

## YOU SWEAR TO TELL THE TRUTH OR WHY SHOULD LIES BE MADE CRIMINAL?\*

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**ABSTRACT:** LIE IS ONE OF THE OLDEST CRIMES KNOWN TO MAN. UNFORTUNATELY, IT EXISTS AS LONG AS THERE IS HUMANITY. THE DANGER AND IRREGULARITY OF LIES ARE FIXED, PERHAPS, IN ALL THE SCRIPTURES OF DIFFERENT RELIGIONS – THEY ALL EXPRESS PROHIBITING THE ACT OF LYING. IN ADDITION TO THE PROHIBITION OF RELIGIOUS, MORAL AND ETHICAL, CERTAIN FORMS OF FALSEHOOD ARE ALSO PROHIBITED UNDER THE THREAT OF CRIMINAL PUNISHMENT. ESTABLISHMENT OF CRIMINAL LIABILITY FOR ANY ACT ALWAYS REQUIRES THOROUGH RESEARCH, BECAUSE THE PROHIBITION OF CERTAIN ACTS DESCRIBED IN THE LAW WITHOUT THE NEED AND SOCIAL CONDITIONING, WILL ONLY HARM THE PUBLIC RELATIONS, RATHER THAN PROTECT THEM.

CRIMINAL BAN SHOULD BE BASED PRIMARILY ON THE OBJECTIVE NEEDS OF SOCIETY IN PUBLIC RELATIONS PROTECTION. MARX WRITES CONFIDENTLY: "THE LEGISLATOR MUST REGARD HIMSELF AS A SCIENTIST. HE DOES NOT MAKE LAWS, HE DOES NOT INVENT THEM, HE ONLY FORMULATES THEM, HE ENUNCIATES THE INNER LAWS OF SPIRITUAL RELATIONSHIPS"<sup>1</sup>. DESPITE THE FACT THAT THIS STATEMENT IS DEBATABLE IN RELATION TO LIES WE CANNOT DISAGREE WITH THAT. N.D.SERGEEVSKY ALSO NOTED THAT THE OFFENDER DOES NOT VIOLATE THE CRIMINAL LAW, THE PERPETRATOR DOES NOT KNOW ALL THESE ARTICLES - THEY VIOLATE KNOWN BANS. THE PURPOSE OF THIS ARTICLE IS TO BRING OUT REASONS WHY CERTAIN FORMS OF LIES ARE PUNISHABLE IN RUSSIA, THE U.S.A AND CONTINENTAL EUROPEAN COUNTRIES.

**KEY WORDS:** CRIMINAL LAW, PERJURY, FALSE ACCUSATION, LIE IN JUSTICE, LIE, OATH.

### A. DEFINITIONS

**BEFORE** turning to social conditioning of criminal liability for providing false statements to law enforcement and judicial authorities we should explain what we mean by the term "lie". Since ancient times philosophers and scientists tried to understand what is meant by the lies, as Aristotle claimed, "if the assertion connects what is actually disconnected, or disconnects what is actually connected, it is false"<sup>2</sup>. Referring to the dictionary of the Russian language: a lie is the deliberate distortion of the truth<sup>3</sup>, and what does not correspond to the reality. In the same dictionary we can find the definition of truth - what exists in reality and corresponds to the real state of things. So, we can summarize that

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\* This article was written as a chapter for a forthcoming dissertation on the subject of the opposition to providing of false testimony to juridical and law authorities: a comparative legal analysis of the Criminal Laws of the Russian Federation, USA and Continental Europe. This explains why we have not addressed everything the reader might have expected us to address at any particular point. The author would like to thank Professors Luvov V. Lobanova (Volgograd State University, Volgograd, Russia) and Thomas Weigend (Universität zu Köln, Cologne, Germany) for helpful advices on this research and also Y. Timokhina (Volgograd State University, Volgograd, Russia).

<sup>1</sup> See K.Marx and F.Engels. *Soch.* – 2nd edition. - B.1. - p.162.

<sup>2</sup> See *Philosophical dictionary. M.: Publishing house «Politicheskaya literatura», 1986. 245 p.*

<sup>3</sup> See *Ozhegov S.I. Russian language dictionary. M.: Russkij yazyk, 1984. 282 p.*

both definitions include the concept of "reality" that is something that exists by itself and is interpreted by man<sup>4</sup>.

FROM the standpoint of psychology, a lie is "an act by which one person misleads another person, making it deliberately"<sup>5</sup>. The point is that one shall aim to mislead the other person, and regardless of whether it fails or not, we can assume that in this case there had been a lie. Thus, in this article, a "lie" is regarded as a person's deliberate and conscious, volitional action<sup>6</sup>, aimed at distorting the truth to mislead another person; the information that the subject does not himself believe to be true. Throughout human history, countering lies, as well as its various manifestations, received the development not only in the religious sphere, but in the legal sphere as well. So, legislators of the predecessor states of Russia, the United States and countries of continental Europe entrenched serious responsibility for perjury and false accusations in their criminal codes or similar acts.

### *B. GROUNDS FOR CRIMINALIZATION IN GENERAL*

IT should be noted that not each type of lie becomes punishable, but only certain forms. So why did the legislature establish criminal prohibitions for providing false information to law enforcement and judicial authorities, highlight these actions of the entire array of human social behavior, without prohibiting other forms of lies? Russia, the United States and continental European countries are at the highest state level of fixed priority of universal human values. Any restriction of a citizen's freedom has to be on the lowest possible level, even despite the implementation of criminal justice. In regard to "lie" we are speaking only about perjury and false accusation, but not about all types of lie. That is why when establishing penal prohibitions a legislator fights only the most dangerous manifestations of negative social phenomena. That is the main reason to investigate the social conditioning of any criminal prohibitions. The legislature nevertheless seeks to minimize the restriction of its citizens freedom, while protecting the essential rights and freedoms of citizens by means of criminal law. Any society is a dynamic system: the relations within a system are constantly changing. In connection to this, there are always new kinds and transformed old criminal acts. However, we should note that "lie in justice" recognized as the crime throughout human history, but the kinds of punishable lies has adapted to changes in human society.

AT the present stage, Russian legislation introduced criminal liability to knowingly false accusation and false testimony<sup>7</sup>, which were made without an oath in the court procedure, while the law of the United States of America, as well as the European countries such as Germany, France, Italy preserves the institution of the judicial oath, the violation of which is also declared to be punishable — perjury. In a continuous process of criminalization and decriminalization of various acts in investigated countries, certain forms of lies continue to be criminal and punishable, just in the way they were in their long history.

<sup>4</sup> See *Concise dictionary of the Russian language. M.: Russkij yazyk, 1989. 92 p.*

<sup>5</sup> See Golunskij S.A., Roginskij G.K. *Methodology and technique of crime investigation. Issue 5. - M, 1934. - 12 p.*

<sup>6</sup> Speaking about the action we mean that a lie can be expressed not only orally but also written or visual. We can not point only utterance, as in the situation where one must choose between suspects «A» and «B» and silently points to «A» (when in fact the person saw the suspect «B» at the crime scene), we can still say that in this case had been a lie.

<sup>7</sup> Article 307 of Russian Criminal Code criminalized not only false testimonies, but also a victim or an expert's opinion, and knowing mistranslation in court, or in a preliminary investigation.

**ATTEMPTS** to formulate the governing principles of the admissibility and expediency of criminalization were undertaken by ancient philosophers. Throughout history, philosophers and lawyers have proposed various criteria for criminalization, beginning with abstract principles and ending with specific legal recommendations. In modern times the foundations of criminalization theory have been proposed by Cesare Beccaria, who thought that the only true measure of crimes committed is the harm they bring to the nation<sup>8</sup>. Later, a well-known English criminologist Cortney S. Kenny in her "Outlines of criminal law" lists 6 different conditions, required to criminalize the conduct:

- *Harm from the criminalized acts should be more significant than direct and indirect harm, which inevitably entails application of its criminal penalties.*
- *The criminalized act must be identifiable with the precision required for the law;*
- *Acts should be demonstrable with certainty;*
- *Proof of such acts should be achieved without compromising the privacy and trust relationships between relatives;*
- *Act must greatly disturb the usual sense of society and public opinion;*
- *Adequate protection of the public from this type of conduct cannot be guaranteed softer — by administrative or civil legal action<sup>9</sup>;*

**DESPITE** the progressive nature of the above-mentioned principles, they still look quite abstract for modern criminal law theory and do not really explain what the basis of criminalization is. Moreover, the principles of criminalization were considered in the course of the III International Colloquium on decriminalization of 1975. Professor of the Rotterdam University L.Hulsman in his general presentation set out a very comprehensive system of criminalization principles. The proposed system was described in the materials of the colloquium<sup>10</sup>. Hulsman thought that a meaningful response to the following three questions for criminalization of an act should be elaborated:

- *What kind of behavior do we regard as undesirable and which judgment is this behavior worth?*
- *What is the expected benefit from the criminal law prohibition and what is the cost for society of such a ban?*
- *Does the existing penal system have necessary tools for making criminalization real and achieve the ban's objectives?*

**THIS** system looks much more objective, however, we think, that the answers to these questions do not allow to assert with confidence that certain forms of conduct should be criminalized in modern time. In modern criminal law literature we can find a huge list of different grounds, factors and criteria for criminalization. Antonov A.D. discriminates the following principles for the criminalization:

- *principles which express the objective necessity and political expediency of establishing criminal liability (base criminalization);*
- *principles which define the requirements of internal logical consistency of the law (grounds);*

<sup>8</sup> See Beccaria Cesare. *On crimes and punishments. M.: Yurizdat, 1939, p.41.*

<sup>9</sup> See Cortney S. Kenny. *Outlines of criminal law. Based on lectures delivered in the University of Cambridge (Ed. by G. Gedfrey Phillips, Cambridge at the University Press) (1947).*

<sup>10</sup> See *The decriminalization. La decriminalisation. Bellagio. 7-12 mai 1973. Centro Nazionale di Prevenzione e difensosociale. Milano, 1975.*

**ACCORDING** to Antonov A.D., the first group includes public danger, the necessity to influence public relations by criminal law only when there are no rules regulating these relations by means of methods of other branches of the law, the dynamics of socially dangerous acts, the correlation of criminalization positive and negative effects, the value of objects under criminal and legal protection and the scale of harm induced, the availability of legal resources for implementing the legal ban, the level of social justice, historical traditions and so on<sup>11</sup>. Many researchers are expanding the criminal grounds system, believing that the system of these grounds is not comprehensive. We can find many more grounds in the Russian, American or European legal literature. Each author offers their own classification, so it is impossible to develop a unified system of grounds even for each particular country and to find the unified one for Russia, the US and European countries. With regard to investigating criminal acts, we think that the most important grounds for the study of certain forms of lies criminalization social conditioning are as follows:

- *Public danger of the acts;*
- *Proportionality of positive and negative consequences;*
- *Tools of the existing penal system to make the criminalization real;*
- *The lack of norms in other branches of law, which can effectively counteract such acts;*
- *Relative prevalence;*

**WE** can speak about the criminalization of acts when it is not an isolated fact, but a phenomenon that represents a specific kind of human activity and has precedential character (i.e. the possibility of recurrence). Criminalization of individual actions, even if they deviate from the social norms, is impossible, since criminal law contains general rules which are intended not for a singular but for a repeated use. However, in our opinion, this is not the main ground, but an optional one, as it cannot be taken into account in the criminalization of highly dangerous acts, such as terrorism or genocide.

**HISTORICAL** and foreign experience- in our opinion this ground, like the previous one, is optional, but nevertheless it must play an important role in criminalization. Appeal to foreign or historical experience allows to avoid mistakes. It is obvious that this experience should be applied very carefully and taking into account national and historical specificity.

**WE** believe that the inclusion of the above-mentioned grounds can fully characterize the presence or absence of the need to criminalize some forms of human behavior, and we consider it necessary to analyze the acts, being studied, in terms of these grounds.

### *C. CRIMINALIZATION OF PERJURY, FALSE DENUNCIATION, FALSE WITNESSES TESTIMONIES*

#### *I. Public danger of the acts*

**SPEAKING** of the first ground, we should note that a lie which affects the administration of justice certainly has the feature of public danger. False witness's testimonies, perjury, false denunciations entail many negative effects — wasting of law enforcement resources to investigate the crimes, which in reality have never been committed, the imposition of unjust convictions based on the testimony, the falsity of which was not revealed in court and many

<sup>11</sup>See Antonov A.D. *Theoretical Foundations of criminalization and decriminalization. Moscow State University. M.V. Lomonosova. - M., 2001. - 29 p.*

other. The acts, being studied, undermine the authority of law enforcement and judicial authorities and hinder fair justice administration, which is one of the fundamental principles of the criminal law of the Russian Federation, the United States and countries of continental Europe. However, despite the social danger level of such acts, it is insufficient to criminalize these forms of social behavior. Galperin I.M. noted that the role of the public danger, in regard to the issue of criminalization, is hypertrophic sometimes<sup>12</sup>. We cannot consider this ground in isolation from other social and legal moments, which affect criminal code working out. In connection to this and we should address to other grounds.

## *II. Relative prevalence*

**FIRST** of all, we need to note that it is quite difficult to find real statistics on how many people lie in court or violate the oath. Harry Hibschen in his work in 1934, which was devoted to perjury, claimed that it occurred in 50% of all the contested civil cases, in 75% of all criminal cases, and in 90% of all divorce cases<sup>13</sup>. In almost a century the situation looks better but people still lie in courts and to the law enforcement agencies. Thus, 202 cases of perjury were recorded in accordance with the data of the United States' Department of Justice in 2007-2008<sup>14</sup>. Modern Russian judicial practice shows that in 2011-2014 years only Volgograd district courts have considered 27 cases of crimes under Art. 307 of the Criminal Code<sup>15</sup>, which is 33% of all considered cases, over this period. This data includes only reported cases of perjury, however, the judiciary, investigatory authorities and scientists agree that the facts of perjury and false accusations occur in a much larger number of cases. Latency and impunity of these acts is the major concern, since they lead to the violation of the fundamental justice principle - the inevitability of punishment. So, Korobeev A.I. and Kuleshov Y.I. indicated that more than 65% of Russian judges, which have been interviewed, noted that the responsibility for perjury is generally not followed, and the level of perjury latency in criminal cases is as high as 50%, and civil - 90%<sup>16</sup>. Such a high level of latency indicates the existing problems in combating the lies in the field of justice and shows us that we need to improve our criminal law. Thus, it can't be argued that the prevalence and repeatability of false witness's testimonies, perjury and false denunciation are undoubtful.

## *III. Proportionality of positive and negative consequences*

**CERTAINLY**, criminal liability always entails negative consequences for the person who is subject to such liability: the interruption of interpersonal relations, condemned by the society, the violation of the normal activities of the person in all spheres of life. Thus, the proportionality of positive and negative effects is always one of the most difficult grounds. However, false testimony entails harm not only to the individual, which may suffer from false denunciation or perjury, but to the entire law enforcement and the judicial system.

**FAIR** justice is considerably complicated or even becomes impossible, if there is a lie in this sphere. Despite the existence of criminal prohibition to lie to the law and judicial

<sup>12</sup>See Galperin I.M. *Criminal policy and criminal law. Grounds and ares of combating crimes. M., 1975. p. 52.*

<sup>13</sup>See Harry Hibschen, *You Do Solemnly Swear or that Perjury Problem*, 24 Am. Inst. Crim. L. & Criminology (1933-1934) at 901.

<sup>14</sup>Federal justice statistics, 2008 — statistical tables. Bureau of Justice Statistics, november 2010. -available at <http://www.bjs.gov/content/pub/html/fjsst/2008/fjs08st.pdf>

<sup>15</sup>Knowingly False Testimony, Expert Opinion, or Mistranslation.

<sup>16</sup> See Korobeev A.I., Kuleshov Yu.I. *Perjury: painful problems of legal responsibility // Rossijskij sudya. 2005. № 7. p. 8.*

enforcement, lie still gets into the sphere of justice and entails many negative consequences. Just imagine the situation where a lie in court is not prohibited. We can assume, that the law enforcement and the judicial system will simply lose a witness as a source of information, and will be forced to rely solely on the physical evidence, which are clearly not enough to make a fair and informed decision. Therefore the positive and negative consequences of the criminalization can be called proportionate.

#### *IV. Opportunities of the existing penal system to make the criminalization real (effective feasibility)*

**FALSE** statements and denunciations, perjury are certainly procedurally demonstrable, otherwise today there would be no judicial practice on this issue. Legislation of the Russian Federation, the United States and continental Europe has an extensive practice of counteracting these acts. However, the trouble is that scientists and experts have repeatedly marked a high level of latency of data acts and quite stingy judicial practice on perjury and false accusation. Latency and a low level of detected crimes indicate that existing mechanisms may not be enough to effectively counter false statements. We have a reason to believe that there are two different scenarios: the first, in which the legislator provides severe punishment, but the law enforcement and judicial authorities do not possess sufficient mechanisms to detect lies, prosecute and punish for it and the second one, in which the law enforcement and judicial authorities do not want to spend extensive resources, because the punishment provided for perjury does not correspond to public danger of acts. Assume that the first scenario takes place in the contemporary United States and in most European countries, where the attention of scientists and experts is focused on procedural mechanisms of false testimony detection. Thus, the scientific literature repeatedly raises questions about the use of lie detector in the US, various methods of interrogation, etc. The second scenario takes place in modern Russian practice - the complexity of detecting false information and low punishment for perjury leads to the fact that law enforcement is reluctant to start up the investigation of such cases, and the attention of scientists is largely focused on the legal norm itself, rather than procedural matters.

**SUMMING** it up, we can note that the criminalization of false statements, perjury and false denunciation is feasible in Russia, the US and continental Europe, but there is another question- not about just feasibility but about the most effective feasibility. In the following articles, we will raise this question and the ways to solve them in a more detailed way.

#### *V. The lack of norms in other branches of law, which can effectively counteract the acts*

**A** person who provides false information to law enforcement and judicial authorities infringes not only the interests of individuals who may be affected as a result of false denunciation or perjury, but also the interests of justice as a whole, the entire judicial system and law enforcement, increasing the probability of making unfair decisions and undermining the authority of these bodies. These actions have a high degree of social danger and, of course, in accordance with this must be referred to criminal offense. Considering that today providing false information to law enforcement and judicial authorities in Russia is a crime against justice, that encroaches on the interests, which are protected by criminal law standards, certainly we can say that there is a lack of norms in other branches of law which can effectively counteract false statements in court.

**THE** Russian Code of Administrative Offences provides only administrative responsibility for knowingly giving false testimony, false specialists' or experts' explanations or knowingly wrong translation<sup>17</sup>. The point is that perjury, in our opinion, has the same level of public danger, regardless of whether a lie came to civil or criminal proceedings, in this regard, we cannot agree with the expediency of such a differentiation of responsibility. Lies, getting to trial, regardless of whether the process is administrative or criminal, has a high degree of danger and can impede the interests of individual citizens and the justice system in general, and therefore, we believe that the responsibility should be equivalent.

### *VI. Historical traditions and backgrounds*

**WE** should complete the research on the grounds of historical justification for the criminalization of lies in justice. Truth has at all times been the most important value of justice. The authors of the oldest monuments of domestic law of Ancient Russia – Russkaya Pravda and princely Charter - understood that a "lie" in justice has a high degree of public danger, threatening the adoption of an unfair decision. False accusation in court became one of the first offenses against justice enshrined in the Russian criminal law. The responsibility for this act was provided by Article 20 of the Extensive editorial of Russkaya Pravda - "O poklepyoy Vire"<sup>18</sup>. Referring to one of the earliest statutes of the United States:

*Willfully and corruptly committing perjury.*

*– If any person shall willfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and willful perjury, on his or her oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the United States or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against said offender shall be reversed. (Act of April 30, 1790, section eighteen)<sup>19</sup>.*

**ONE** of the oldest French statutes, "la loi de stellion" says that perjurers shall be expelled, according to the statute 13 of "la loi de jure" the punishment for perjury was beating by a whip; but all the laws of the Code emphasize that a perjurer has no longer the right to be a witness<sup>20</sup>. Throughout the history of criminal law in Russia, America and continental Europe the punishment for the researching acts, differentiating the responsibility, changing the legal constructions have been changing, but a lie in justice has always been recognized as very dangerous, and required the establishment of criminal responsibility. Historical analysis of countering the false information is demonstrating that legislatures of Russia, America and all the countries of continental Europe have historical background to fixing criminal liability for

<sup>17</sup>Article 17.9 of the Code of Administrative Offences of the Russian Federation.

<sup>18</sup>See Teslenko A.V. *Development of domestic legislation on liability for providing false information to law enforcement and judicial authorities / Zakonipravo*, p. 96-100, №3, 2014. (The article contains the study of legislative acts which functioned of the Russian territory, from Russkaya Pravda to the Criminal Code of 1996).

<sup>19</sup>See 2 Francis Wharton, *A Treatise on the Criminal Law of the United States* (Philadelphia, Kay & Brother 5th ed. 1861), at 287.

<sup>20</sup>See *Encyclopediemethodique. Jurisprudence, dedieeetpresentee, Tome sixieme* (ChezFanckoucke, Libraire, hotel de Thou, rue des Poitevins), M. DCC. LXXXVI., 1786, at 383.

false testimony and perjury, as these compounds were reflected in a variety of legislations, since the laws of Hammurabi\* to the modern criminal codes.

#### *D. New types of lie criminalization*

**TODAY**, researchers also propose to criminalize other forms of lies, which up to the present are not punishable. So, Brian Druzin and Jessica Lee substantiate the need for criminalizing of a whole group of crimes, which the authors call "egregious lying causing serious harm"<sup>19</sup>. As examples of the lies that must be recognized as criminal authors refer to the following acts: "a situation in which a person is willfully lying to the orphan, that his parents are dead, when in fact this person knows that the parents are alive and desperately searching for the child. We cannot agree with the need to criminalize such acts, as the examples do not correspond to any ground which we showed up before. The criminalization of much more extensive range of lies would entail exclusively difficulties for law enforcement and judiciary system and will have more negative consequences for both - the judiciary and civil society, that the criminal law is have to protect.

#### *E. Conclusion*

**IN** conclusion, we can argue, that perjury, false testimonies and false denunciations are corresponding to all the grounds, which, in our opinion, are necessary to criminalize some actions in Russia, in the United States and in the countries of continental Europe. Judges, prosecutors, legislators and scientists all agree that false testimonies, perjury and false denunciation are threatening the effective administration of justice. The offense prevents a fair and proper trial in the particular proceeding and interferes into the overall administration of the judicial system. Summing it up, false witness's testimonies, false denunciations, and, with respect to the United States and countries of continental Europe, also perjury – are the acts, which have all the characteristics of a crime and should be prohibited under criminal penalty which are caused by the social conditions.

**HOWEVER**, answering "yes" to the question about the need to criminalize lie in justice, we still have a lot of questions on how to do that in the highest effective way, especially in Russia, where the highest punishment or non qualified knowingly false testimony, expert opinion, or mistranslation is "only" arrest for up to three months.

**ANOTHER** question which is interesting for our topic is an oath in criminal procedure. Historical analysis shows that this criminal institute has been very important during the history of Russian, American and European legislators and it is still playing a huge role in modern American and European criminal procedure, but not in Russia. Can an oath help to protect the interests of justice or it is just a tradition which cannot be analyzed as a real mechanism of protecting?

**WE** think, that there are still a lot of questions about the lie in justice, which have to be answered, and the issue is very topical, especially for Russian law and criminal procedure, and we believe, that research should be continued.

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