ON THE CONCEPT OF POSITIVE CRIMINAL RESPONSIBILITY IN THE CONTEXT OF CRIMINAL LAW IMPACT: A CRITICAL VIEW

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ABSTRACT

The article provides critical analysis of the views of scientists promoting the concept of the positive legal responsibility in the general legal and industry-specific aspects. The supporters of such approach point out that the legal responsibility, being a kind of the social responsibility, also can be not only retrospective but positive. They apply this statement to the industry-specific kinds of the legal responsibility, including the criminal. The authors of the publication justify the opposite view according to which the introduction of notions "positive legal responsibility" and "positive criminal responsibility" into scientific use, legislation and legal precedents can only confuse, create difficulties in legal consciousness and legal use, as their content, limits and meaning are ambiguous and indefinite.

Keywords: Positive Criminal Responsibility, Positive Legal Responsibility, Legal Precedents, Criminal, Legislation.

INTRODUCTION

Some time ago, the concept of two aspects of the notion of the legal responsibility and two forms of its implementation was formed in the national theory of law and has come into certain use. Recognizing that the legal responsibility is a comprehensive legal phenomenon, the supporters of this concept, however, offer to differentiate the so-called positive (prospective) form of implementation of the legal responsibility consisting in the statutory obligation of the citizens to follow and fulfil the legal prescriptions and realized in their good behaviour, approved and encouraged by the state, along with the "*traditional*", retrospective (negative) form of its implementation.

This approach has not been unambiguously approved and commonly recognized in the legal science. The argument in favour of reasonable and useful introduction of common notion of the "*positive legal responsibility*" and the derived industry-specific notions, particularly, the "*positive criminal responsibility*", into scientific use and, moreover, into legislation is recognized by many jurists as contradictory, obscure and indecisive, thus causing serious objections, and from our side as well.

In our opinion, the vulnerability of this approach consists in the following:

Inconsistency of the author's expression of the specified notions, absence of a single approach to their definition and their indecisive justification;

Absence in the concept supporters of a rather clear picture of the limits of the notions of the social responsibility, legal responsibility, criminal responsibility, and so on, and the interrelation of these notions, as well as the interrelation of the notions "*a subject complying with legal rules"* and *"a positively responsible person";*

Insufficient justification of offers on usefulness both of the common notion "*positive criminal responsibility*" and its industry-specific variations and reasonability of their introduction both into general theory of jurisprudence and industry-specific sciences, and into effective legislation and legal precedents (Alekseev, 2020).

Problematic nature of positions of jurists recognizing the existence of the so-called regulatory legal relations on which basis the specific legal responsibility appears already from adoption of the legal rule that means the appearance of legal obligation "*not to commit offences*". Argumentativeness of attitudes towards the interrelation of prohibition and obligation as the methods of legal regulation and the limits of regulatory "*intervention*" of the state and law into the social life; exaggeration of the meaning of the legal regulation in ensuring the public order and calm.

The disadvantages and inadequacy of the criticized concept are more expressed from the position of the criminal law and industry-specific criminal legal science that was noted in our publications many times.

METHODS AND MATERIALS

The supporters of the positive legal responsibility have provided the most in-depth explanation of their position in the Draft Legal Policy Concept in the Sphere of Legal Responsibility that had been prepared by a team of authors and published in 2015. We analysed this work as it allows for understanding the nature and basis for views and opinions of the supporters of the criticized concept.

The notions, terms and definitions we use in the course of the study required the etymological analysis to identify their nature and content.

To ensure reliability and visual illustration of theoretical provisions of the study, the work uses the effective legislation (the Constitution of the RF, Criminal Code of the RF).

To achieve the impartial and comprehensive study, the work uses the materials of the domestic scientists in general theory of law and criminal law, as well as sociology and philosophy of the Soviet, post-Soviet and modern periods.

Therefore, both the general scientific and specific scientific cognition methods are used in the publication.

RESULTS AND DISCUSSIONS

We suppose that the origin of the concept of the positive legal responsibility and its industry-specific components is the idea of the so-called regulatory legal relations which form the basis of specific positive legal relations and positive legal (including positive criminal) responsibility that means the appearance and existence of the legal obligation *"not to commit offences (crimes)"* of all the citizens.

The supporters of this position state that *"there are no and cannot be nothing-regulating legal rules"*, that "*any legal bond is a legal relation*", that the fact of adoption and coming into

force of the legal (criminal legal) rule is the basis for appearance of the legal (criminal legal) relation of general regulatory type being the basis for specific positive legal relations and positive legal responsibility of the general public-all citizens of the state and all other persons who, in principle (even though supposedly), can eventually violate the established legal rule (Vitruk, 1976; Reshetov, 1976).

In the criminal law, this position has been more comprehensively and convincingly justified by (Tarbagaev, 1986) who considers the positive criminal responsibility of the subject as a *"continuously implemented set of the publicly existing legal relations on compliance with the penal prohibitions*" where it lawfully participates in his opinion, the mechanism of appearance of the regulatory criminal legal relations is as follows: on the date of coming of the regulatory act into legal force, there appears the:

> "*Criminal responsibility in its positive sense-the specific legal bond between mutual rights and obligations of the parties".*

At a certain stage of development, the so-called positive criminal responsibility, or the *"criminal responsibility in its positive sense*" appears: a "*continuously implemented set of the publicly existing legal relations on compliance with the penal prohibitions*". The "*positively responsible*" is the behaviour of citizens that corresponds to the criminal law rules.

However, many authors think this problem is far-fetched, and some call the positive criminal responsibility as the "*fifth wheel*" in the issue of responsibility. These authors with good reason suppose that the fact of adoption of the legal rule and its coming into legal force does not entail the appearance of legal relations. The legal relations can include only real specific relations governed by the law rules, and the relations on compliance with the criminal law prohibitions constitute normal public relations, and thus, do not acquire the qualities of the legal relations, they are out of the law-governed relations. Respectively, these scientists dismiss the recognition of the regulatory legal relations and consider that the law rules are not implemented directly in the legal relations but only create the prerequisites for the legal relations.

For example, it is established for the crime committed in the past. We do not agree that the criminal law also establishes the positive criminal responsibility that is expressed in the person's desisting from crime, positive behaviour determined by the rules of the Specific Part of the Criminal Code. The criminal law, for example, establishes the responsibility for homicide. Those who do not commit it bear the positive criminal responsibility according to the point of view considered. Responsibility is that follows some actions (omissions). A person who has committed it shall be responsible. In addition, the positive actions cannot, in principle, cause the responsibility; they are encouraged. The major part of people does not commit crime not because this can entail the criminal responsibility but due to complete rejection of such activity contradicting their views and beliefs. It is not possible to imagine a person who simultaneously "*bears the positive responsibility"* virtually for all the crimes listed in the Criminal Code of the Russian Federation.

Santalov (1982) recognizing that the legal bonds result from adoption of the criminal legal rule, and along with this, dismisses that these bonds are the legal relations. According to the authors, not any law-governed public relation can be attributed to the legal relations, but:

> *"Only real specific (relative) law-governed relations. The relations on compliance with the criminal law prohibitions constitute normal public relations, implementation of the positive responsibility of people, but do not acquire the qualities of the legal relations".*

In our opinion, the position of these authors is more justified and proper. The adoption of the criminal legal rule and its coming into legal force are of course not pointless but result in certain changes in public relations, impact on the behaviour of all subjects and, in general, on "feeling" of the society and state. And this is to be reasonable used to ensure unavoidable and fair criminal legal effect. However, the fact of adoption of the criminal legal rule and its coming into legal force does not "*automatically*" entail the appearance of criminal legal relations and positive criminal responsibility.

The recognition of the fact mentioned would virtually mean that, from the effective date of the legal rule, every subject becomes a participant of the legal relations only due to the reason that the state has made the relevant decision. And a huge amount of such legal rules, numbering into hundreds of thousands, are adopted as virtually all critical public relations have got the law-governed mediation.

Therefore, if to follow the criticized point of view, every person appears to be "*misled*" by multiple and variable legal bonds at any moment of his/her life irrespective of his/her desire and will, bound by various legal relations providing for his/her rights and obligations and prohibiting any his/her way of behaviour. It is noticeable that everything is under penalty. Even irrespective of that the subject is not going to violate the legal requirements, even he/she is thinking of them, he/she will bear the load of responsibility that is offered to consider as a wilful way of ensuring the responsibility (Astemirov, 1979).

It should be understood that the law is inseparably associated with enforcement irrespective of that this is a retrospective or prospective aspect. It just seems that the enforcement provides only for the retrospective legal responsibility, and the positive responsibility consists in wilful observance of the legal prescriptions by the citizens: it is necessary only to write the relevant wish in the document and require its "*wilful*" fulfilment and promise a certain "*carrot*" for good behaviour. The enforcement consists in the alternatively provided "*carrot*" in the form of retrospective responsibility in case of failure to fulfil the specified requirements. However, the "*or-or*" formula takes place in fact, and this appears from the essence: or observance of the legal prescriptions, or responsibility for their violation.

In our opinion, the adoption of the criminal legal rule does not result in the legal obligation "*not to commit crimes*" of all the citizens. As the (Kuznetsova, 1969) fairly noted, "*a person who does not commit crimes is uninterested for the criminal law*". "*Not to commit crimes*" is a common, matter-of-course rule, the rule for human conduct within a community that should be imposed on anybody as the obligation. The behaviour without violating the penal prohibition is out of the criminal legal boundaries, not governed by the criminal law, does not induce any criminal legal relations and cannot be characterized as the "*positive criminal responsibility*". People do not commit crimes not due to the existing legal rules, legal government of these relations, but because this is the definite rule. The contrary is abnormal, that is the crime commitment that contradicts the penal prohibitions. Until a person does not commit a regulatory prescription, the socially dangerous act prohibited by the criminal law rules, the latter will not refer to him/her, and this person will not bear any criminal legal obligations and criminal responsibility.

Following the criticized concept, it would have to be recognized that a person violating, for example, the standards of morality, or for example, committing disciplinary, administrative or other offences and showing his/her irresponsibility, is "*criminally positive responsible*" because he/she has not committed a crime. In our opinion, one cannot be "*positively responsible*" by following one social rules and violating the others, be responsible "*partially*" or "*sometimes*".

In our opinion, based on the criticized concept, it is impossible properly to assess the behaviour of a person as positively responsible or responsible, if he/she recklessly commits a socially dangerous act that the criminal law treats as the crime in case of its deliberate commitment. For example, P. 2, Art. 122 of the Criminal Code of the Russian Federation stipulate criminal responsibility for infecting the other person with HIV by a person who has known about his/her disease. The responsibility for this offence shall be borne by a person who has deliberately infected the other person with HIV. Such acts committed recklessly shall not be considered as offence and entail no criminal responsibility according to P. 2, Art. 24 of the Criminal Code of the Russian Federation. Consequently, a subject who has deliberately committed such act behave irresponsibly, and that who has committed the same and in the presence of guilt but reckless should be recognized "*positively responsible*". Is it logical? (Duyunov, 2002).

In such cases, the legal assessment of behaviour of the citizens, lawful and unlawful, responsible or irresponsible, depends on the will of the law-maker, that is, it is considerably subjective and to a certain degree occasional. The law-maker recognize the same behaviour either criminal, "*irresponsible*" (for example, reckless HIV infection according to the Criminal Code of the RSFSR 1960), or lawful "*positively responsible*" (the same offence according to Art. 122 of the Criminal Code of the Russian Federation) depending on the "*occasional*" factors. Although, the essence of the behaviour and its moral and social-political assessment, as well as the results are the same. The psychological implication of the behaviour has not also changed.

One of the mistakes of our opponents stating that the penal prohibition imposes an obligation on the citizens, forces them not to commit an offensive act prohibited by the criminal law, that is, induces to actual compliance with the requirements and prescriptions of the criminal legal rules, and therefore, regulates the public relations, consists in unintentional substitution of one method of legal regulation, i.e. establishing a prohibition, with the other, i.e. imposing an obligation. Correspondingly, the protective function of the legal rule that, first of all, related to the prohibition, is substituted with the regulatory function related, first of all, to empowering and obligation. Meanwhile, it is known that these are various individual methods of legal regulation and various legal functions of individual content and meaning (Duyunov, 2003).

From our perspective, an obligation as a method of legal regulation supposes that it is imposed through the legal rule on certain subjects who have to act as prescribed by this rule. In case of failure of such subject to fulfil the imposed obligation (and according to the assumption of innocence, only in this case), he/she will bear the retrospective responsibility. If the relevant responsibility was not imposed on the subject, there are no grounds for his/her retrospective responsibility. A prohibition is not personified by the law-maker in such a way and does not require special imposition on certain subjects. It consists in the requirement to abstain from certain acts addressed to a certain scope of subjects. In case of violation of the prohibition, it is required to establish the fact of violation that is the ground for bringing the guilty subject to responsibility.

The criminal law rules establishing the sanctions for various offences prohibit to commit the acts indicated in the law but do not "*oblige not to commit*" them.

But it should be taken into account that in many cases the law-maker "*obliges not to commit"* certain acts by defining in the regulatory document an obligation not as a command to act but as a command to abstain from certain behaviour addressed to a certain scope of subjects. That is, in fact, the law-maker introduces a prohibition on the behaviour that would violate the established law rule (for example, P. 2, Art. 15 of the Constitution of the Russian Federation). Our opponents interpret such rules as an argument in favour of the idea of the positive legal responsibility (Duyunov, 2015).

We suppose that such requirements binding on all the subjects to follow the effective legislation have, certainly, a certain disciplinary value. However, until their violation, they have the declarative nature of calling which existence, content and meaning many subjects do not even think of, take at face value, do not care tuppence as a matter-of-course thing they were not going to violate.

The major methodological mistake of the supporters of the criticized concept consists in exaggeration of the value of legal (including criminal legal regulation) when, for example, it is strictly stated that "*the legal regulation covers all spheres of the public life";* and the legal rules provides for "*establishing a program for actions of the legal subjects (particular people), their entitlement and commitment*", "*modelling*" of public relations, and the normal, lawful behaviour of citizens is considered only as a "*result of legal regulation*".

It appears that in the conditions of the modern civil society where the public relations are regulated by various social norms, the penetration of the law into various spheres of personal life and society cannot be comprehensive. The legal rules are, of course, important in the life of society, but there are the large layers of human relations that are "*beyond*" the legal regulation. In the conditions of the civil society, the "*intrusion*" of the law (particularly, criminal) into the public life must have very reasonable grounds and clearly defined boundaries. Using the legal instruments (especially, the prohibitions) should be particularly careful and with due regard, and only when really needed. The priority should be given to unlawful social norms, and if necessary, to use the legal rules (when the problem cannot be resolved using the other methods and means) - to those having the least penal content (Loshenkova, 2007).

As to the appearance of legal relations, there should be at least two parties, the opinion, consciousness and will of which must be represented in the legal relation. The will of one party, even if this is the state, is not sufficient for the appearance of legal relation. Although, the law, including the criminal, is adopted by the representatives chosen by people, it remains the act of the unilateral expression of will of the law-maker, i.e., the state. The will of each citizen this act is addressed to is expressed just implicitly and not always rather accurate. Of course, it does not mean that the citizens are entitles to ignore such commands of the law that do not correspond to their interests, the law is mandatory for everyone irrespective of the attitude to it. The point is that the legal relation does not appear automatically by adopting a new rule, in order it appears, an outwardly expressed act of behaviour and obligated party are necessary to evidence the drive for implementation of the legal relation (its positive or, in case of offence, retrospective aspect).

We may speak of implementation of the legal riles in the legal relation only in cases when not only the state but its "*counterpart*", the subject of the legal relation, particularly, a citizen whose interests are involved by this regulatory document, directly or indirectly, expressed in any act of behaviour their positive (or negative) attitude to the relevant rule of behaviour established by the state. Only in this case, we can hope on the subject interest in complying with this legal

rule, in particular, and existing order of law, in general, and its positively responsible behaviour (Lipinsky, 2014).

CONCLUSION

Therefore, it should be stated that the category "*social responsibility*" penetrates the social sphere, its various components, and all spheres of social behaviour basically always denoting the same. The fundamental and unbreakable is that the compliance with the rule for human conduct within a community, always and unambiguously, should be considered normal, expected and encouraged, and the violation should entail the response being negative for a violator (Matuzov, 1976).

At this, the theoretically important idea of desirable positive, law-abiding, responsible behaviour of all the subjects cannot but inspire respect and drive for its implementation, but just as an idea, "*respect to the law*". Practical realisation of this idea by normative consolidation and forced practical implementation of common mandatory requirements is virtually impossible and even harmful because it is not possible to force all citizens not just observe but respect and follow the law "*not from fear but from conscience*", as it appears from the criticized position.

That is why the positive aspect of social responsibility should, of course, have its "*echo*" in all social spheres, including jurisprudence and its individual fields, thus moving to work over the problem of legal culture and respect to regulatory prescriptions at the most. It is not necessary and makes no sense to indicate the notion "*positive legal responsibility*" and its industry-specific varieties (particularly, "*positive criminal responsibility*") as the legal and regulatory ones by following the erroneous statement: the more legal prescriptions, the calmer, order and freedom (Matuzov, 1977).

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