

REASONABLE RISK FROM THE PERSPECTIVE OF RATIONAL CHOICE THEORY

Oleg N. Bibik

*Dostoevsky Omsk State University, Omsk,
Russia* **Article info**

Received – 2018 April 15

Accepted – 2018 May 20

Available online – 2018 August 20

Keywords

Reasonable risk, rational choice theory, risk management, risk coefficient, standardization, stimulation of reasonable risk

The subject. The article is devoted to analysis of criminal legal issues of reasonable risk.

The purpose of the article is to prove the necessity of reasonable risk management in criminal legal purposes.

Methodology. The problem of reasonable risk is considered through the theory of rational choice, economic analysis of law, as well as through formal legal analysis.

Results, scope of application. The justified risk demonstrates the ineffectiveness of the use of state coercion in view of the social utility of the actions performed, since the benefit from them exceeds the possible adverse consequences. It is stated that art. 41 of the Criminal Code of the Russian Federation is rarely applied by judicial bodies. Reasonable risk is confound by extreme necessity. At the same time, it is not taken into account that the risk is not accompanied by the inevitable infliction of consequences, whereas if extreme necessity they come necessarily. It is proposed to introduce a system of management of reasonable risk, including through standardization, development of rules of conduct in terms of possible risk, calculation of the risk factor. The risk of consequences is a key factor in determining guilt. The greater the likelihood of socially dangerous consequences anticipated by a person, the greater the corresponding risk, the greater the degree of guilt of the subject. For example, with regard to direct intent, the risk factor may be 95-100%, with respect to indirect intent – 50-95%, with respect to recklessness – 1-49% (with frivolity, a person, although predicting the possibility of occurrence of events, but presupposes that they will not come; therefore, he estimates the probability of less than 50/50), with respect to negligence – 0.1-1%. If the risk of the event is less than 0.1 % or the average value reflecting its random nature, it can be concluded that there is a case.

Conclusions. In case of a high probability of occurrence of consequences, the obvious risk is unreasonable and there are signs of intentional infliction. It is important to manage risks in terms of encouraging people to take risks if the criminal law imposes too high a risk level, a person abandons socially useful activities, which can lead to more serious adverse consequences. Stimulation of reasonable risk in criminal law is possible, inter alia, by means of pre-suppositions, in the performance of which the justified nature of risky actions is assumed.

1. Relevance of the justified risk

Scientific and technological progress, accompanied by the acquisition of new knowledge, the use of new technologies, equipment, pushes people to conduct accompanied by a serious risk of harming the relationships protected by criminal law [1 -2]. The consequences of this risk, to a certain extent, are inevitable payment for progress . For example, the exploration of outer space involves not only huge financial costs, but also human victims. Suffice it to recall the disaster of the Soviet "Soyuz-1" in 1967, "Soyuz-11" in 1971, the US space shuttle s "Challenger" in 1986, Columbia in 2003.

Limitations imposed on human behavior through criminal law can be a serious incentive to abandon the actions associated with the danger of causing consequences , as a consequence, hindering social development [3-7] . In this regard, in criminal law provided a justified risk as a circumstance excluding the crime of the act. Prof. M.S. Grinberg, who fundamentally investigated problems in a well-founded risk, gave his definition: "It is not a crime action, although falling under the signs of an act provided for by the Special Part of the Criminal Code, but committed in the course of a legitimate production risk, i.e. to obtain a socially valuable production result or to prevent harmful consequences by causing a knowingly dangerous action if the hazard corresponded to the social value of the possible result" [8, p. 30-31]. These proposals are reflected in the criminal law (Article 41 of the Criminal Code).

2. Theory of rational choice and justified risk

Criminally-legal norms regulating the proved risk, as a whole do not cause objections. At the same time, for objective reasons, including the assessment nature of many legal categories, they need to be improved, including through the theory of rational choice, which is widely used in the framework of economic analysis of law ("law and economics"). This theory assumes that the behavior of the person is, based on a subjective rationality. A person chooses the most useful behavior at a lower cost. A justified risk involves calculation, which in turn is based on rational choice.

The results of the economic analysis of the circumstances precluding criminality, confirms inexpedient s use of coercion in such situations, as criminal punishment or no deterrent effect, or stimulate behavior that ultimately lead to causing greater harm (damage) than the one that caused the subject [9, p. 29]. The existence of a justified risk testifies to the ineffectiveness of using state coercion due to the social usefulness of the actions performed, when the benefits from them exceed possible adverse consequences. Accordingly the problem of formulating a reasonable risk features consist in the fact that: 1) stimulation be socially useful behavior e e, e availably resemblance to crime [8, p. 29]; 2) Delete it Causing e overuse injury (damage), abuse by those that refer to the aforesaid circumstances of th. It is necessary to find a balance in the protection of public and private interests, which is possible only through the optimal distribution of risks

that minimize criminal behavior. In addition, it should take into account the principle possibility of checking the criteria used to evaluate the behavior of subjects of social relations.

3. Criteria for sound risk in criminal law and court practice

In Art. 41 of the Criminal Code of the Russian Federation there are four criteria for justified risk:

1) the nature of a socially useful goal. At the same time, there should be a comparability of a socially useful goal and a good that can suffer. The greater the value of the goal - the more can be the value of the good that the subject risks [10, p. 389];

2) the inability to achieve this goal by actions (inaction) that are not risk-related;

3) sufficient measures to prevent harm to the interests protected by criminal law. In this connection, MS. Greenberg, referring to the theory of operations research, which is closely related to game theory and rational choice theory, we mention five liters that increased attention to the possible danger and violation of protected interests to prevent it is not always eliminate the wrongfulness of the act. So, when choosing a strategy of behavior, a person must proceed from the fact that the natural pattern of nature unknown to him will lead to actions of nature, the least favorable for him [8, p. 30].

4) the absence of deliberate risk contingency with a threat to the lives of many people, with the threat of an ecological catastrophe or a public disaster.

In the judicial practice the provisions of Art. 41 of the Criminal Code are extremely rare. So, according to the data of the Judicial Department under the Supreme Court of the Russian Federation for 2017. (form 10.2 "Report on the peculiarities of criminal cases, the use of real penalties and grounds for termination of criminal proceedings"), there was only one case in which the Court found the existence of the circumstances. At the same time, the act of the defendant was qualified by Art. 158 of the Criminal Code of the Russian Federation (!). But even with such a small number of cases of relatively often make mistakes, such as incorrect delimited reasonable risk and extreme necessity, does not reveal the ratio of socially useful purpose, and caused consequences.

The difference between justified risk and extreme necessity is that the risk is not accompanied by inevitable consequences, whereas if absolutely necessary, they come necessarily. In particular, the risk takes place if the authorized entity gives an order to leave the rescue team to the scene of the incident, which is associated with the threat to their life and health [10, p. 387]. The judiciary does not always pay attention to this. Thus, J. was accused by the justice of the peace, accused of illegal cutting of forest plantations committed with the use of his official position (Part 3, Article 260 of the Criminal Code of the Russian Federation). The section headed by Zh. was the only production enterprise that had the strength and resources to prepare firewood for the population. When the provision of firewood by law was impossible due to the discovery of a gap in the Forest Code of the Russian Federation and to eliminate the danger that threatens their life and health, it violated the criminal law prohibiting the cutting of forest plantations without complying with the current legislation regulating these legal relations, danger could not be eliminated. In the appeal judgment, the district court indicated that the provisions of Art. 41 of the Criminal Code, because in order to achieve a socially useful purpose J. acted without the risk of a Practical and piano was in a state of emergency, which also excludes criminality.

M has been recognized by the court in a state of reasonable risk. At the same time, as the prosecution correctly noted, he could not pursue the goal of protecting the interests of the victim to the inviolability of the home, since they had already been violated by his actions [11]. There is an extreme need, since harm to protected relations was inflicted in such a situation with inevitability.

On the truthful M. on charges of committing a crime, the composition of which is provided for by Part 1 of Art. 145.1 of the Criminal Code of the Russian Federation, the court stated that by providing a partial payment of wages in money terms and products produced by the

enterprise, M. acted in conditions of reasonable risk with the aim of preserving production and maintaining its economic activities, taking into account the difficult financial situation of the enterprise (Decree of the Presidium of the Supreme Court of the Republic Khakassia No. 44-U-95/2005) [12]. At the same time, in this case, M. inevitably harmed the relations protected by the criminal law, which excludes the risk that the infliction is only probabilistic. In addition, it requires additional argumentation that the interests of the enterprise should take precedence over those of employees who were deprived of the opportunity to receive remuneration for work, to support themselves, their families.

Another example of the application of art. 41 of the Criminal Code of the Russian Federation is connected with the case of S., who, being the general director of the JSC, carried out entrepreneurial activities associated with the extraction of income on an especially large scale, without special permission (clause "b" part 2, Article 171 of the Criminal Code). Knowingly aware of the expiration of the validity of acts certifying the mining withdrawal by the OJSC, which are an integral part of the subsoil use license and the permit that grants the exclusive right to use subsoil within the established boundaries, pursuing the goal of extracting profits from the sale of illegally produced hydrocarbon raw materials, S. deliberately organized the work OJSC for the illegal production of hydrocarbon raw materials and its subsequent implementation. In a number of decisions of the judiciary, it was noted that these actions should be considered a reasonable risk [12]. At the same time, it was not specified how in the relevant situation it was possible to avoid causing consequences, what was the socially useful purpose of such a risk, why it could not be achieved without violating the criminal law. And although these decisions were later abolished, they nevertheless testify that the courts tend to interpret Art. 41 of the Criminal Code is broad.

In fairness it should be noted that the judicial authorities are also arguments to refuse to accept reasonable risk circumstances, which do not have corresponding features, for example, in the following cases:.. 1) guilty of illegal rubles to e forest plantations (Part 3, Article 260 of the Criminal Code) referred to the grounded risk, because it "could not pay workers a salary and at least somehow support the production of agricultural enterprises"; 2) the perpetrator, being the head of the organization, made a non-payment for more than two months of salary out of mercenary and other personal interest, although he had a real possibility (Part 1, Article 145.1 of the Criminal Code of the Russian Federation). At the same time, he stated that he was forced not to pay salaries to employees of the company, to direct money for economic needs, so that the enterprise had the opportunity to continue economic activities with a view to profit in the future. In these situations, there is an inevitable infliction of harm (damage) public relations, as well as the absence of a socially useful purpose, which could outweigh the negative consequences of the acts committed.

Summarizing a little, it should be noted that the judiciary is extremely rare and not always reasoned apply Art. 41 of the Criminal Code. The reasons may be a high level of inquiry, investigation, supervision of the prosecutor's office for a preliminary investigation, which allows to avoid criminal prosecution in the presence of a justified risk, and misunderstanding of this circumstance, which confirms the need for further improvement of the relevant regulations and practice of their application.

4. Management of reasonable risk management

The category of risk is strongly associated with economic theory in which it is a key factor affecting human behavior. The risk is associated with the existing decisions, uncertainty and the ability to select multiple behaviors. When deciding to take into account of the risk coefficient, which is formed by dividing the maximum possible amount of the loss to the amount of own financial resources. Optimal to about recommended to determine risk coefficient of 0.3, and the critical (its excess can lead to bankruptcy) 0.7 [13, p. 8-9, 22-25, 282-283, 294, 359-361].

P suit serves as a universal category, having the status of I scientific concept [14, p. 4]. Therefore, the use of economic knowledge in this field is quite possible, and with reference to

criminal law issues, in particular when studying a justified risk. To minimize the negative consequences, systems should be used to manage a reasonable risk, which may include, among other things, taking sufficient measures to eliminate and prevent risk, that is, prevention at the very risk. The lawsuit should be available to the person prepared for the decision, who has the necessary knowledge and experience.

The optimal way to manage risks is to standardize, develop rules of conduct in conditions of possible risk. For example, in the medical activities are widely applied Rules and Good Clinical Practice (the Clinical Good Practice). The draft of the relevant Rules of the Eurasian Economic Union of 21.11.2014, which is an international ethical and scientific standard for planning and conducting research involving a person as a subject, provides, inter alia, that Prior to the beginning of the study, an assessment should be made of the relationship between foreseeable (predictable) risk and inconvenience with the expected benefit for the subject of research and society. The study can be initiated and continued only if the expected benefit justifies the risk. The rights, safety and welfare of research subjects are of paramount importance and should prevail over the interests of science and society. The researcher must have appropriate qualifications, education, training and experience enabling him to assume responsibility for the proper conduct of a clinical trial.

In addition, the calculation of the risk factor is necessary if this is possible. In particular, the application of a new drug, a new technology to treat patients on the basis of previous trials necessary to take account of what is the risk of adverse effects, which does not have to exceed a predetermined amount. The risk of occurrence of consequences should be calculated, including to consider the issue of the qualification of the act, because it is one of the key factors in determining the form of guilt. The greater the probability of socially dangerous consequences foreseen by a person, the greater the corresponding risk, the greater grounds for imputing consequences, the greater the degree of guilt of the subject (and, accordingly, the degree of danger of the crime).

For example, in normal activities that are not associated with an increased risk of causing consequences, the risk factor may amount to 95-100 % for direct intent, for 50-95 % for indirect intent, for 1-49% for levity (if the person is frivolous, although and foresees the possibility of an occurrence of events, but presumptively expects that they will not come, so he estimates the probability less than 50 to 50), with respect to negligence - 0.1-1%. If the risk of the event is less than 0.1% or the average statistical value reflecting its random nature, then it is possible to draw conclusions about the occurrence of the incident.

The above classification of risk factors can be argued, in particular, using the concept of acceptable risk, applied in a number of countries in the field of labor protection, the essence of which is to reduce the risk of activity to a certain level acceptable to society. For example, in the Netherlands, this concept is regulated by law and provides that the probability of death within a year for an individual from the hazards associated with the technosphere is more than 10^{-6} considered unacceptable, and less than 10^{-8} - negligible. Unacceptable risk has the likelihood of a negative impact of more than 10^{-3} . Thus, an "acceptable" level of risk is chosen in the range 10^{-6} - 10^{-8} per year, based on economic and social reasons.

At a high probability of occurrence of consequences obvious unreasonable character of risk and presence of signs of deliberate causing is obvious. So, if the chances are that as a result of the trial, the experiment an accident will occur and people die, were 50% or more, when the consequences occur there are grounds to qualify the deed as murder. As deliberate infliction of serious harm to health should be considered, for example, an experiment in the Military Chemical Institute by effects of toxic matter on the human body.

The abovementioned scale requires clarification in relation to specific areas of public relations, in which a person is faced with high risks. Thus, in medicine, risk assessment indices are actively used based on a multivariate analysis of clinical observations that establish the relationship between clinical data and the frequency of perioperative cardiac complications and death from cardiac causes. These indices facilitate the decision-making process for doctors. In

particular, according to data for 2014 the development of complications in out-of-cardiac operations is from 7 to 11%, at risk lethal outcome from 0.8 to 1.5%. The risk of surgical intervention (risk of developing a myocardial infarction or death from cardiovascular disease within 30 days after surgery) is classified as low - less than 1%, medium - from 1 to 5%, and high - over 5%. The execution term (but not emergency) operation risk of death and severe complications associated with primary disease in the absence of surgical treatment, may outweigh the potential risk of cardiac complications intended operation. Similar rules for assessing the permissible risk can be developed and applied to servicemen, rescue services, other units whose activities are directly related to factors that threaten the life and health of employees of these units.

Thus, with regard to certain types of activities, taking into account the need to take care of life and human health, we admit a higher level of risk. In other cases, the priority should be given to the rules of conduct, which provide for the minimization of risks.

Important is risk management in terms of encouraging people to take risks, because a person tends to avoid risk. If the criminal law will produce too high requirements for behavior in terms of risk, the person refuses to socially useful activities that can lead to more serious adverse effects. As shown by studies in the field of behavioral economics etc. In order that the man was willing to take risks, you need to create an environment in which the promotion would have meant for the decision itself, aimed at socially useful result, on the basis of information available at the time of the decision, even if, ultimately, the result of the decision failed to achieve the goal. To introduce such an order of encouragement in practice does not allow people's inclination for belated judgments. In the interval between the moment of making the decision and the moment when the result appears, the subject evaluating the behavior of the person (for example, the leader) can forget that he himself at first considered the decision to be correct (the problem of the "stubborn principal") [15, p. 200-201]. In addition to standardizing activities related to risk, its calculations, the promotion of a justified risk in criminal law is possible through presumptions, within the framework of which are supposed to be based on the nature of risky actions. For example, in the criminal law can be presumed reasonable risk if there is significant contribution to the development of science, the invention of new drugs and methods of treatment of diseases that are dangerous for many people that it does not imply consequences indicated in part 3 Art. 41 of the Criminal Code.

4. Conclusions

The urgency of further development of the problems of justified risk increases every year due to the constant introduction of the latest scientific developments, technologies and equipment into life. These problems can be investigated, including through the theory of rational choice. It should be recognized that Art. 41 of the Criminal Code rarely and not always reasonably applied by the judicial authorities, which indirectly proves the need for its improvement.

To minimize the negative effects should be used system -based risk management, which may include including the adoption of adequate measures to eliminate and prevent the risk, prevention from risk. The optimal way to manage risks is to standardize, develop rules of conduct in a risk environment. It is also necessary to calculate the risk factor. At a high probability of occurrence of consequences obvious unreasonable character of risk and presence of signs of deliberate causing is obvious. Of particular importance is the management of risks in terms of encouraging people to take risks, as a person is prone to avoiding risk.

REFERENCES

1. Greenberg M.S. *The problem of production risk in criminal law*. Moscow, Gosyurizdat Publ., 1963. 132 p. (In Russ.).

2. Kapinus O.S. Reasonable risk: legal constructions in domestic and foreign criminal law, in: Kapinus O.S. *Sov-remennoe ugolovnoe pravo v Rossii i za rubezhom: nekotorye problemy otvetstvennosti*, Collection of articles. Mos-cow, Bukvoed Publ., 2008, pp. 36–39. (In Russ.).
3. Chudievich V.V. Reasonable risk in criminal law. *Rossiiskii sledovatel' = Russian Investigator*, 2007, no. 3, pp. 12–14. (In Russ.).
4. Sarantsev K.A. Medical risk as a kind of justified risk and features of its assessment in the investigation of criminal and improper medical care. *Rossiiskii sledovatel' = Russian Investigator*, 2013, no. 3, pp. 10–12. (In Russ.).
5. Oreshkina T. Reasonable risk in the system of circumstances precluding the criminality of the act. *Ugolovnoe pravo = Criminal Law*, 1999, no. 1, pp. 17–24. (In Russ.).
6. Samorokov V.I. Risk in criminal law. *Gosudarstvo i pravo*, 1993, no. 5, pp. 103–112. (In Russ.).
7. Timerbulatov A. Risk: criminal law aspects. *Gosudarstvo i pravo*, 1995, no. 3, pp. 112–116. (In Russ.).
8. Greenberg M.S. *Crime against public security in the field human-technology interactions*, Doct. Diss. Thesis. Sverdlovsk, 1973. 34 p. (In Russ.).
9. Harel A. Economic Analysis of Criminal Law: a Survey, in: Harel A., Hylton K.N. (eds.). *Research Handbook on the Economics of Criminal Law*. Cheltenham, Edward Elgar Publ., 2012, pp. 10–50.
10. Greenberg M.S. Justified professional and industrial risk. *Vestnik Omskogo universiteta = Herald of Omsk University*, 2012, no. 1 (63), pp. 386–389. (In Russ.).
11. Garbatovich D.A. The problems of the rule of a valid risk. *Ugolovnoe pravo = Criminal Law*, 2013, no. 2, pp. 10–15. (In Russ.).
12. Galakhova A.V. (ed.). *The estimated signs of the Criminal code of the Russian Federation: scientific and judicial interpretation*, scientific and practical guide. Moscow, Norma Publ., 2014. 736 p. (In Russ.).
13. Tepman L.N. *Risks in the economy*. Moscow, YuNITI-DANA Publ., 2002. 380 p. (In Russ.).
14. Al'gin A.P. *Risk and its role in public life*. Moscow, Mysl' Publ., 1989. 187 p. (In Russ.).
15. Thaler R. *Misbehaving: The Making of Behavioral Economics*. Moscow, Eksmo Publ., 2017. 368 p. (In Russ.).

ИНФОРМАЦИЯ ОБ АВТОРЕ

Бибик Олег Николаевич – доктор юридических наук, профессор кафедры уголовного права и криминологии Омский государственный университет им. Ф.М. Достоевского
644077, Россия, г. Омск, пр. Мира, 55а
e-mail: olegbibik@mail.ru
SPIN-код: 2670-9299; AuthorID: 495309

БИБЛИОГРАФИЧЕСКОЕ ОПИСАНИЕ СТАТЬИ

Бибик О.Н. Обоснованный риск с позиции теории рационального выбора / О.Н. Бибик // *Правоприменение*. – 2018. – Т. 2, № 2. – С. 48–55. – DOI: 10.24147/2542-1514.2018.2(2).48-55.

INFORMATION ABOUT AUTHOR

Oleg N. Bibik – Doctor of Law, Professor, Department of Criminal Law and Criminology
Dostoevsky Omsk State University
55a, Mira pr., Omsk, 644077, Russia
e-mail: olegbibik@mail.ru
SPIN-code: 2670-9299; AuthorID: 495309

BIBLIOGRAPHIC DESCRIPTION

Bibik O.N. Reasonable risk from the perspective of rational choice theory. *Pravoprimenenie = Law Enforcement Review*, 2018, vol. 2, no. 2, pp. 48–55. DOI: 10.24147/2542-1514.2018.2(2).48-55. (In Russ.).