

Sokolov A.V., a prosecutor of supervision over the observance of laws in the execution of judgments in criminal proceedings of Prosecutor's office of Luhansk ♦

Liability for negligence under the Criminal Code of Ukraine and the criminal codes of other CIS countries and Baltic countries: a comparative legal study

Abstract: It is examined the features of the regulatory liability for negligence in the criminal legislation of CIS countries and Baltic countries. The conclusion about the need to improve the criminal legal counteraction negligence way differentiation criminalization of official categories, as well as secure the qualifying particularly evidence of a crime.

Keywords: official person; place holder; negligence; the criminal-law protection; legislation criminalizing foreign countries.

Due to legislative changes to Section XVII of the Criminal Code of Ukraine, which led to the change of its name: "Crimes in official activity and professional activity related to the provision of public services" in the Code appeared integral number of new articles. This is dictated by the need to meet international obligations Ukraine. In our opinion, these trends in the development of legislation on criminal liability in the field of official activity should be reflected in the differentiation of liability for negligence. It can be done by using the positive experience of other countries.

It is therefore necessary to carry out a comparative legal research methods fixing criminal liability for negligence in the art. 367 of the Criminal Code with the relevant rules in the criminal codes of CIS countries and the Baltic countries (hereinafter - the

♦ **Sokolov Andrey Vladimirovich** – a prosecutor of supervision over the observance of laws in the execution of judgements in criminal proceedings as well as the application of other measures of coercion related to restraint of liberty of Prosecutor's office of Luhansk city, Counselor of Justice (Ukraine). E-mail: Sokol_Lug.ua@mail.ru

Criminal Code and the name of the State). Must take into account the fact that in many of these foreign countries Criminal liability for negligence is provided by criminal norms of different sections of the Criminal Code. We have analyzed such CC for comparative legal study: Azerbaijan [1], Armenia [2] Belarus [3], Kazakhstan [4], Kyrgyzstan [5], Moldova [6], Russia [7], Tajikistan [8], Uzbekistan [9], Georgia¹ [10] and Turkmenistan² [11] considering the similarity of their legal systems, as well as general guidance for these countries act - Model criminal Code for the CIS Member States (hereinafter - the Model criminal Code) [12]. Separately, we analyzed the Lithuanian Criminal Code [13], Latvia [14] and Estonia [15], as these countries were part of the former USSR.

According to Article 367 of the Criminal Code, criminal liability is incurred for non-execution or improper execution of their official duties through careless attitude towards them, causing substantial harm to legally protected rights, freedoms and interests of individual citizens, state or public interests or the interests of separate legal entities. Qualification sign of that crime component is damage acts as serious consequences. Even more important is the fact that, despite the presence in the norms of the Criminal Code of Ukraine three categories of officials, they all have a responsibility under Article 367 of the Criminal Code without regard to their different legal status.

First of all let us note in which sections of the Criminal Code provides analyzed penal provisions for Countering negligence. Model CC recommended placing this provision in Chapter 32 “Crimes against the interests of the public service” section XII “Crimes against the state”. Lawmakers of analyzed countries differently solved this question. Thus, in the Criminal Code, this rule placed in section XVII of the Criminal Code “offenses in the field of performance and professional activities related to the provision of public services”. In the analyzed CC of CIS countries and the Baltic countries, this criminal law norm is provided in such structural parts: “Crimes against the state, the interests of public service and local government” (Chapter 33 of the Criminal Code of Azerbaijan, chapter 30 of the

¹ Georgia withdrew from the CIS in 2009.

² Turkmenistan is an associate member of the CIS.

Criminal Code of Russia); “crimes against the state, the interests of the public service” (Chapter 30 of the Criminal Code of Tajikistan), “Utilities crime” (Chapter XXXIX of the Criminal Code of Georgia); “Function Crime” (Chapter 30 of the Criminal Code of Kyrgyzstan, Chapter 8 of the Criminal Code of Estonia), “Crimes against public service” (Chapter 29 of the Criminal Code of Armenia), “Crimes against the interests of the service” (Chapter 35 of the Criminal Code of Belarus), “Crimes against the interests of the public service” (Chapter 13 of the Criminal Code of Kazakhstan, chapter 23 of the Criminal Code of Turkmenistan), “Crimes committed by public officials” (Chapter XV of the Criminal Code of Moldova); “Crimes against public order” (Chapter XV of the Criminal Code of Uzbekistan), “Crimes and Criminal offenses against public service and public interest” (Chapter XXXIII of the Criminal Code of Lithuania), “Criminal acts in the service of public institutions” (Chapter XXIV of the Criminal Code of Latvia).

It should be noted that part of the Criminal Code of the foreign countries carry criminal negligence and legal counteraction standards provided in other structural parts of the Criminal Code. Thus, in the Criminal Code of Kazakhstan in Chapter 8, “Crimes against the interests of service in commercial and other organizations” establishes liability for failure or improper performance of the person performing managerial functions in a commercial or other organization, the duties owing to careless or negligent attitude to the service, if it results in death or other serious consequences (Art. 232). Thus, liability for negligence under the Criminal Code of Kazakhstan comes for Art. 316 and Art. 232 depending on the category of the official.

Chapter XIX of the Criminal Code of Latvia “Criminal acts in the national economy” establishes liability for negligent performance of duty committed by the responsible official of the company or organization, or the same person authorized by the company or organization, which caused significant damage to the company, the organization or the legally protected rights and interests of another person (Article 197). Thus, liability for negligence under the Criminal Code of Latvia or comes under

Art. 319 (when qualifying dereliction of duty of public servants negligence) or Art. 197 depending on the type of official.

Proceeding from the above, we observe that the chapter title of the Criminal Code, providing for liability for negligence, directly depends on the legislator of a country to consolidate the responsibility of officials in the public and commercial sector. Moreover, if the CC is not allocated a separate structural part, responsible for providing crimes against the interests of activity in commercial and other organizations, the responsibility for negligence occurs on the total article published in the chapter on liability of public servants. It also indicates that the majority of the Criminal Code of the CIS and Baltic countries (except Kazakhstan and Latvia), responsible officials in the public and commercial sector does not differentiate.

Section XVII of the Criminal Code of Ukraine, criminal liability for malfeasance is differentiated according to the categories of officials in virtually all elements of crimes, except for negligence. According to V. Kovalenko, legislator differently evaluates the degree of social danger of crimes in the area of official activity, committed various categories of officials. Impossible to equate the danger to the public crimes in activity, for example, a representative of state authority or local government, and crime committed by an official of a private campaign. Although the nature of their organizational or administrative functions similar, yet their social value is completely different [16, p. 33].

We observe that due to the comprehensive reform of this section of the Criminal Code of Ukraine responsibility of a group of officers for negligence is also subject to differentiation, because the analysis of the Criminal Code of foreign countries showed that if the differentiation of criminal responsibility for official crimes depending on the subject crime (official category) is legally held, the responsibility for negligence occurs on several articles (separately for civil servants and officials of the private sector).

As the N. Melnik and N. Havronyuk, the subject of official crimes in the area of official activity and professional activity related to the provision of public services can be of three types: 1) official public legal entity, 2) an official legal entity of

private law, 3) any official [17, p. 1049]. According to this classification, we point out that the subject of negligence relates to the third kind of official. Accordingly any official can make negligence.

Also consider the position in this regard A. Zadorozhny, who charges according to a series of crimes in the sphere of official activity inherent the direct link between the wrongful act and leading his official activities, which can be expressed in misuse, abuse, non-fulfillment or improper fulfillment of their office-related duties [18, p. 108]. Note that to such crimes scientist refer and negligence, indicating a direct relationship between fulfillment or improper fulfillment of their official duties due to careless attitude to them the nature and extent of service activity carried out in accordance with the authorization. Also interesting is the position of V. Hashev, who notes that the difference between the actions of individuals within the civil service, and persons performing managerial functions in public organizations and private institutions, is not the same social nature of these actions [19, p. 114-115]. Given the system character of such changes in the Criminal Code, the legislator in the elements of the crime “negligence” did not consider such a difference in the actions of an official legal entity of public law and official legal entity of private law.

In addition, in 2011, the Criminal Code introduced separate articles, establishing liability special subjects, which were not identified as officials. These are persons providing public services (auditor, notary, appraiser, a person who is not a public employee, official of local self-government, but carries out professional activities related to the provision of public services, including expert, court-appointed trustee, an independent mediator, a member of the labor arbitration, the arbitrator). The criminalization of such subjects reflecting the desire of the legislator to ensure adequate protection of the criminal law in the area of public services. As the V. Terent'ev criminalization of social relations in the Slavic legal family is mostly carried out on the grounds of social media properties and characteristics of criminality. This approach is justified by an ideology of domination over the individual collective values, rooted in community orders and inherent in our legal family. At the same time a significant increase in the number of special subjects is a

reflection of the general trend of the criminal - legal control over differentiated by social status and featured actors behavior [20].

As for to liability for negligence of such entities, it should be noted that the possibility of referring to the subjects of the negligence of persons engaged in professional activities related to the provision of public services does not have a unique solution. L. Brych on this occasion said that Art. 367 of the Criminal Code of Ukraine “negligence” apply to both public officials and actions and the actions of officials of private law. This is due to the fact that the subject of these crimes is official, the signs of which are defined in Art. 18 of the Criminal Code, which sets out the general concept of the official ... The question of whether persons providing public services can be subject to a crime under Art. 367 of the Criminal Code, has no clear legislative solutions [21, p. 253]. We considered that these individuals are not subject to negligence, and their acts within the signs of negligence, are not punishable.

Thus, in the Criminal Code of Ukraine has been a significant expansion of service both in terms of crimes differentiation of criminal responsibility under the categories of officials and criminalization on grounds of the introduction of the Criminal Code in the new special subjects. Foreign experience in terms of legislative differentiation criminal liability for official negligence different categories of officials (in particular the Criminal Code of Kazakhstan and Latvia) indicates the possibility of modifications to section XVII of the Criminal Code of Ukraine regarding the establishment of a separate rule on liability for negligence of the official legal entity of private law as well as those associated with the provision of public services in the field of performance management. The rationale for this distribution is explained by the need for objective evaluation of different degree of social danger of acts committed by the various categories of officials.

We should also say that in the seventeenth section of the Criminal Code of Ukraine defined the concept of categories of officials as officer holding charge or particularly responsible position (note to Art. 368 of the Criminal Code of Ukraine). On this occasion, A. Zadorozhnyy notes that criminal law in Note 1 to Art. 364 of the

Criminal Code contains a definition of the officials who are the subjects of crimes stipulated in Articles 364, 365, 368, 368-2, 369 of the Criminal Code, as well as officials in charge or particularly responsible position (note to Art. 368 of the Criminal Code) while leaving unattended penal response officials are subjects of other crimes in the area of performance management, including negligence [19, p. 109].

In our opinion, these categories of officials can be used to differentiate legislator liability for negligence, for example, as qualified and highly qualified signs of that crime. Our position is due to the fact that the proper performance of the official duties of their public law, for example, at the local level (district, area in the city) and at the central level (central authorities) differs different levels of official authority, their prevalence (on site) number of subordinate entities, the nature of their functions and other characteristics, which, in our opinion, indicate the need to establish different levels of liability for negligence by the significance of his position official. Furthermore, the sphere of possible negligence committed clearly defined powers (service competence) official, its terms of reference. Thus, in connection with the presence of an official “high” level of authority, which may be determined by the category of his position in the system of government, including by determining the rank or qualification class rank, the greater the danger to the public and the importance (in negative aspect) is negligent failure to perform or improper performance of such person of their duties.

In many countries of the CIS and Baltic States criminal law rule providing penalties for official negligence, secured similar item 309 “official negligence” of the Model Criminal Code. In part 1 of this article is provided responsibility for failure or improper performance of a public official duties owing unfair or negligent attitude to the service, if it results in a material breach of the rights and legitimate interests of citizens, organizations, society and the state, and in Part 2 are recorded such qualified signs as death or other serious consequences. Appropriate recommendation adopted legislator in establishing criminal liability for negligence simple composition in the

criminal law of Georgia, Armenia, Azerbaijan, Tajikistan, Kazakhstan, Turkmenistan, Kyrgyzstan, Estonia.

Some post-Soviet states establish liability for negligence in the simple elements of the crime in case of damage on a large scale to the rights and legitimate interests of citizens or the state or public interests (Part 1 of Art. 329 of the Criminal Code of Moldova); great harm to the state, natural or legal person (Article. 229 of the Criminal Code of Lithuania), or offense to the presence of damage in a large amount (Part 1 of Art. 293 of the Criminal Code of Russia, Part 1, Art. 207 of the Criminal Code of Uzbekistan) on a large scale (Part 1 of Art. 428 of the Criminal Code of Belarus).

Well, the simple structure of negligence in the criminal law provides for post-Soviet countries of socially dangerous consequences in the form of significant harm or damage on a large scale to legally protected rights, freedoms and interests of individual citizens, state or public interests or the interests of separate legal entities. It can be expressed in the damage of a material or immaterial nature. Given the foregoing, it can be concluded that the legislative building dispositions Part 1 of Art. 367 of the Criminal Code similar items we analyzed the Criminal Code.

Qualified by negligence in Part 2 of Art. 367 of the Criminal Code is the occurrence of serious consequences, both tangible and intangible. Likewise did the legislator Latvia. Note that in the Model Criminal Code relevant aggravating circumstances were as follows: a person causing death or other serious consequences. Similarly provides for liability for negligence in the Criminal Code of Georgia (Part 2 of Art. 342), Azerbaijan (Part 2 of Art. 314), Armenia (Part 2 of Art. 315), Tajikistan (Part 2 of Art. 322), Kazakhstan (h. 2 t. 316), Turkmenistan (Part 2 of Art. 188), Kyrgyzstan (Part 2 of Art. 315), Moldova (Part 2 of Art. 329).

Some other post-Soviet states qualifying signs of negligence set so: causing moderate or severe bodily injury (Part 2 of Art. 207 of the Criminal Code of Uzbekistan), a person's death, damage on a large scale, other serious consequences (Part 2 of Art. 316 of the Criminal Code Kyrgyzstan) causing the victim grievous bodily harm or death (Part 2 of Art. 293 of the Criminal Code of Russia).

We note that part of the Criminal Code of the former Soviet Union (Russia, Uzbekistan) is not installed in the compositions of the crimes of qualified consequences of a material nature. Also it is worth to note that Article 162 of the Criminal Code of Estonia, as well as in art. 229 of the Criminal Code of Lithuania there are no signs of qualified negligence.

Particularly aggravating circumstances of negligence established only in the Criminal Code of Russia (the death of two or more persons) and Uzbekistan (the death of a person or the illegal transport across state or customs border of narcotic drugs or psychotropic substances in large quantities).

We should also recall that the aggravating circumstances are an important way to differentiate criminal liability. L. Pavlik said that differentiation occurs through criminal liability reflected in the criminal law features that increase or decrease the degree of social danger of the crime, it seems that is more appropriate recognition of qualifying (particularly aggravating) signs means differentiation of criminal responsibility [22, p. 2]. In addition, according to A. Marin qualifying signs, along with other criminal law means, the function of differentiation of criminal responsibility, setting new, higher compared to the penalties provided for the offense with the basic composition beyond the typical punishment [23, p. 366].

Based on the comparative analysis we consider it expedient to use the experience of the Criminal Code of Russia and to provide specifically separate aggravating circumstances in Art. 367 of the Criminal Code of Ukraine. Therefore propose to add art. 367 of the Criminal Code of Ukraine in the third part as follows: "The same act that caused the death of two or more persons". This legislative solution is necessary from several considerations. First, it will allow considering differentially in qualification different kinds of consequences of negligence, and secondly, to date, when such differentiation is not carried out, the incidence of death to two or more persons negligence qualifies under Part 2 of Art. 367 of the Criminal Code of Ukraine. Lack of differentiation of criminal responsibility does not allow due consideration to the severity of these effects, as the onset of death of several people. Also, establishing a special qualifying sign also provide clear criteria for establishing

in Part 2 of Art. 367 of the Criminal Code of Ukraine consequences in the form of harm to life and health.

Thus, a comparative analysis of criminal law providing opposition to official negligence in Criminal Code of Ukraine and the CIS countries, the Baltic States and enables us to determine the systemic approach to the legislative regulation of responsibility for official negligence. Using the positive experience of foreign lawmakers consider it necessary to make certain modifications to Article 367 of the Criminal Code of Ukraine (especially in terms of securing a qualifying sign official negligence necessary differentiation of responsibility for official negligence criterion for official category). They are aimed to improve the criminal law and the practice of law in this area.

Bibliography

1. The Criminal Code of the Azerbaijan Republic. St. Petersburg. University Press Law Center, 2001.

2. The Criminal Code of the Republic of Armenia [electronic resource]. Mode of access to the document: <http://www.parliament.am.htm>. Date of visit: 12/12/13.

3. Criminal Code of the Republic of Belarus. St. Petersburg. University Press Law Center, 2001.

4. Criminal Code of the Republic of Kazakhstan. St. Petersburg. University Press Law Center, 2001.

5. Criminal Code of the Kyrgyz Republic. St. Petersburg: SPL of Press Law Center, 2002.

6. The Criminal Code of the Republic of Moldova. St. Petersburg. University Press Law Center, 2003.

7. Criminal Code of the Russian Federation: the text is amended and added on February 15, 2011. Moscow: Penguin Books, 2011.

8. The Criminal Code of the Republic of Tajikistan. St. Petersburg. University Press Law Center, 2001.

9. The Criminal Code of the Republic of Uzbekistan. St. Petersburg. University Press Law Center, 2001.
10. Criminal Code of Georgia. St. Petersburg. University Press Law Center, 2002.
11. Criminal Code of Turkmenistan [electronic resource]. Mode of access: <http://www.legislationline.org/ru/documents/action/popup/id/14380/preview>. Date of visit: 12/12/13.
12. Model Penal Code for States - Members of the Commonwealth of Independent States / Decision of the Interparliamentary Assembly of States - members of the Commonwealth of Independent States on May 13, 1995 [electronic resource] / Access mode: <http://www.iacis.ru/upload/iblock/753/019.pdf>. Date of visit: 12.12.13.
13. The Criminal Code of the Republic of Lithuania. St. Petersburg. University Press Law Center, 2003.
14. The Criminal Code of the Republic of Latvia. St. Petersburg. University Press Law Center, 2001.
15. The Criminal Code of the Republic of Estonia [electronic resource] / Access: <http://constitutions.ru/archives/446>. Date of visit: 12.12.13.
16. Kovalenko V.V. The concept of differentiation criminal responsibility for crimes related to performance management. Actual problems of criminal responsibility: Materials International Scientific practical conf., 10-11 October 2013 / edited by V.Y. Tacij (chief ed.), V.I. Borisov (deputy chief ed.) and others. – Kh., Right. 2013, p. 30 - 35.
17. Scientific and Practical Commentary of the Criminal Code of Ukraine / Ed. M. Melnik, M. Havronyuk. 9th ed., Processed and reported. K.: Legal Opinion, 2012.
18. Zadorozhnyy A.A. Criminal legal description of crimes related service activities. Law and Security. 2012, no. 2, p. 105 - 111.
19. Hashev V. G. Criminal liability for the abuse of power or position// Dissertation of PhD in Law. Dnepropetrovsk, 2007.

20. Terent'ev V. I. Special responsibility of the perpetrator in criminal law of Ukraine// Thesis abstract of PhD in Law. Odessa National Law Academy. O., 2003, [electronic resource]. Mode of access: http://librar.org.ua/sections_load.php?s=economy_legal_science&id=333. Date Hits: 12.12.13.

21. Brych L.P. Criminal legal qualification of corruption in view of the new anti-corruption legislation of Ukraine. // Scientific Bulletin of Lviv State University of Internal Affairs. Series of Law. 2010, no. 2, p. 250 - 263.

22. Pavlik L. Means differentiation criminal liability provided for in the Special Part of the Criminal Code of Ukraine// Journal of the Academy of Advocacy of Ukraine. 2012, no. 2 (15), p. 1-11.

23. Marin O.K. Some theoretical basis of the analysis of characteristics that qualify a crime // Problems of State and Human Rights in Ukraine: Mater. 12th Regional scientific and practical conference, 9-10 February 2006. Lviv: Faculty of Law, National University of Lviv Ivan Franko, 2006, p. 366 - 369.