ppi 201502ZU4645
Esta publicación científica en formato digital es continuidad de la revista impresa
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185Depósito legal pp
197402ZU34

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela

Vol.40 *Nº 72*
Enero
Junio
2022

Cuestiones Políticas Vol. 40, Nº 72 (2022), 813-822
IEPDP-Facultad de Ciencias Jurídicas y Políticas - LUZ

Abuse of the right by civil servants in the aspect of the basis of criminal liability

DOI: https://doi.org/10.46398/cuestpol.4072.49

Olga Sergeevna Guzeeva *

Abstract

The objective of the article was to examine the problems associated with the search for theoretical foundations for the legal-criminal assessment of the abuse of the law by official representatives of the State. It is divided into two situations: (a) an evaluation of the actions of public servants who consistently embody the illegitimate and illegal policy of the State; b) an evaluation of the actions of state representatives under conditions where such actions diverge from the content of the state's legal policy. When the criminal conduct of public servants is a continuation of the «criminal policy» of the State, their responsibility cannot be based entirely on the concept of abuse of rights. The authors used the comparison method as the main method of the research. In conclusion, they distinguish the application of illegal laws and the illegal application of laws. If in the first case it is not possible to establish signs of abuse of the right, then in the second case it is quite possible scientifically speaking, which is essential for the qualification of the actions of the perpetrators.

Keywords: constitutionalization of criminal law; responsibility of public officials; state responsibility; abuse of the law; official crime.

* Judge of the Arbitration Court of the Moscow Region, Russian Federation. ORCID ID: https://orcid.org/0000-0002-6810-395X

Recibido el 15/09/2021 Aceptado el 26/12/2021

Abuso del derecho por parte de los funcionarios públicos en el aspecto de la base de la responsabilidad penal

Resumen

El objetivo del artículo fue examinar los problemas asociados a la búsqueda de fundamentos teóricos para la valoración jurídico-penal del abuso de la ley por parte de representantes oficiales del Estado. Se divide en dos situaciones: a) una evaluación de las acciones de los servidores públicos que consistentemente encarnan la política ilegítima e ilegal del Estado; b) una evaluación de las acciones de los representantes del estado en condiciones en que tales acciones divergen del contenido de la política legal del estado. Cuando la conducta delictiva de los servidores públicos es una continuación de la «política criminal» del Estado, su responsabilidad no puede basarse enteramente en el concepto de abuso de derecho. Los autores utilizaron el método de comparación como método principal de la investigación. Como conclusión se distinguen la aplicación de leyes ilegales y la aplicación ilegal de leyes. Si en el primer caso no es posible establecer signos de abuso del derecho, entonces en el segundo caso es bastante posible científicamente hablando, lo cual es esencial para la calificación de las acciones de los perpetradores.

Palabras clave: constitucionalización del derecho penal; responsabilidad de los funcionarios públicos; responsabilidad del Estado; abuso de la ley; delito oficial.

Introduction

Criminal law takes legal relations under its protection, which are developing in almost all spheres of public life, both between citizens and in the relationship between citizens and the state. Because of this, not only cases of abuse of rights by citizens concerning other individuals and the state fall into the sphere of criminal law response, but also cases when representatives of the state abuse their rights in relations with citizens. This refers to the abuse of official rights and duties, official status, the position when a representative of the state acts in an official capacity. The criminal law contains several articles describing such abuses, the most general of which are Articles 285 and 286 of the Criminal Code of the Russian Federation and which are supplemented by a significant array of special norms.

1. Methods

The authors choose the comparison method as the main research method. The method was chosen for the effective conduct and preparation of the procedure for identifying the connection between abuse and the classic violation of human rights by the state. This method is used when comparing complex objects and phenomena that are described by a large set of widely varying features.

When discussing the abuse of rights by civil servants, it is important to pay attention to the existence of a close connection between such abuse and the classic violation of human rights by the state. This connection, however, does not mean that the phenomena are identical. We need both a strictly differentiated approach and a generalized assessment that takes into account aspects of the state's legal policy.

At least two problematic situations should be distinguished here.

The first situation is the need to assess the actions of civil servants who consistently implement such a state policy, which by its nature is not legal and is aimed at depriving or restricting citizens of their rights and freedoms. This policy itself, in principle, can be assessed as an abuse of the law by the state – a legitimate use of the law in contradiction with the intended purpose and meaning of the law to the detriment of human interests. History contains enough examples in this regard, when officials formally fulfilling their official duty and implementing the prescriptions laid down in normative acts, actually implemented a policy of legal restrictions and repression. The behavior of officials here is inseparable from the state policy, is a necessary and consistent implementation of it.

The second situation is to assess the actions of state representatives to abuse their official powers in conditions when such actions are at odds with the content of the state's legal policy. *Remaining* in the official status, civil servants, abusing their official rights and duties, act in this case against not only the interests of citizens but also the interests of the state. Their behavior is very clearly distanced from the official political and legal course, which goes against it.

These situations give rise to extremely difficult questions in political and legal, constitutional, and criminal aspects about the responsibility of both the state as such and its specific representatives.

2. Results

The common place of these different situations is the indispensable responsibility of the state. It has a constitutional and legal nature

(Kolosova, 2006; Signatova, 2006; Kondrashov, 2011) and is meaningfully expressed in political, financial, civil, and other forms of sanctions – from rehabilitation to compensation for moral damage. Significant requirements for such liability were established by the Constitutional Court of the Russian Federation, which, in particular, concerning the problem of compensation for harm, recognized:

- within the meaning of Art. 53 of the Constitution of the Russian Federation, everyone shall have the right to state compensation for damages caused by unlawful actions (inaction) of bodies of state authority and their officials, and it is obliged to compensate for harm associated with the implementation of state activities in its various spheres, regardless of the imposition of responsibility on specific state authorities or officials and regardless of the fault of these persons (Resolution of the constitutional court of the Russian Federation No. 18-P, 1997; Resolution of the constitutional court of the Russian Federation No. 38-P, 2019):

- The state assumes responsibility for the illegal actions of each official or authority, including both the issuance of normative acts, individual power orders, and actual actions (illegal, harmful behavior) or inaction, in particular, the failure of a state body or official to perform those actions related to the scope of their public-legal (power) duties that they should have committed following the law (Determination of the constitutional court of the Russian Federation, 2009).
- The changes that have occurred in the organization of power, the change in the legal nature and powers of the bodies exercising public power, do not in themselves imply the deprivation of the citizen of the right to compensation for harm, which, because of illegal actions (inaction) of no longer existing authorities, has arisen for him/her at present (Resolution of the constitutional court of the Russian Federation No. 26-P, 2019).

Without going further into the study of the question of the responsibility of the state itself (as obviously going beyond the scope of our topic), we will pay attention to the problems that arise with the implementation of the responsibility of its representatives acting as individuals. There are at least two main ones: about the possibility of bringing officials to criminal responsibility and about the qualification of their actions, their separation from an ordinary law enforcement error. They correlate with the situations highlighted earlier, reflecting the different relationship between the actions of civil servants and official policy.

In the case when the criminal behavior of civil servants is a continuation of the «criminal policy» of the state, a change in the political course always raises the question of the possibility of bringing such persons to justice in

the updated political and legal conditions (Ledyakh, 1973; Kudryavtsev and Trusov, 2002; Agilar, 2013). In Russian conditions, concerning the change of the political and legal regime in the 90s of the last century, this issue should be resolved based on Part 2 of Article 18 of the Law «On the Rehabilitation of Victims of Political Repression», which stipulates:

employees of the Cheka, GPU-OGPU, NKVD, MSS, prosecutor's offices, judges, members of commissions, «special meetings», «twos», «threes», employees of other bodies that exercised judicial powers, persons who participated in the investigation and consideration of cases, who were found guilty of crimes against justice following the established procedure on political repression, are criminally liable based on the current criminal legislation (Federal law of the Russian Federation No. 1761-1, 1991).

Meanwhile, there are several legal obstacles to the implementation of this order (including the doctrine of the execution of the order, the statute of limitations for bringing to responsibility, compliance with the procedural procedure for bringing certain categories of officials to responsibility), and most importantly, political properties. In a summary, the main factors contributing to this, in our opinion, are as follows:

- In Russia, unlike, for example, post-war Germany, there were no officially established signs of crime and guilt in the behavior of the state itself and it bodies in conducting illegal policies, we recognized the presence of victims of repression, but their subject was not established.
- The provisions of the Law "On the Rehabilitation of Victims of Political Repression" allow only representatives of the judiciary and executive authorities to be found guilty of repression, which does not allow raising the question of the responsibility of representatives of legislative bodies, public organizations, and political parties and indirectly reflects the recognition that the illegal nature was not so much the state policy itself, as its implementation at the law enforcement level.
- The country still largely retains the priority of a normative understanding of the right and the identification of right with the law, there is no developed doctrine of the application of the principles of law, which generally removes the question of responsibility for the application of non-legal regulations.
- There is a tendency not to touch on politically sensitive topics and historical issues, the discussion, and solution of which can serve as a factor in the destruction of social peace and harmony.

While legal factors can be considered relatively easy to overcome due to changes in legislation and consistent compliance with the principles and

norms of international law, the latter requires political efforts, the exertion of political will. As far as we can judge, the corresponding political campaign has not been launched in Russia.

The Law of the Russian Federation «On the Rehabilitation of Victims of Political Repression» (in the preamble) recognized that millions of people had become victims of the arbitrariness of the totalitarian state during the years of Soviet power and were subjected to repression for political and religious beliefs, on social, national, and other grounds. The Constitutional Court of the Russian Federation also stated that the regime of unlimited, based on violence, power of a narrow group of communist functionaries had been dominating in the country for a long time (Resolution of the constitutional court of the Russian Federation No. 9-P., 1992).

Russia, as the legal successor of the USSR – «the state activities of which are associated with the infliction of harm, by its nature representing harm that is incalculable and irreparable», is obliged to strive for the fullest possible compensation for such harm (Resolution of the constitutional court of the Russian Federation No. 39-P, 2019). The forms and methods of such compensation are determined by the said law. Therewith, it is precisely compensatory measures, the restoration of violated rights, that the state's responsibility for political repression is limited, which is directly prescribed by the purpose of the Law «On the Rehabilitation of Victims of Political Repression», as it is fixed in its preamble.

The practice of retroactive public-legal responsibility of state representatives for the implementation of illegal policies in Russia has not been developed, as clearly evidenced by the experience of the Commission under the President of the Russian Federation on the rehabilitation of victims of political repression.

Meanwhile, from the point of view of purely legal norms (both constitutional and the Law «On the Rehabilitation of Victims of Political Repression»), there are no obstacles to the realization of the responsibility of the perpetrators (Bobrinskii, 2014, 2018). In the context of our topic, it is worth noting that such responsibility cannot be entirely based on the concept of abuse of law. Theoretically, it *is important to distinguish between two points: the application of illegal laws (for example, on responsibility for anti-Soviet agitation and propaganda) and the illegal application of laws (for example, a conviction for political reasons for state or other crimes).*

The prerequisites for such a gradation are contained in Articles 3 and 5 of the law «On the rehabilitation of victims of political repression». If in the first case it is not possible to establish signs of abuse of the right in the actions of law enforcement entities, then in the second case it is quite permissible, which is essential for solving the important question of the qualification of the actions of the perpetrators.

Note that Article 18 of the Law «On the Rehabilitation of Victims of Political Repression» refers to the responsibility of persons found guilty – we quote – «of crimes against justice». Thus, in our opinion, the state has officially confirmed that from a legal point of view, it does not intend to consider political repression as crimes of the state itself against human rights and freedoms but allows for only the behavior of specific officials associated with the illegal application of laws to be assessed as crimes against justice.

This circumstance (we will deliberately refrain from evaluating it) in the concrete historical conditions of Russian reality largely erases the differences between the previously highlighted situations of differentiated participation of state representatives in the implementation of its political course. It is formally *proclaimed that the country's legal policy at all times corresponded to constitutional standards, while at the law enforcement level, the behavior of individual officials went beyond the law and was illegal.*

When assessing such behavior from the point of view of the criminal law, the question of distinguishing between criminal abuse of law and error necessarily arises. This issue was partly considered by the Constitutional Court of the Russian Federation concerning the problem of judicial errors, but it seems that its conclusions are general. The court recognized that the federal legislator distinguishes two types of judicial errors. Firstly, when carrying out judicial activities, there may be errors that do not discredit a priori the persons who made them, which arise during the resolution of a particular case when interpreting and applying the norms of substantive or procedural law and are subject to correction by higher judicial instances.

Such unintentional judicial errors of an ordinary nature cannot be regarded as a manifestation of an unfair attitude of a judge to his/her professional duties and serve as a basis for applying penalties to him/her. Secondly, a different type of judicial errors is possible, which are the result of the incompetence or negligence of the judge, i.e., the unfair performance of his/her function in the administration of justice, leading to a distortion of the fundamental principles of judicial proceedings and a gross violation of the rights of participants in the process.

In cases where the issuance of an unlawful judicial act due to such an error does not fall under the signs of a crime, it can nevertheless indicate either the obvious negligence of the judge, or his/her inability to perform his/her professional duties, which is unacceptable in the administration of justice, and therefore, be the basis for applying disciplinary measures to him/her (Resolution of the constitutional court of the Russian Federation No. 19-P, 2011).

These guilty mistakes, therefore, can be either non-criminal or criminal, and in the latter case – either intentional or careless, which directly affects the qualification of the actions of the guilty person (in particular, the application of Article 305 of the Criminal Code of the Russian Federation or Article 293 of the Criminal Code of the Russian Federation).

Conclusion

Authors conclude that it is intentional mistakes, which, due to their intentional nature, are poorly associated with the etymological concept of error, and should be considered as a manifestation of abuse of the law by the law enforcement officer, since there is a conscious use of the opportunities provided to him/her against the interests of law, distortion of law and distortion of justice.

Abuse of law by public servants may be a reflection of the anti-legal policy of the state, and in this case, the interests of law require both the responsibility of the state itself, as well as the responsibility of officials whose behavior, not justified by the concept of executing an order cannot be evaluated from the standpoint of abuse of law; the behavior of officials may not be related to legal policy, and in this case, it is the abuse of law as a deliberate and incorrect application of law that serves as the basis for the responsibility of the perpetrators.

Bibliographic References

AGILAR, Paloma. 2013. “Judicial complicity in repression of authoritarian regimes and transitional justice” In: Otechestvennye zapiski. Vol. 6, pp. 111-134.

BOBRINSKII, Nikolai Alekseevich. 2014. “Legal framework for transitional justice in United Nations instruments” In: Biblioteka kriminalista. Nauchnyi zhurnal. Vol. 5, pp. 320-328.

BOBRINSKII, Nikolai Alekseevich. 2018. “Post-Soviet transitional justice: achievements and missed opportunities” In: Sravnitelnoe konstitutsionnoe obozrenie. Vol. 1, No. 122, pp. 142-168.

DETERMINATION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 1005-O-O. 2009. “On refusal to accept for consideration the complaint of the limited liability company “Uniya” on violation of constitutional rights and freedoms by Articles 1069 and 1070 of the Civil Code of the Russian Federation”. Available online. In: https://

legalacts.ru/doc/opredelenie-konstitutsionnogo-suda-rf-ot-04062009-n-1005-o-o-ob/ . Consultation date: 08/08/2021.

FEDERAL LAW OF THE RUSSIAN FEDERATION No. 1761-1. 1991. "On the rehabilitation of victims of political repression". Moscow, Russia.

KOLOSOVA, Nina Mikhailovna. 2006. The theory of constitutional responsibility: nature, features, structure. Abstract of a thesis of candidate of legal sciences. Institute of Legislation and Comparative Law under the Government of the Russian Federation. Moscow, Russia.

KONDRASHOV, Andreay Aleksandrovich. 2011. The theory of constitutional and legal responsibility in the Russian Federation. Abstract of a thesis of candidate of legal sciences. Moscow State University named after M.V. Lomonosov. Moscow, Russia.

KUDRYAVTSEV, Vladimir Nikolaevich; TRUSOV, Aleksei Ivanovich. 2002. Political justice in the USSR. Yuridicheskii tsentr Press. St. Petersburg, Russia.

LEDYAKH, Irina Andreevna. 1973. Nazi criminals and judicial practice in the Federal Republic of Germany. Legal literature. Moscow, Russia.

RESOLUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 9-P. 1992. "On the case of checking the constitutionality of the Decrees of the President of the Russian Federation of August 23, 1991, No. 79 "On the suspension of the activities of the Communist Party of the RSFSR", of August 25, 1991, No. 90 "On the property of the CPSU and the Communist Party of the RSFSR" and dated November 6, 1991, No. 169 "On the activities of the CPSU and the Communist Party of the RSFSR", as well as on the verification of the constitutionality of the CPSU and the Communist Party of the RSFSR". Available online. In: http://pravo.gov.ru/proxy/ips/?docbody=&link_id=2&nd=102020039&bpa=cd00000&bpas=cd00000&intelsearch=12.04.2002+%B99-%CF++. Consultation date: 08/08/2021.

RESOLUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 18-P. 1997. "On the case of checking the Constitutionality of certain provisions of Article 1 of the Federal Law of November 24, 1995 "On amendments and additions to the Law of the Russian Federation "On social protection of citizens exposed to radiation as a result of the Chernobyl disaster". Available online. In: https://legalacts.ru/doc/postanovlenie-konstitutsionnogo-suda-rf-ot-01121997-n/. Consultation date: 08/08/2021.

RESOLUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 19-P. 2011. «In the case of checking the constitutionality of the provisions of paragraphs 1 and 2 of Article 3, paragraph 1 of Article 8 and paragraph 1 of Article 12.1 of the Law of the Russian Federation «On the status of judges in the Russian Federation» and Articles 19, 21 and 22 of the Federal Law «On the bodies of the judicial community in the Russian Federation» in connection with the complaint of citizen A.V. Matyushenko».

RESOLUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 26-P. 2019. "In the case of checking the constitutionality of Articles 15, 16 and 1069 of the Civil Code of the Russian Federation, paragraph 4 of Article 242.2 of the Budget Code of the Russian Federation and part 10 of Article 85 of the Federal Law "On the general principles of organizing local self-government in the Russian Federation" in connection with the complaint of the administration of the urban district of Verkhnyaya Pyshma". Available online. In: http://publication.pravo.gov.ru/Document/View/0001201907050004. Consultation date: 08/08/2021.

RESOLUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 38-P. 2019. "In the case of checking the constitutionality of the provisions of Articles 1070 and 1100 of the Civil Code of the Russian Federation and Article 22 of the Federal Law "On the basics of the system for the prevention of neglect and juvenile delinquency" in connection with the complaint of citizen A". Available online. In: http://publication.pravo.gov.ru/Document/View/0001201912040020. Consultation date: 08/08/2021.

RESOLUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION No. 39-P. 2019. "In the case of checking the constitutionality of the provisions of Article 13 of the Law of the Russian Federation "On the rehabilitation of victims of political repression", paragraphs 3 and 5 of Article 7, paragraph 1 of part 1 and part 2 of Article 8 of the City Law Moscow "On ensuring the right of residents of the city of Moscow to living quarters" in connection with the complaints of citizens A.L. Meissner, E.S. Mikhailova, and E.B. Shasheva". Available online. In: http://publication.pravo.gov.ru/Document/View/0001201912120001. Consultation date: 08/08/2021.

SIGNATOVA, Nadezhda Valentinovna. 2006. Responsibility of the Russian Federation for the violation of human and civil rights and freedoms: a constitutional and legal study. Abstract of a thesis of candidate of legal sciences. Russian Academy of Public Administration under the President of the Russian Federation. Moscow, Russia.

UNIVERSIDAD
DEL ZULIA

CUESTIONES
POLÍTICAS

Vol.40 Nº 72

Esta revista fue editada en formato digital y publicada en enero de 2022, por el ***Fondo Editorial Serbiluz, Universidad del Zulia. Maracaibo-Venezuela***

www.luz.edu.ve
www.serbi.luz.edu.ve
www.produccioncientificaluz.org