согласия потерпевшего при принятии процессуальных решений. СПС «КонсультантПлюс».
17. В.В. Питецкий. О недостатках воплощения принципа справедливости в действующем Уголовном кодексе РФ. СПС «КонсультантПлюс».
18. В.В. Питецкий. Новые правила установления категории преступлений и принцип справедливости. СПС «КонсультантПлюс».
19. С.И. Никулин. Вопросы применения ч.6 ст. 15 УК РФ. СПС «КонсультантПлюс».
20. Ермакова К.П. Понятие и субъективные пределы судебного усмотрения // Журнал российского права. 2009. N 8. С. 91.
21. Ермакова К.П. Понятие и субъективные пределы судебного усмотрения // Журнал российского права. 2009. N 8. С. 50.
22. Ларина Л.Ю. К вопросу об изменении судом категории преступления // Юридическая наука. 2013. N 2. С. 57.
23. Джагрунов А.А. Изменение категории преступления: проблемы и противоречия // Исторические, философские, политические и юридические науки, культурология и искусствоведение. Вопросы теории и практики. 2013. N 8-1. С. 80-81.
24. Ларина Л.Ю. К вопросу об изменении судом категории преступления // Юридическая наука. 2013. N 2. С. 57-58.
25. Бавсун М.В. Судебное усмотрение при назначении наказания и проблемы его ограничения в УК РФ // Журнал российского права. 2007. N 9. С. 105-106
26. Лактаева А.Ю. Гарантии и возможности реализации принципа равенства при назначении наказания // Вестник Волжского университета им. В.Н. Татищева. 2011. N 75. С. 66.
27. Мартышкин В.Н., Гавин А.С., Дементьева Т.А. Правовые и нравственные критерии судебного усмотрения // Вестник Омского университета. Серия: Право. 2008. N 1. С. 21.
28. Г.А. Трофимова. Принцип судебного усмотрения: расширение границ правоприменения. СПС «КонсультантПлюс».
29. Ю.Ю. Семин. С.В. Плохов. Имплементация международных норм-процесс сложный. О приведении законодательства Российской Федерации в соответствии с международными стандартами уголовного законодательства. СПС «КонсультантПлюс».

**References (transliterated):**

1. A.V. Grinenko. Kategorizatsiya prestuplenii i polozheniya obshchei chasti ugolovnogo kodeksa RF v svete gumanizatsii zakonodatel'stv. SPS «Konsul'tantPlyus».
2. S.I. Nikulin. Voprosy primeneniya ch.6 st. 15 UK RF. SPS «Konsul'tantPlyus».
3. N.E. Mullakhmetova. Primirenie storon pri izmenenii sudom kategorii prestupleniya. SPS «Konsul'tantPlyus».
4. A.L. Ivanov. Rekomendatsii Plenuma Verkhovnogo Suda RF o primenenii ch.6 st. 15 UK. SPS «Konsul'tantPlyus».
5. A.N. Kravtsova. Predely polnomochii suda kassatsionnoi instantsii po primeneniyu chasti 6 stat'i 15 UK RF. SPS «Konsul'tantPlyus».
6. Kudryavtseva A.V., Voronin Yu.A. Ugolovno-protsessual'nye aspekty izmeneniya kategorii prestuplenii v sootvetstvii s ch. 6 st. 15 UK RF // Vestnik Yuzhno-Ural'skogo gosudarstvennogo universiteta. Seriya "Pravo". N 20(279). Vyp. 30. S. 50.
7. L.V. Vinitskii. M.E. Kubrikova. Vozmozhno li izmenenie kategorii prestupleniya pri rassmotrenii ugolovnykh del v poryadke glavy 40.1 UPK RF? SPS «Konsul'tantPlyus».
8. A.L. Ivanov. Rekomendatsii Plenuma Verkhovnogo Suda RF o primenenii ch 6 stat'i 15 UK. SPS «Konsul'tantPlyus».
9. A.V. Grinenko. Kategorizatsiya prestuplenii i polozheniya obshchei chasti ugolovnogo kodeksa RF v svete gumanizatsii zakonodatel'stv. SPS «Konsul'tantPlyus».
10. S.I. Nikulin. Voprosy primeneniya ch.6 st. 15 UK RF. SPS «Konsul'tantPlyus».
11. A.A. Khaidarov. Pravo suda izmenit' kategoriyu prestupleniya na menee tyazhkuyu. SPS «Konsul'tantPlyus».
12. M.F. Mingalimova. Neyasnost' v prakticheskom primenenii novykh polozhenii obshchei chasti UK. SPS «Konsul'tantPlyus».
13. T.D. Ustinova. Obshchestvennaya opasnost' i ee vliyanie (uchet) pri konstruirovanii norm obshchei chasti UK RF. SPS «Konsul'tantPlyus».
14. N.E. Mullakhmetova. Uchet mneniya i poluchenie soglasiya poterpevshego pri prinyatii protsessual'nykh reshenii. SPS «Konsul'tantPlyus».
15. V.V. Pitetskii. O nedostatkakh voploshcheniya printsipa spravedlivosti v deistvuyushchem Ugolovnom kodekse RF. SPS «Konsul'tantPlyus».
16. V.V. Pitetskii. Novye pravila ustanovleniya kategorii prestuplenii i printsip spravedlivost. SPS «Konsul'tantPlyus».
17. S.I. Nikulin. Voprosy primeneniya ch.6 st. 15 UK RF. SPS «Konsul'tantPlyus».
18. Ermakova K.P. Ponyatie i sub''ektivnye predely sudebnogo usmotreniya // Zhurnal rossiiskogo prava. 2009. N 8. S. 91.
19. Ermakova K.P. Ponyatie i sub''ektivnye predely sudebnogo usmotreniya // Zhurnal rossiiskogo prava. 2009. N 8. S. 50.
20. Larina L.Yu. K voprosu ob izmenenii sudom kategorii prestupleniya // Yuridicheskaya nauka. 2013. N 2. S. 57.
21. Dzhagrunov A.A. Izmenenie kategorii prestupleniya: problemy i protivorechiya // Istoricheskie, filosofskie, politicheskie i yuridicheskie nauki, kul'turologiya i iskusstvovedenie. Voprosy teorii i praktiki. 2013. N 8-1. S. 80-81.
22. Larina L.Yu. K voprosu ob izmenenii sudom kategorii prestupleniya // Yuridicheskaya nauka. 2013. N 2. S. 57-58.
23. Bavsun M.V. Sudebnoe usmotrenie pri naznachenii nakazaniya i problemy ego ogranicheniya v UK RF // Zhurnal rossiiskogo prava. 2007. N 9. S. 105-106
24. Laktaeva A.Yu. Garantii i vozmozhnosti realizatsii printsipa ravenstva pri naznachenii nakazaniya // Vestnik Volzhskogo universiteta im. V.N. Tatishcheva. 2011. N 75. S. 66.
25. Martyshkin V.N., Gavin A.S., Dement'eva T.A. Pravovye i nravstvennye kriterii sudebnogo usmotreniya // Vestnik Omskogo universiteta. Seriya: Pravo. 2008. N 1. S. 21.
26. G.A. Trofimova. Printsip sudebnogo usmotreniya: rasshirenie granits pravoprimeneniya. SPS «Konsul'tantPlyus».
27. Yu.Yu. Semin. S.V. Plokhov. Implementatsiya mezhdunarodnykh norm-protsess slozhnyi. O privedenii zakonodatel'stva Rossiiskoi Federatsii v sootvetstvii s mezhdunarodnymi standartami ugolovnogo zakonodatel'stva. SPS «Konsul'tantPlyus».