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ADMINISTRATIVE RESPONSIBILITY WITHOUT ESTABLISHMENT OF THE FORM OF A GUILTY DEED

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Justifies the opportunity of bringing to administrative responsibility of a delinquent regardless of the form of his guilty action. Defines the subjects which can be brought to administrative responsibility, regardless of the form of guilt. Here is introduced the author's definition of the legal category of guilt.

Keywords: guilt, administrative responsibility, forms of guilt, subjective fault imputing, objective fault imputing.

Despite the fact that an administrative offence is recognized as a guilty, unlawful action (inaction) of a physical person or legal entity for which the Code on Administrative Offences or the laws on administrative offences of the constituent subjects of the Russian Federation establishes administrative responsibility (what implies the obligation of proving the guilt of an offender), the application of administrative responsibility without the establishment of guilt is still valid.

A good example of this approach is the deviation from the principle of guilt and the imposition of liability for damages regardless of tortfeasor fault in some articles of chapter 59 of the Civil Code of the RF, which establishes the obligations due to infliction of harm, as well as bringing to administrative liability of vehicles owners in case of fixation of administrative offences by the special technical means operating in automatic mode, having a function of photographing and filming, recording, or by means of photographing and filming and video recording (see article 2.6.1. of the Code on Administrative Offences of the RF).

Judicial practice on administrative disputes confirms the possibility of mentioned by us deviation from the general rule in cases where the law provides an objective imputation of guilt. However, in our opinion, we should distinguish

the objective imputation of guilt, when the delinquent must prove his innocence, from the proposed by us principle of bringing to administrative responsibility, without a ascertainment of delinquent guilt when the object and the objective side of an administrative offense derives directly from the unlawful act which could and must be perceived by the delinquent (individual subject of law) as an unlawful and punishable by law action.

Due to the fact that tort legislation uses mental principle of guilt, in our opinion, in most cases there is no need to establish the form of delinquent guilt, especially if the legislator does not link the form of guilt with the severity of the applicable administrative penalty. The person performing the administrative jurisdiction on this kind of administrative offenses, should be exempt from establishing a form of guilt and clarification of what had felt the delinquent at the time of committing the administrative offense.

Proceedings on the cases that do not require the establishment of the form of delinquent guilt will be limited with establishing the circumstances of exclusion of bringing the delinquent to administrative responsibility. They are: extreme necessity, insanity, limitation on holding a person administratively responsible, as well as the existence the fact of physical and psychological coercion, the execution of an order or directive (in the context of application of an administrative penalty to the officials).

According to the norm of article 2.7 of the Code on Administrative Offences of the RF the person who committed an administrative offense in a state of extreme necessity is exempt from administrative liability in mind that the law in this case does not consider as an administrative offense the actions of a person causing harm to legally protected interests. Institute of extreme necessity is not an innovation in Russian legislation, as it was quite developed in the framework of criminal law, this fact is noticed by A. N. Guev in the commentary to article 2.7 the Code on Administrative Offences of the RF: "Article 39 of the Criminal Code of the RF establishes that causing harm to interests protected by the criminal law in a state of extreme necessity it is not a crime. Similarly, in administrative law the causing harm, in the state of extreme necessity to interests protected by the law on administrative offences does not constitute an administrative offence" [2].

Under actions in a state of extreme necessity that cause harm to legally protected interests, the legislator implies various actions, although constituting an administrative offense entailing administrative responsibility, but meanwhile excludes the guilt of this delinquent. The essential points of extreme necessity are the circumstances of infliction harm by a delinquent – the liquidation of imminent

danger to the personality and the rights of the delinquent or others, as well as the legally protected interests of society or the State, if this danger could not be eliminated by other means. In addition to this condition the norms of the examined article of the Code on Administrative Offences of the RF establish the material limit of damage inflicted by actions in the state of extreme necessity. This condition is about that the inflicted harm should be less significant than prevented.

There is no doubt on the assertion of A. N. Guev that state of extreme necessity arises "when there is an actual, real, not imaginary threat to specified interests. There is no extreme necessary if the threat to the specified protected interests may arise in the future. This is directly indicated by the words "to eliminate the directly threatening danger"" [2].

Causing harm to the protected by right (law) interest may be considered justified if the delinquent had no other way to prevent greater damage (harm). Therefore, before making a decision about an active action (an extreme necessity cannot be expressed in inaction) any person shall commensurate the consequences of his/her actions seeking in the first place not illegal ways to prevent or eliminate the threat of harm to the interests protected by law. In the case of the inevitability of committing of an administrative and legal tort a person must perform such actions which constitute the least harmful violations. It should be borne in mind that the issue on the delinquent actions, as the only possible ones, should be resolved taking into account the specific circumstances of the case.

To correlate the prevented harm and the caused harm it should be taken into account the content of the protected and violated interests. We cannot but agree with A. N. Guev that "when comparing human life and health and property interests the preference is given to life and health of people. If for protection of property interests being violated the similar interests, must be used the factors of cost assessment of harm caused and prevented" [2].

The next circumstance that affects the application of administrative penalties to a delinquent is insanity at the time of committing an administrative and legal tort. Article 2.8 of the Code on Administrative Offences of the RF defines insanity as the inability of a physical person for reasons of mental health to recognize the facts and social meaning of his behavior and to control it. Code on Administrative Offences of the RF establishes administrative liability based on legal provisions of the sanity of individuals and, consequently, the public officials. Presence of doubts about the sanity of a public official at the time of committing illegal actions (for example, actions contrary to common sense and not giving logical explanation, or applying of the delinquent before committing

an administrative offense for psychiatric care in a medical institution) obliges an administrative jurisdiction body (or official) to establish the presence or absence of delinquent's sanity. Of the listed by article 2.8 of the Administrative Code of the causal factors of insanity for a physical person - a chronic mental illness, temporary mental disorder, dementia or other mentally sick condition, in our opinion, only a temporary mental disorder can be adopted as the circumstance precluding the administrative responsibility of a public official. In other cases, the contract for the passage of public service would not have been concluded with a delinquent. On-duty administrative offence committed by a public official should be distinguished from the administrative offence of a physical person (common subject of administrative law).

In legal literature distinguishes insanity, which has different criteria for causality – the psychological (legal) and medical (biological) that have several signs. Psychological criterion of insanity determines impossibility of delinquent to realize the actual nature and wrongfulness of his actions (an intellectual sign) or control them (a strong-willed sign).

Allowed for a public official medical criterion associated with a temporary mental disorder, which is a short-term, or by itself passing state (reactive psychosis, memory loss); and other morbid mental state. Without going into details of the study on options for mental disorders, it should be emphasized that such impairment should occur secretly and imperceptibly, as otherwise the representative of the employer would be obliged to suspend the patient from his service duties and send him for medical survey. Considered by A. N. Guev [2] versions of mental disorders associated with use of drugs or alcohol by an physical person for a public official in the commission of an administrative-legal tort, as it seems to us, can only be circumstances aggravating the administrative responsibility. In another interpretation of insanity this would lead to the delinquent's evasion from administrative responsibility.

It should be recognized that delinquent insanity is defined by a combination of both criteria – mental (legal) and medical, and the final decision about the insanity of a public official, who has committed an administrative-legal tort, will be made by the administrative jurisdiction body considering the case on an administrative offense of that person. It is no secret that resolving the issue of insanity of a public official would require the involvement of experts with relevant knowledge in the field of psychiatry. Only experts-psychiatrists will be able to establish the existence and nature of the delinquent's morbid mental disorder, determine the depth of the lesion of his mental abilities, and its causes.

The possibility of release from administrative liability due to the insignificance of the administrative offense, provided for by the legislator in article 2.9 of the Code on Administrative Offences of the RF, in our opinion, is unlikely to be justified with respect to such subject of administrative responsibility as a public official. If, in respect of the private entity that is a managed entity in administrative and legal relations, is acceptable application under certain conditions of verbal warning with explanation to him the wrongful nature of his conduct and the possible harmful consequences for him and society, but the public official by virtue of his administrative and legal status is himself obliged to distinguish lawful actions from lawlessness and to realize the consequences of his tort conduct. It seems to us, the mere fact of an administrative offense by a public official has to be an exceptional case. Therefore, there can be no question of replacing an administrative penalty to oral warnings. As an official (service) tort the administrative offense of a public official also has the character of a disciplinary misconduct in framework of which the representative of an employer who has entered into a contract with a specified person on the passage of public service, has the opportunity to educate the servant as long as he want and take appropriate measures of disciplinary punishment.

In our view, to article 2.9 of the Code on Administrative Offences of the RF must be entered an exception from the general rule – non-proliferation norms of this article on the delinquent – a public official, as the very inclusion of the service tort to the Code on Administrative Offences of the RF in the form of a particular administrative offense is already talking about the State's negative public attitude to this tort, and nonpublic measures of impact on service tort of a public official are within the framework of disciplinary penalties.

The circumstances relating to the limitation of bringing to administrative responsibility are of essential meaning when sentencing punishment any subject of administrative liability. However, the provisions of article 4.5 of the Code on Administrative Offences of the RF, as we see it, not really suite to such entity as a public official. For example, the general statute of limitations for administrative prosecution (the statute of limitations of making judgment on a case concerning an administrative offense in the context of the articles of Law) - two months (three months, in a case of considering by a judge) is absolutely unacceptable for the service torts of public officials who are persecuted by provisions of the Code on Administrative Offences of the RF, as tortious conduct of those persons in the first place creates relationships defined as an administrative and legal dispute [4]. And only after resolution of an administrative and legal dispute, can be instituted proceedings on the case on administrative offence of a public official. Therefore, we

believe, with respect to bringing to administrative responsibility of a public official should be established specific limitation periods, taking into account the date of discovery of an administrative offense and date of completion of the administrative and legal dispute. Naturally, remains unchanged the position on that the day of an administrative offense shall be considered the day when this or that unlawful deed is completed.

Consideration of the circumstances affecting the application of administrative penalties to public officials would not be complete if we had not referred to such circumstances of an administrative offense, as the fulfillment by a public official an order or instruction. For example, the obligation of execution of orders and instructions by public civil servants is enshrined in article 15 of the Federal Law No. 79-FL from July 27, 2004 on the Public Civil Service of the Russian Federation. However, the same article prohibits public civil servant to execute unlawful order. Upon receipt of the leader order, which, according to a civil servant, is unlawful, a civil servant must submit a written justification of illegality of the order with an indication of the provisions of the Russian Federation legislation, which may be violated in the execution of this order and receive confirmation of this order from the head in writing form. In case of confirmation of this order in writing form by the head the civil servant is obliged to abandon its execution.

A similar norm for municipal employees exists in the Federal Law No. 25-FL of March 02, 2007 on Municipal Service in the Russian Federation (see part 2 of article 12).

Considering the duties of civil and municipal servants stipulated by the mentioned laws and judicial practice on administrative and legal disputes we come to the conclusion that the delinquency of deeds of these public officials is directly related to failure to perform their official duties imposed upon them by law. The question arises as to whether to establish a form of guilt of public officials in cases of non-performance of their job (service) duties? What other evidence of guilt in these cases is necessary?

Certainly, the practice is based on science. In science, there is no single theoretical and legal concept of justification of application responsibility "regardless of fault", which leads to a formal use of objective imputation.

Moved from the criminal law to administrative law psychological theory of guilt, in our opinion, is not universal and unconditional for all the subjects of administrative law. It seems to us, in administrative law should be developed its own theory of the offender guilt. Content of articles of the Code on Administrative Offences of the RF with heading "Form of guilt" reveals, in our opinion,

the classification of offenses, depending on the volitional and intellectual mood of a delinquent at the moment of his illicit act. The legislator has proposed to law enforcer artificial structure of forms of guilt, when in fact the content of article 2.2. of the Code on Administrative Offences of the RF deciphers the types of administrative offenses (gives their classification) depending on the taking place intellectual and volitional moment of a delinquent at the time of committing illegal actions.

We believe that in the administrative law the concept definition of guilt should not be limited by mental attitude of delinquent to his deed. And an indication of guilt as a necessary condition of legal liability is the functional purpose of guilt, as a category of law. Fault - a category of social society, the rules of the existence of which are governed by various rules including legal ones. In isolation from society, the concept of guilt does not exist. And above all, fault - an assessment by society of committed actions. On the basis of these views, let's formulate our own concept of guilt.

Fault – this is a socio-legal category that reflects the condemning (blaming) subjective assessment of deed (actions or inactions) of a physical person, committed in violation of social norms and rules of conduct with particular volitional and intelligent aspect, which characterizes the deed as intentional or reckless, as well as wrongful actions of a legal entity, entailing legal liability.

This concept does not contain any contradictions in the case of various assessments of deeds by a delinquent himself and by persons exercising administrative jurisdiction, judges and other persons – participants of tort legal relations. Society by means of the laws determines the procedure of establishment of guilt, authorized persons establishing guilt, as well as deeds and conditions of their commitment (deliberate or careless), which are condemned by society. And the final decision on the guilt of a delinquent in case of a dispute is taken by a judicial authority.

In the context of the given by us concept of guilt it is not correct to speak about the existence of forms of guilt. Intent and negligence is a form of manifestation of an offense rather than a form of guilt! The need for differentiation these forms of manifestation of guilt related, in our opinion, with a view to impose differentiated offender's penalties, depending on the taking place volitional and intellectual aspects of the offender in a particular tort. However, in most cases in the administrative and tort legislation the type of tort does not matter that was noted by B. V. Rossinsky: "In the articles of the Code on Administrative Offences of the RF and the laws of the RF subjects, establishing administrative responsibility, a form of guilt is more often

not indicated. According to the articles administrative liability arises, regardless of the form of guilt… In some cases, although the form of guilt is not directly established by the legislator, indirectly, it is clear from the nature of the deed… However, sometimes the wording of an administrative offense expressly says that it can be committed only in the form of intent or only in the form negligence" [5, 618-619].

We believe that wine, as a socio-legal category has been introduced as a requirement of legal liability occurrence to implement in the law enforcement activity the presumption of innocence. The implementation of this presumption requires a certain course of actions of the subjects of administrative jurisdiction, which are obliged to collect sufficient evidence on the subject of proof and compliance with the rule of law in procedural actions. Therefore, in tort relations is important not only to the mental attitude of delinquent to a deed and its consequences (i.e., not his subjective assessment), rather assessment of authorized by law subject of administrative jurisdiction the delinquent's offense in terms of forms of guilt manifestation. This statement has a definite sense in view of the fact that the delinquents, as practice shows, if there are sufficient and absolute evidence of their guilt, continue to assert their innocence.

We believe that in cases of guilt assessment by a delinquent – a physical person it should be kept in mind not a very guilt, but feeling of guilt i.e. the delinquent awareness of the guiltiness of his actions. In this context (sensory perception of guilt), it is rightly so the assertion of legal scholars on the absence of guilt(feeling of guilt) by collective entities of law (legal entities).

However, in our opinion, the fault of a legal entity (in our concept of the fault) can be implemented in both intentional actions and the actions by negligence, due to the intentional acts or acts by negligence of its officials (authorized representatives of the collective entity of law). This rule is valid in the tax area. In accordance with part 4 of article 110 of the Tax Code of the RF the organization guilt in the commission of a tax offense is determined by the fault of its officials or its representatives, actions (inactions) of which resulted in the commission of the tax offense.

Proposed by us transfer of guilt from the field of mental sensations to the area of objectively possible conduct of subjects in the field of legal relations governed by public law is not a novelty in the law. Civil law has in this matter the relevant experience, when the real conduct of participants of property turnover is compared with the requirements of the diligence and prudence which should be exercised by an attentive and bona fide entity.

We agree with A. M. Huzhin that "the existing in the modern judicial practice provision on the possibility application of legal liability "without establishment of guilt" is not equal to objective imputation" [6, 188]. Everything that the specified author said for civil law is relevant for the public sectors of law.

Code on Administrative Offences of the RF contains a number of articles with administrative offenses in which the liability volume is of unconditional nature (proving of innocence is formal, as even casual actions are imputed to a delinquent). However, in law-enforcement practice may be a decrease in the amount of liability in connection with the establishment of the circumstances of extreme necessity, as well as mitigating circumstances.

Unfortunately, currently in administrative law there is no theoretical-legal conception of justification the application of liability regardless of fault. Attempt to prove the necessity of bringing to administrative responsibility separate entities of law regardless of guilt has been made by us at the consideration of the subjective aspect of administrative offences of public civil servants [3]. We believe that bringing to administrative responsibility regardless of fault may take place with respect to collective subjects – legal entities. Foundations for the considered are laid down by legislator in the articles of the Code on Administrative Offences of the RF with the formal structure, which in fact presume the guiltiness of an illegal action, and the proceedings on the case on an administrative offense in such cases are limited to checking circumstances which exclude bringing to administrative responsibility.

Bringing forward the concept of the possible application of administrative responsibility "regardless of fault", we offer to the scientific community to puzzle out the essence of legal structures and concepts, which are the terms of its implementation. For example, the rules of administrative and tort legislation, allowing the possibility of bringing to administrative responsibility without establishing a form of guilt, cannot be identified with responsibility without fault. Responsibility without establishing a form of guilt should occupy an intermediate position between the "strict legal liability" based on the presumption of guilt, and "soft legal liability" based on the presumption of innocence.

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