



Criminal-Legal and Penal Enforcement Regulation of the Use of Firearms by Employees of the Penitentiary System of Russia

VLADIMIR A. PONIKAROV

Academy of FSIN Russia, Ryazan, Russian Federation

ORCID: <https://orcid.org/0000-0003-0030-0794>, e-mail: minrs@yandex.ru

Abstract. *Introduction:* the paper investigates criminal and penal enforcement inconsistencies in the legislative regulation on the use of firearms by the staff of the penal system in their official activities. Legal details consist in the fact that we put forward scientifically substantiated proposals to reform criminal-legal and penal enforcement aspects associated with the use of firearms by employees (guns, submachine guns, rifles, which are operated by the Federal Penitentiary Service of Russia). We analyze Article 86 of the Criminal Code of the Russian Federation, which establishes relevant security measures. We also consider the practice of foreign countries related to this problem. *Aim:* to investigate the criminal-legal and penal enforcement aspects related to the use of firearms by staff of the penal system for example, in relation to convicts. *Methods:* we use dialectical method as methodological and theoretical basis for the study, and deductive method to analyze the norms of the Criminal Code of the Russian Federation regarding the use of firearms. We also use systematized methods to study articles of the Criminal Code and the Penal Enforcement Code. They help to classify the legal facts that establish the legal right of staff to use firearms. We use empirical methods of mastering in order to improve penal officers' performance in the use of firearms. The article presents the results of a survey of 318 employees. *Results:* we have investigated the essence of criminal-legal relations in terms of the use of firearms by employees of the penal system; we have also studied the practice of implementing the norms concerning the use of firearms by law enforcement officers; we propose a theoretical model for improving criminal legislation related to the use of firearms. In addition, we provide scientifically substantiated ideas and empirical studies aimed at improving criminal and penal enforcement legislation on the use of firearms. Research findings of our paper include new ideas concerning the use of firearms within the boundaries of criminal and penal enforcement legislation (we suggest that the foundations associated with the use of firearms should be contained in the Criminal Code of the Russian Federation).

Keywords: criminal legislation; penal enforcement legislation; use of firearms; legal facts; legal relations; security measures; Federal Penitentiary Service of Russia; penal enforcement system.

12.00.08 – Criminal law and criminology; penal law.

For citation: Ponikarov V.A. Criminal-legal and penal enforcement regulation of the use of firearms by employees of the penitentiary system of Russia. *Penitentiary Science*, 2021, vol. 15, no. 1 (53), pp. 171–175. DOI 10.46741/2686-9764-2021-15-1-171-175.

Discussion

According to the Russian legislation, employees of the penal system and law enforcement agencies have the right to use physical force, special means and service firearms [13]. However, in practice, the implementation of this right entails many issues. For example, penal officers must not use firearms outside the correctional facility, while at the same time they are required to prevent offenses (of a criminal nature) at any time and in any place, including those occurring outside the correctional facility. It turns out that penal officers are obliged

to prevent all types of crimes (on the streets, squares, in public gardens, etc.), but they can use coercive measures (firearms) only within the penal institution. This is wrong. We believe that it is necessary to legally allow a penal officer to use weapons outside the territory of the correctional institution.

Individual problems related to the use of security measures (firearms, special means) in the law enforcement activities of employees were covered in the publication by a team of authors issued in the journal *Chelovek: prestuplenie i nakazanie* (Man: Crime and Punishment) [12],

general problems of criminal coercion – in the work of V.M. Chkhikvadze [15]. S.S. Zakharova provided arguments substantiating a reasonable risk associated with these measures [3].

General issues of state and individual coercion were studied in the scientific work of N.V. Makarenko [8]. A.I. Kaplunov touched upon specific administrative aspects in terms of preventive measures [5], A.I. Dolgova studied the identity of the criminal against whom the measures under consideration were applied [1]. G.I. Kalmykov considered the organizational and tactical foundations for the use of firearms by employees of internal affairs agencies [4]. V.A. Merzlyakova studied criminal liability of law enforcement officers for abuse of official authority [9], V.V. Merkur'ev – the necessary defense in the framework of criminal and criminological aspects [10].

I.M. Urazalin considered criminal-legal and criminological aspects of the use of coercive measures (firearms, special means) within a specific constituent entity of Russia (for example, the Astrakhan Oblast) [14], E.V. Donets studied the problems of inflicting harm when detaining a person who committed a prison-related offence [2]. A.S. Knyazkov analyzed the use and use of firearms by police officers [6]. I.S. Kokorin studied civil liability for the harm inflicted by the use of such measures (firearms, special means) [7], V.N. Oparin studied legal regulation of the use of direct coercion by law enforcement officials [11]. There are other publications that are close to the topic of our research.

At the same time, no one has considered issues related to the criminal-legal and penal enforcement regulation of the use of firearms by employees of the Russian penitentiary system.

The Law of the Russian Federation no. 5473-1 of July 21, 1993 "On institutions and bodies executing criminal penalties in the form of imprisonment" allows penal officers to use service firearms. We note that this act contains mainly the norms of administrative law, rather than criminal law. However, we believe that the use of firearms should give rise to criminal, rather than administrative, legal relations. Moreover, the situation is further confused by Article 86 of the RF Penal Enforcement Code, which, in our opinion, also generates criminal, rather than penal, relations.

Let us take a closer look at how penal officers, as well as employees of other law enforcement agencies, use physical force, special means, and service firearms in accordance with the law.

The reason for the use of all of these means can be an administrative offense or a criminal offense.

In our opinion, it is necessary to distinguish between the grounds for the use of the first two means and the third one, because of their different legal orientation. For example, the use of special means and physical force by penal officers is due to their administrative and legal nature, because these means are not only regulated exclusively by the norms of administrative law, but are also used mainly in case of administrative offenses, which cannot be said about firearms (it is prohibited to use firearms in such situations).

Consequently, according to legislation, firearms can only be used if a crime is committed. In this case, it gives rise to criminal-legal relations and not administrative-legal relations.

Let us take a look at the laws that regulate the use of service firearms.

The use of service firearms by employees of the Federal Security Service (FSB) is stipulated by Federal Law 40-FZ of April 3, 1995 "On the Federal Security Service". Representatives of the Russian Guard use weapons on the basis of Federal Law 226-FZ of July 3, 2016 "On the troops of the National Guard of the Russian Federation". Military personnel of the Foreign Intelligence Service (SVR) use firearms in accordance with Federal Law 5-FZ of January 10, 1996 "On foreign intelligence". The police use weapons in accordance with Federal Law 3-FZ of February 7, 2011 "On the police".

All these laws contain administrative and legal norms; this means they regulate criminal-legal relations, although it is obvious that the use of firearms is a component of the criminal sphere (the basis for its use is the commission of a criminal act). Often, the use of firearms by employees of law enforcement agencies (the Federal Penitentiary Service, the Ministry of Internal Affairs, the Federal Security Service of Russia) can result in injuries and even deaths, and then a criminal investigation should be conducted, the circumstances of what happened should be clarified, and guilt (or innocence) of the employee should be established, the correctness of their actions should be analyzed.

Thus, there arises a paradoxical situation: a criminal offense has been committed, and the use of firearms by employees to neutralize a criminal, for example, falls under the norms of administrative law. In our opinion, this should not be the case.

A similar situation is developing in the framework of the penal enforcement legislation. For example, Article 86 of the RF Penal Enforcement Code does not give rise to penal enforcement legal relations. The above legal norm determines the emergence of exclusively criminal-legal relations: escape from a colony or prison (Article 313 of the RF Criminal Code), participation in mass riots (Article 212 of the RF Criminal Code).

Article 31 of the Law of the Russian Federation "On institutions and bodies executing criminal penalties in the form of imprisonment" establishes the following legal facts of criminal-legal orientation:

Employees of the penitentiary system have the right to use firearms:

a) as protection against attacks that threaten the life and health of citizens ("Crimes against life and health");

b) to repel the attack threatening the life and health of employees of the penal system, and to repel the attack aimed at seizing firearms ("Attempt on the life of a law enforcement officer" and "Violence against a representative of authorities");

c) to release hostages ("Hostage-taking");

d) to repel a gang attack or an armed attack on protected objects, premises and structures of institutions that execute punishments, as well as on vehicles ("Organization of an illegal armed group or participation in it", "Disorganization of the activities of institutions that provide isolation from society").

Employees of the penitentiary system have the right to use firearms without warning:

a) when repelling an attack with the use of firearms or vehicles ("Crimes against public safety", "Assault on the life of a law enforcement officer");

b) in cases of escape of convicted persons and prisoners from correctional facilities, pre-trial detention centers or from custody with firearms, with the use of vehicles or from a vehicle while it is moving ("Escape from places of deprivation of liberty, from arrest or from custody");

c) in case a convicted person, prisoner or other person approaches the penal officer and carries an exposed firearm or cold weapon or objects with which bodily harm can be inflicted, while reducing the distance specified by the penal officer, as well as when trying to touch the penal officer's firearm ("Encroachment on the life of a law enforcement officer").

Thus, the administrative legal content initiates the actual criminal-legal relations, and the

latter are regulated by the norms of administrative law. We consider this approach wrong.

For example, the law "On institutions and bodies executing criminal penalties in the form of imprisonment" consists of the norms of administrative law, but in the part related to the grounds for the use of service firearms, this law "awakens" criminal relations. Therefore, these grounds should be determined in the Criminal Code.

We believe that the above-mentioned regulatory and administrative acts (laws) should contain only the norms that establish the right only to use physical force and special means.

Penal system officers have the right to apply security measures only within the correctional colony and on a restricted access territory. However, in other countries, for example in France [16; 20], these measures can be applied outside the penitentiary institution, since this ensures safety of the facility [19]. At the same time, emphasis is placed on the observance of human rights, legality of the use [21], as well as self-control in the implementation of these measures [17]. And some basic principles on the use of firearms are defined in criminal legislation [18].

We conducted a survey among students of the Academy of the Federal Penitentiary Service of Russia (Ryazan) and employees of the penal system (318 people from various divisions of the penal system (operatives, employees of the security department, guard), the geography of which is represented by twelve regions of the country) in the period from February 2020 to January 2021.

Our research has shown that the majority of employees of the penitentiary system (295 people, or 92.8% of the respondents) believe that the use of firearms generates criminal law relations. The rest regarded these legal relations as criminal-executive (18 people, or 5.6 %) or administrative (5 people, or 1.6 %).

Results of the research

When conducting this scientific research, we obtained the following main results:

- the essence of criminal-legal relations in terms of the use of firearms by penal system officers was considered;
- the practice of implementing the norms related to the use of firearms by law enforcement officers was studied;
- a theoretical model for improving criminal legislation related to the use of firearms is proposed.

The use of firearms by penal system officers within the limits of criminal and penal enforce-

ment legislation, especially in case of mass riots, should be regulated exclusively by criminal norms, and the use of physical force and special means – by the RF Penal Enforcement Code.

One should use only those special means that are in service with institutions and bodies of the penal system, and depending on the expected strength of the crowd resistance. As practice shows, the number of convicts – active participants in riots – can range from 25 to 180 people. Therefore, the use of special means against groups of convicts must be recorded in the framework of the penal enforcement legislation.

In addition, the RF Penal Enforcement Code should contain specific security measures related to the use of firearms so that convicts had an idea of what special means can be used against them in the event of mass riots.

In addition, it is advisable that RF Penal Enforcement Code should contain a set of special terms and definitions, since the following criteria are still unclear to penal system officers:

- 1) resistance by convicts to prison staff (it is advisable to legally define the terms “resistance” and “attack”);
- 2) disobedience to staff;
- 3) manifestations of riotous conduct, etc.

Moreover, penal enforcement legislation, regulating the legal relations arising during the detention of convicts who have escaped from a correctional colony and are subject to escort, is obliged to take into account the presence of special road vehicles, railway cars (for forestry correctional institutions), and also to record that a guard headed by a chief, sentinels and sentries is appointed for the transportation of convicts.

Conclusions

1. The use of weapons generates criminal-legal relations only.
2. An officer of the penal system has the right to use service firearms only if a convicted person or another person commits a crime.
3. The distinction between criminal norms, penal enforcement norms and other norms is determined by a specific legal relationship (respectively, criminal or penal enforcement).

4. Within the limits of the penal enforcement legislation, only physical force and special means should be legally used as security measures.

5. It is advisable that the RF Criminal Code (in a separate article) should contain the grounds for the use of firearms by officials of all law enforcement agencies and military personnel of Russia. They may look like this.

Employees of all law enforcement agencies have the right to use firearms individually or as part of a unit in the following cases:

- 1) necessary defense and extreme necessity;
- 2) sudden group (two or more people) or armed attack;
- 3) to protect any natural person or themselves from assault, if this assault involves violence that is dangerous to life or health;
- 4) to prevent any crime that is dangerous to life and health;
- 5) to prevent the escape of the following persons from custody:
 - a) persons detained on suspicion of committing a crime;
 - b) persons in respect of whom detention has been chosen as a preventive measure;
 - c) persons sentenced to imprisonment; as well as to prevent attempts to forcibly release these persons;
- 6) to stop a vehicle by damaging it, when the driver creates a real danger to the life and health of people and does not obey the officer's repeated lawful order to pull over;
- 7) to neutralize an animal that directly threatens the life and health of people.

6. Federal laws, according to which law enforcement officers use service firearms, contain the norms of administrative (managerial), and not criminal law.

All this will contribute to the legitimate implementation of security measures by the employees of the penal system in their activities. The provisions of the present paper can be used in the educational process in the Academy of the Federal Penitentiary Service of Russia and in other law enforcement educational organizations to improve the skills of employees of the penal system.

REFERENCES

1. Dolgova A.I. *Lichnost' organizovannogo prestupnika: kriminologicheskoe issledovanie: monografiya* [Personality of an organized criminal: criminological research. Monograph]. Moscow: Norma: INFRA-M, 2020. 368 p.
2. Donets E.V. *Prichinenie vreda pri zaderzhanii litsa, sovershivshego prestuplenie v protsesse otbyvaniya nakazaniya v vide lisheniya svobody: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Infliction of harm while detaining a person who committed a prison-related offence: Candidate of Sciences (Law) dissertation]. Ryazan, 2004. 176 p.

3. Zakharova S.S. *Obosnovannyi risk v ugolovnom prave Rossiiskoi Federatsii: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Justified risk in the criminal law of the Russian Federation: Candidate of Sciences (Law) dissertation]. Ryazan, 2005. 237 p.
4. Kalmykov G.I. *Pravovye organizatsionnye i takticheskie osnovy primeneniya ognestrel'nogo oruzhiya sotrudnikami organov vnutrennikh del: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Legal, organizational and tactical bases of the use of firearms by employees of internal affairs bodies: Candidate of Sciences (Law) dissertation]. Moscow, 2003. 216 p.
5. Kaplunov A.I. *Primenenie sotrudnikami politsii ognestrel'nogo oruzhiya: zakonodatel'stvo, teoriya i praktika: monografiya* [The use of firearms by police officers: legislation, theory and practice. Monograph]. Saint Petersburg: S.-Peterb. un-t MVD Rossii, 2018. 260 p.
6. Knyaz'kov A.S. *Primenenie i ispol'zovanie ognestrel'nogo oruzhiya sotrudnikami militsii kak mera administrativno-pravovogo presecheniya: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [The use of firearms by police officers as a measure of administrative and legal restraint: Candidate of Sciences (Law) dissertation]. Tomsk, 1998. 259 p.
7. Kokorin I.S. *Grazhdansko-pravovaya otvetstvennost' za vred, prichinennyi primeneniem fizicheskoi sily, spetsial'nykh sredstv i oruzhiya sotrudnikami organov vnutrennikh del: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Civil-legal liability for the harm inflicted by the use of physical force, special means and firearms by employees of internal affairs bodies: Candidate of Sciences (Law) dissertation]. Saint Petersburg, 2006. 215 p.
8. Makarenko N.V. *Gosudarstvennoe prinuzhdenie v mekhanizme obespecheniya ekonomicheskoi bezopasnosti: teoretiko-prikladnye problemy: dissertatsiya na soiskanie uchenoi stepeni doktora yuridicheskikh nauk* [State coercion in the mechanism of ensuring economic security: theoretical and applied problems: Doctor of Sciences (Law) dissertation]. Nizhny Novgorod, 2016. 758 p.
9. Merzlyakova V.A. *Ugolovnaya otvetstvennost' sotrudnikov pravookhranitel'nykh organov za prevyshenie dolzhnostnykh polnomochii: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Criminal liability of law enforcement officers for abuse of official powers: Candidate of Sciences (Law) dissertation]. Moscow, 2003. 204 p.
10. Merkur'ev V.V. *Neobkhodimaya oborona: ugolovno-pravovye i kriminologicheskie aspekty: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [The necessary defense: criminal-legal and criminological aspects. Candidate of Sciences (Law) dissertation]. Ryazan, 1998. 238 p.
11. Oparin V.N. *Pravovoe regulirovanie primeneniya mer neposredstvennogo prinuzhdeniya dolzhnostnymi litsami pravookhranitel'nykh organov Rossiiskoi Federatsii: dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Legal regulation of the use of measures of direct coercion by officials of law enforcement agencies of the Russian Federation: Candidate of Sciences (Law) dissertation]. Omsk, 1998. 225 p.
12. Ponikarov V.A., Kalutskii I.N., Smolev S.M., Stroilov S.V. The legal innovations connected with use of physical force, special means and firearms by employees of a penal system in their law-enforcement activities. *Chelovek: prestuplenie i nakazanie=Man: Crime and Punishment*, 2017, vol. 25, no. 3, pp. 384–389. (In Russ.).
13. Ponikarov V.A., Ponikarov S.V. The ratio of administrative law and criminal-legal regulation of the use of weapons by personnel of the penal system and other workers of law enforcement agencies. *Chelovek: prestuplenie i nakazanie=Man: Crime and Punishment*, 2014, no. 1, pp. 119–121. (In Russ.).
14. Urazalin I.M. *Ugolovno-pravovye i kriminologicheskie aspekty primeneniya fizicheskoi sily, spetsial'nykh sredstv i ognestrel'nogo oruzhiya sotrudnikami organov vnutrennikh del (po materialam Astrakhanskoi oblasti): dissertatsiya na soiskanie uchenoi stepeni kandidata yuridicheskikh nauk* [Criminal-legal and criminological aspects of the use of physical force, special means and firearms by employees of internal affairs bodies (based on the materials of the Astrakhan Oblast): Candidate of Sciences (Law) dissertation]. Krasnodar, 2004. 237 p.
15. Chkhikvadze V.M. *Sovetskoe voenno-ugolovnoe pravo* [Soviet military-criminal law]. Moscow: Yurid. izd-vo, 1948. 457 p.
16. Bordeaux N. *Direction d'Etat, autorits de police de la France*. Marcel, 2019. P. 56.
17. Buchhandler-Raphael M. Loss of self-control, dual-process theories, and provocation. *Fordham Law Review*, 2020, vol. 88, no. 5, p. 1815.
18. Hedmi N.Y. *Features of countering crime in Israel*. Tel Aviv, 2016. Pp. 15–17.
19. Lobel O. Interlocking regulatory and industrial relations: the governance of workplace safety. *Administrative Law Review*, 2015, vol. 57, no. 4, pp. 1071–1151.
20. Prelo M. *Organisation de la peine judiciaire en France*. Paris, 2017. P. 25.
21. Rhode L. Human rights, those who are governed and the legitimacy of law enforcement. *Comparative Civilizations Review*, 2020, vol. 82, no. 82, p. 5.

INFORMATION ABOUT THE AUTHOR

VLADIMIR A. PONIKAROV – Doctor of Sciences (Law), Associate Professor, professor at the Department of Administrative and Financial Law, Faculty of Law, Academy of FSIN Russia, Ryazan, Russian Federation. ORCID: <https://orcid.org/0000-0003-0030-0794>, e-mail: minrs@yandex.ru

Received February 1, 2021