

ABUSE OF CRIMINAL LEGAL NORMS DURING THE REALIZATION OF RESPONSIBILITY FOR VIOLATION THE SAFETY RULES IN THE PRODUCTION OF WORKS AND RENDERING OF SERVICES

Maxim V. Bavsun, Ilya A. Beletskiy

Omsk Academy of the MIA of Russia, Omsk, Russia

Article info

Received – 2018 April 15

Accepted – 2018 May 20

Available online – 2018 August 20

Keywords

Criminal liability, principles of criminal law, abuse of law, limits of criminal law regulation, redundancy of norms, provision of services, work, violation of safety rules

The subject. The article is devoted to analysis of abuse of public rights in the sphere of criminal prosecution for violation the safety rules.

The purpose of the article is to identify the condition and prerequisites for abuse of public rights in the sphere of criminal prosecution for violation the safety rules.

Methodology. The authors use theoretical analysis and synthesis as well as legal methods including formal legal analysis, interpretation of legal acts and adjudications. Results, scope of application. It is proved that such abuse is the application of the criminal law in controversy with its specific tasks, established by the interrelated provisions of art. 2 of the Criminal Code of the Russian Federation and art. 6 of the Criminal Procedure Code of the Russian Federation. The possibility of applying criminal law to the detriment of the protected interests of citizens and in violation of constitutional principles is due to a number of factors: first, the blurring of the limits of criminal law impact in the field of security in the production of works or services, and secondly, the lack of isomorphism of criminal law norms providing for liability in the named sphere of public relations and, as a consequence, the lack of coordination of sectoral norms.

Conclusions. Conditions for abuse the public rights in criminal sphere indicate that the legislator ignores the requirement of systematic legal regulation, since identical offenses can receive both criminal law and administrative legal assessment.

1. Introduction.

The Constitution of the Russian Federation declares that the exercise of the rights and freedoms of man and citizen must not violate the rights and freedoms of others (Part 3, Article 17), and also equality before the law and the court (Part 1, Article 19). The provisions of the European

Convention for the Protection of Human Rights and Fundamental Freedoms cannot be interpreted as meaning that any State, any group of persons or any person has the right to engage in any activity or to perform any acts, aimed at the abolition or restriction of the rights and freedoms recognized in the Convention to a greater extent than is provided for in the Convention (Article 17).

These interrelated provisions form the general legal principle of the inadmissibility of abuse of the law, which is nevertheless more often spoken in the context of civil law (and, in civil law, it is directly said about the prohibition of abuse of the right (Article 10 of the Civil Code of the Russian Federation)).

2. Abuse of law in the implementation of public interest.

Absolutely true is the utterance of A.Ya. Kurbatov about the fact that "the question of abuse of power can arise when both private and public interests are violated in all spheres of legal regulation" [1, p. 37]. This idea is supported by MA. Kaufman, who as a statement of the issue examines some problems associated with the abuse of criminal law [2]. We are absolutely in solidarity with the scientist and that the abuse of law is possible in the sphere of criminal law influence [3-9] and, in continuation of the discussion that began, we note that one of the most vulnerable criminal laws is the scope of security in the production of works or the provision of services.

3. The causes of the proliferation of abuse of the law in the field of security in the performance of work or the provision of services.

This situation is due to several factors.

3.1. First, the criminal-legal impact in the field of security in the production of works or the provision of services does not have clearly defined limits. This is reflected in the fact that similar offenses receive different qualifications, and not only within the Criminal Code. Such "free" application of the law became possible due to inconsistency between the criminal law norms.

Responsibility for crime essentially similar in this area provides a large number of rules (articles 143, 216, 217, 238 269 CC RF et al.). These crimes are, as a rule, constructed in the same way - reckless crimes with material composition [10].

The available judicial practice testifies that for *identical crimes* the culprits are condemned then the corresponding part of Art. 143 of the Criminal Code of the Russian Federation, Art. 216 of the Criminal Code of the Russian Federation or even Art. 109 of the Criminal Code. In this case, you can reasonably claim violations of the principles of fairness and equality before the criminal law, which is often a concomitant abuse of law. By the form of guilt, and on punitive potential, the named crimes are almost identical, however, in the first place, though small, but still differ in their sanctions are, secondly, the criminal case on a crime under Part. 1 of Art. 143 of the Criminal Code are subject to a magistrate, part 1 of Art. 216 of the Criminal Code - the district court. Imbalance is obvious.

The most clearly a violation of the fundamental principles of criminal law is manifested in the application of Art. 238 of the Criminal Code, as well as Art. 217 of the Criminal Code. The design of the first of these articles makes it possible to prosecute for administrative (in nature and nature of the danger) the right of violation - It is virtually impossible to proceed from the boundary of Part 1 with Volume 238 of the Criminal Code of the Russian Federation from Art. 6.6 of the Code of Administrative Offenses of the Russian Federation "Violation of sanitary and epidemiological requirements for catering of the population" and whether from administrative offenses in the field of road traffic.

The same applies to the offense under Part 1 of Art. 217 of the Criminal Code of the Russian Federation and the offense for which the Part 3 of Art. 9.1 of the Administrative Code of the Russian Federation. It is very difficult to establish the difference between "violation of safety rules ... which *could result in death of man*" (v. 1, Art. 217 of the Criminal Code) and "violation of safety requirements, leading to the emergence of *immediate threat to life or health of people*" (note to Article 9.1 of the Code of Administrative Offenses of the Russian Federation).

Obviously, it is a legislative art shortcomings when describing the compositions of offenses under the named standards, as well as disorders and systemic legal regulation, which are one of conditions conducive violation in regulatory guidelines.

3.2. Secondly, the uncertainty about the form of the guilt of a number of crimes has a negative impact on the "cleanliness" of the criminal law regulation. Until now, among scientists there is no agreement on what kind of guilt is a crime under Art. 217 of the Criminal Code. Even the Constitutional With beats of the Russian Federation did not give a direct answer to the question of the applicant whether the challenged norm with the Constitution to the extent that its construction involves the possibility of arbitrary determination of guilt form.

Similar Problems arise in connection with the application of art. 238 of the Criminal Code. One of the fairly well-known criminal cases investigated in relation to hematologists M. The court sentenced her to two years in prison for committing a crime under Art. 238 of the Criminal Code of the Russian Federation, for the fact that after her operation the patient died. If we follow the logic of the prosecution, the doctor, while committing crime under Art. 238 of the Criminal Code of the Russian Federation, acted deliberately and was aware of the public danger of her actions - deliberately incorrectly conducted a bone marrow sampling through a puncture. But in this case, the doctor could not have foreseen la inevitable and socially offensive dangerous consequences, and if it did not want and their approach, then, in any case, to treat and to s to them indifferently, and then it is necessary to talk about a deliberate crime against a person.

The construction of the offense with a double form of guilt (clause "a" part 2 with v . 238 of the Criminal Code of the Russian Federation) , on the one hand , assumes that the professional is aware of the public danger of violation of the safety rule, and (1) foresees the possibility of the onset of socially dangerous consequences of his act , but without sufficient grounds for doing so, arrogantly expects to prevent these consequences (levity) or 2) does not foresee the possibility of the socially dangerous consequences of his actions (inaction), although with the necessary care and foresight he should and could to foresee them (negligence) [11, p. 58]. It should be noted that negligent attitude to the consequences in the described situation with deliberate violation of safety rules is hardly possible, since a professional can not foresee them, and frivolous attitude is more realistic, but the *legislative design of this kind of negligence and so implies that a person can knowingly violate rules, that's why it foresees the possibility of consequences*. The fact is that following the formula "foresee a possible harm - give up the action fraught with it" is probably not always the case. According to M.S. Grinberg, such a follow-up would exclude, for example, medical or engineering activities [12, p. 135].

In this regard, we believe that in part s root problems violation of the principles of criminal law that should be an occasion and Article impact both on lawmaking and on law-enforcement activities in the implementation of various measures of criminal law, defining the specificity of each of them [13, p. 8], lies in the artificially created competition of norms and, as a consequence, the blurring of the limits of regulation.

3.3. Thirdly, a condition conducive to abuse criminal legal norms, is the erection of the rank of an independent crime of individual elements the composition of a careless crime.

Such a decision of the legislator is not (unfortunately) single. The identification of the stages of the commission of a crime or forms of complicity in independent criminal offenses is found in the chapter on crimes against public security. This is due to the fact that "some types of preparatory activities of antisocial individuals are so dangerous that protect the interests of citizens, society and state from such activities require decisive action at an earlier stage, when only the conditions for the commission of crimes [14]. And if there is no doubt that the passage of training for the purpose of carrying out terrorist activities is reasonably forbidden under penalty of punishment, then regarding the public liability for providing transport services in violation of established rules, one cannot say so. The criminal liability of a person, rendering service in transport of services on the water, under this article do not attract any violations, but only those that caused a significant infringement of consumer rights and testify to a sufficiently high degree of public danger to the life and health of the consumer, this crime is committed in the form of an act by introducing or reliably established

intention of the guilty person to introduce consumer confusion about quality services that really represent a danger to his life or health.

As a result of the current criminal legal regulation, the subject of the production of works or services is in situation of ignorance of what will entail if it will lead to criminal or administrative liability. Applied to this thesis in the 70s of the last century, M.S. Grinberg wrote that the conditions in which people live and work has changed dramatically, have become much more sophisticated, and their mental ability in general remained the same, the same as a hundred or two hundred years ago. What is characteristic, after a specified period, a considerable time has already passed, and the technological process has advanced many times ahead, which cannot be said of the human psyche [15, p. 73]. Therefore, the problem of the discrepancy between the psycho-physiological data of a person in the current situation has also become more relevant.

One of such manifestations of the indicated problem is Part 1 of Art. 238 of the Criminal Code of the Russian Federation, which should not be seen as an independent crime, but as an element of the composition of a careless crime. Intentional violation of safety rules or provision of a service (performance of work) that does not meet safety requirements, in the absence of a strong-willed attitudes towards consequences (desire and x offensive) is an *act* in a crime committed *by levity*, the composition of which must be constructed as material.

As a further illustration of what was said suppose that the norm provided for in Part 1 of Art. 185 of the Criminal Code "Abuses during the issue of securities", will be constructed in a similar manner to Part 1 of Art. 238 of the Criminal Code of the Russian Federation - the consequences in the form of major damage will be removed from the composition, will cease to be its constituent element. In this case, the criminal-legal prohibition will become identical to the administrative-legal prohibition established in Art. 15.17 of the Administrative Code of the Russian Federation "Unfair issuance of securities". Obviously, then, the nature of public legal consequences in case of violations during the issue of securities, on the one hand, will be unknown to the perpetrator (*violation of the principle of legal certainty*), on the other hand, will enable the law enforcer to independently and arbitrarily choose the type of such liability (*abuse of right*).

Perhaps the only case in which the presence of similar prohibitions in the Criminal Code and the Administrative Code may be deemed justified - it is an opportunity of bringing to administrative responsibility of legal persons **only**. A successful solution can be observed in the norms of Art. 171.2 of the Criminal Code and Art. 14.1.1 of the Administrative Code of the Russian Federation when for an offense similar to a crime, only a legal entity can be brought to administrative responsibility.

4. Possibility of choice of two kinds of public and legal responsibility as a prerequisite of abuse of rights.

It may be justified that the transfer of criminal liability for violations of safety rules in the production of works or the provision of services to earlier stages will only have a positive effect, play a significant preventive role and help prevent serious consequences, but it should not be forgotten that legal regulation should answer the principle of legal certainty. The question of the possibility of transferring the criminal liability at the earlier stages of committing *socially dangerous* acts of merit, but in this case the act must be really socially dangerous (the crime), and not only illegal (administrative offense), in addition, must be observed and systematic legal regulation - if the legislator has decided to establish the criminal responsibility (without administrative prejudice) for the carriage of passengers in a car with deviant tire tread, it should be excluded for this administrative responsibility, and vice versa.

Otherwise, it is necessary to say that the legislator creates the prerequisites for the abuse of the right (if the choice of two types of public legal responsibility is possible, the law-enforcer chooses a more repressive - criminal).

The possibility of an arbitrary choice between two types of public legal responsibility does not correspond to the tasks of the Russian Criminal Code (protection of human and civil rights and freedoms), which, in conjunction with the appointment of criminal proceedings (protection of a

person from an unlawful and unfounded charge, conviction, restriction of rights and freedoms) are aimed at eliminating cases of abuse of criminal law.

Condition that allows the investigator or the court to apply the criminal law, ignoring his task to comply with the principles of legal certainty and system of legal regulation, which is manifested as: a) the existence of a large number of norms providing liability for the same acts and does not differentiate it; b) there are no elements of the offense in the statement, in particular, the subjective side, so that law enforcers can understand them at your own interpretation. In these cases, abuse of rights is less apparent.

We can say that the abuse of the norms of criminal law is part of the Russian legal reality, it is expressed in the application of the criminal law in violation of the tasks defined for it (Article 2 of the Criminal Code of the Russian Federation, Article 6 of the Code of Criminal Procedure) and becomes possible due to non-compliance with the principles of legal certainty and the systemic nature of legal regulation.

5. The conclusion.

Summarizing the above, we should note that the existing phenomenon of abuse needs to be investigated in relation to other areas of criminal-legal protection and to identify the conditions conducive to this. In turn, the problem raised is to a greater extent the legislative nature of origin, and the law-enforcer is only in a situation where there is simply no other way to act otherwise. The redundancy of the criminal law regulation often creates well-founded complications in practice, and the abuse of the criminal law begins at the stage of its formation.

REFERENCES

1. Kurbatov A.Ya. The principle of the inadmissibility of the abuse of criminal law: old problems added new. *Zakon*, 2013, no. 9, pp. 36–43. (In Russ.).
2. Kaufman M.A. On the abuse of criminal law (to the question), in: *Ugolovnoe pravo: strategiya razvitiya v XXI veke*, materials of the XV International scientific and practical conference. Moscow, RG-Press Publ., 2018, pp. 46–58. (In Russ.).
3. Zhalinskii A.E. *Criminal law in anticipation of changes: theoretical and instrumental analysis*, 2nd ed. Mos-cow, Prospekt Publ., 2009. 400 p. (In Russ.).
4. Borkov V.N. The Supreme Court of the Russian Federation Decided not to Confuse a Gift with a Bribe. *Sov-remennoe pravo = The Modern Law*, 2014, no. 1, pp. 107–110. (In Russ.).
5. Esakov G.A. Topical problems of modern criminal law (Based on materials of international conferences). *Pravo i politika = Law and Politics*, 2007, no. 3, pp. 149–151. (In Russ.).
6. Yumashev N.S., Yumashev A.N., Solopov N.S. On the principal of fair practices, avoidance of law and prohibition of law in the rules of civil and criminal-procedure legislation. *Rossiiskii sledovatel' = Russian Investigator*, 2015, no. 15, pp. 34–40. (In Russ.).
7. Baev O.Ya, Baev M.O. *abuse of the right to pre-trial criminal proceedings*, Monograph. Moscow, Prospekt Publ., 2014. 216 p. (In Russ.).
8. Grishina E., Leveev Yu. Abuse of the law by the subjects of criminal prosecution: moral and ethical problems and ways of their elimination. *Mirovoi sud'ya = Magistrate judge*, 2009, no. 10, pp. 6–8. (In Russ.).
9. Parfyonov V.N. The problem of abuse of criminal procedural rights. *Rossiiskii sledovatel' = Russian Investigator*, 2014, no. 7, pp. 23–26. (In Russ.).
10. Kravchenko R.M. Peculiarities of Qualification of Unsafe Work Performance and Service Rendering at Illegal Business Activity. *Rossiiskii sud'ya = Russian Judge*, 2017, no. 9, pp. 40–44. (In Russ.).
11. Bavsun M.V., Veklenko S.V. *Criminal-legal assessment of the subjective side of crime*. Omsk, Omsk Academy of the MIA of Russia Publ., 2006. 256 p. (In Russ.).
12. Greenberg M.S. Random (probabilistic) trials and criminal law. *Sovetskoe ugolovnoe pravo*, 1986, no. 1, pp. 129–133. (In Russ.).

13. Fisenko D.Yu. *Special principles of criminal law*, Cand. Diss. Thesis. Omsk, 2016. 23 p. (In Russ.).
14. Inogamova-Khegai L.V. *Conceptual basis of competition of criminal law*, Monograph. Moscow, NORMA Publ., INFRA-M Publ., 2015. 288 p. (In Russ.).
15. Greenberg M.S. Psycho-physiological abilities of a person and criminal responsibility. *Sovetskoe ugodovnoe pravo*, 1974, no. 12, pp. 70–75. (In Russ.).

ИНФОРМАЦИЯ ОБ АВТОРАХ

Бавсун Максим Викторович – доктор юридиче-ских наук, профессор, заместитель начальника по научной работе

Омская академия МВД России
644092, Россия, г. Омск, пр. Комарова, 7
e-mail: oma@mvd.ru

SPIN-код: 8591-6572; AuthorID: 266045

Белецкий Илья Александрович – кандидат юри-дических наук, научный сотрудник научно-иссле-довательского отдела
Омская академия МВД России
644092, Россия, г. Омск, пр. Комарова, 7
e-mail: abinik@inbox.ru

INFORMATION ABOUT AUTHORS

Maxim V. Bavsun – Doctor of Law, Professor, Dep-uty Head for Research
Omsk Academy of the MIA of Russia
7, Komarova pr., Omsk, 644092, Russia
e-mail: oma@mvd.ru
SPIN-code: 8591-6572; AuthorID: 266045

Ilya A. Beletskiy – PhD in Law, researcher, Research Department
Omsk Academy of the MIA of Russia
7, Komarova pr., Omsk, 644092, Russia
e-mail: abinik@inbox.ru

БИБЛИОГРАФИЧЕСКОЕ ОПИСАНИЕ СТАТЬИ

Бавсун М.В. Злоупотребление уголовно-право-выми нормами в ходе реализации ответственно-сти за нарушение правил безопасности при про-изводстве работ или оказании услуг / М.В. Бавсун, И.А. Белецкий // Правоприменение. – 2018. – Т. 2, № 2. – С. 40–47. – DOI: 10.24147/2542-1514.2018.2(2).40-47.

BIBLIOGRAPHIC DESCRIPTION

Bavsun M.V., Beletskiy I.A. Abuse of criminal legal norms during the realization of responsibility for vi-olation the safety rules in the production of works and rendering of services. Pravoprimerenie = Law Enforcement Review, 2018, vol. 2, no. 2, pp. 40–47. DOI: 10.24147/2542-1514.2018.2(2).40-47. (In Russ.).