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CONTINUING OR LATENT ADMINISTRATIVE OFFENCES?

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Analyzing the issues of application the provisions on a continuing offense in the context of determining limitation for bringing to administrative responsibility and views of jurists on overcoming collisions of private and public interests, the authors propose a new approach to the calculation of the terms of the limitation of actions in the administrative and tort legislation – based on the division of offenses to public (open) and latent (hidden) administrative offenses.

Key words: administrative offences, administrative responsibility, Limitation for bringing to administrative responsibility, continuing offences, latent offences, limitation of actions.

Lately, scholars and practitioners have frequently started to refer to the problem of the division of offenses to continuing and not continuing ones [7; 8, 3-12; 9, 189-190; 13; 15, 63-67; 14, 151-153; 10, 60-66; 5; 6; 3]. The impetus for this was the Decree of the Plenary Session of the Supreme Court of the Russian Federation No. 5 from March 24, 2005 "On Some Issues Raised by the Courts in Applying the Code on Administrative Offences of the Russian Federation" [2], the content of paragraph 14 of which sparked a wave of criticism.

There are two provisions of the Decree that have caused criticism from scientists.

First – a range of acts, which may contain a legal obligation, long-term nonperformance or improper performance of which is a continuing administrative

offense. In this Decree is provided a definition of a continuing offense, which "is recognized as an administrative offense (action or inaction) expressed in a long never-ending non-performance or improper performance of duties imposed on an offender by law". Analyzing the mentioned Decree D. N. Bakhrakh noted the need to add this definition with the words "or adopted on its basis subordinate acts" [7]. The next two decisions of the Supreme Court of the Russian Federation indicate a sequential formation of a clear position: so, the Decree of the Presidium of the Supreme Court of the Russian Federation from February 27, 2008 "Review of the Legislation and Judicial Practice of the Supreme Court of the Russian Federation for the fourth quarter of 2007" clarifies that provision of paragraph 14 of the Decree No. 5 from March 24, 2005 is applicable also in cases where the time limit for performing a duty is established by not only a normative legal act, but also by another act, including an order of an authority exercising state supervision. Later the Plenary Session of the Supreme Court of the Russian Federation in its decision No. 23 of November 11, 2008 "On Amendments to some Decisions of the Supreme Court of the Russian Federation" has enshrined a broader concept of acts that impose obligations on an offender, having specified that "such obligations may be also imposed by another normative legal acts, as well as non-normative legal acts, for example, recommendation of a procurator, order of a body (official) performing state supervision (control)" [3].

In the first legal collision resolution should be noted matching and consistent positions of scientists and law enforcement to determine the range of acts that could contain a legal obligation, long-term non-performance or improper performance of which is a continuing administrative offense.

Second – wording of the definition of a continuing offense in part of exclusion of offenses consisting in non-compliance with provided by legal acts obligation by the deadline.

According to V. I. Popova the Decree of the Plenary Session of the Supreme Court of the Russian Federation No. 5 from March 24, 2005 "On Some Issues Raised by the Courts in Applying the Code on Administrative Offences of the Russian Federation" "has not clarified, but confused the considered issue" [17, 50].

The wording contained in the Decree of the Plenary Session of the Supreme Court of the Russian Federation has put many control bodies employees in a difficult position. How can it be that the offense has been committed, the duty is not performed, but there is no possibility to bring an offender to administrative responsibility?

Not only law-enforcers, but also scientists who study administrative law started the search for an acceptable solution. We should take note of proposal of D. N. Bakhrakh to rediscover an offense and draw up a new record on administrative violation if the statute of limitation for an offenses has expired, but the obligation has not been executed and the offense is continuing, because "no matter, why in due time the offender has not been punished, continuing even after the drawing up a record, in other words, willful violation of the law must not remain unpunished" [7]. S. V. Yaroslavtseva takes the same position in relation to paragraph 14 of the Decree of the Plenary Session of the Supreme Court of the Russian Federation No. 5 from March 24, 2005. She recognizes the idea provided by D. N. Bakhrakh "progressive in terms of theory" [20, 34] and calls to "consider a period of bringing to administrative responsibility for a continuing offense unexpired, if at the date of passing resolution on bringing to administrative responsibility the circumstances that caused the bringing to such responsibility have not been eliminated, regardless of when it was firstly discovered" [20, 36]. Despite the fact that the "obligation of compulsory payments does not lose its validity and after failure to comply with it in the prescribed period" [12, 41], such a conclusion, taking into account its binding to the existing wordings of the objective side of many administrative offenses, is very similar to the famous phrase of Zheglov: "If the Brick is a thief – his place in prison, and people don't care about the way I will put him in there".

A somewhat different approach to the solution of this problem has L. Yu. Plotnikova. She forms the following definition of a continuing offense – it is "a detrimental to the legally protected public relations action or inaction that is committed continuously for a long time, expressed in non-performance or improper performance of obligations assigned on the subject of administrative law and / or accompanied with a subsequent non-performance or improper performance of obligations assigned by the rule of law after the deadline that stops with its suppression or independent decision to terminate"[16, 55].

She also suggests to change the calculation of the limitation periods to administrative offenses, using the wording adopted in the Criminal Code of the RF, namely, "calculate from the date an offense was committed prior to the entry of a decision on the administrative offense in force, including the time that has elapsed before the discovery of the offense" [16, 55]. Mechanistic approach to copying the achievements of criminal and criminal procedural sciences to the legislation on administrative responsibility seems to be unreasonable.

In the considered approaches to the resolution of the called legal collision through the updating of the concept of a continuing administrative offense seems

unreasonable unification of various deeds under a single concept of a continuing offense: violation of order, breach of conditions, violation of rules, violation of requirements and deadlines [8, 3].

If the attribution of the first four types of violations to continuing offences is not in doubt, the latter is unlikely to be considered as such. Describing continuing offenses P. P. Serkov focuses at the absence of qualifying signs of time and place of a not exercised legal obligation. He notes that their absence does not allow "to determine the end of the objective side of an administrative offense" [18, 3]. On the basis of the fact that it is possible to place on record the start of the limitation period of bringing to administrative responsibility at the termination or suppression of failure to comply with a legal obligation P. P. Serkov concludes, that there is a long-term continuing non-performance of obligation imposed by law before the occurrence of these two circumstances. In case of breach of an obligation by a certain deadline, the sign of time is available [18, 3]. Therefore, there is no reason to classify such an offence as a continuing one.

It should also be noted that if at committing an administrative offence there is a possibility to suppress it by state bodies or still it may be possible to stop its commission by the very person, it is a continuing offense. This is a characteristic feature of continuing offences. If there are not such possibilities, because the offense has been actually over when it has been started – then this is a usual offense [10, 65]. Many articles of the Code on Administrative Offenses of the RF are formulated in such a way that you cannot prevent or stop an offense, you can only reveal it. For example, article 15.5 provides for responsibility for violation of deadlines stipulated by the legislation on taxes and fees for submission a tax return to the tax authority at the place of registration. With the submission of a tax return beyond deadline the situation does not change – the term is broken simultaneously with the beginning of the day following the day when the duty has to be performed. A. Zharov points at another set of elements of an administrative offense which cannot be detected by oversight bodies within the prescribed time limits to bring the perpetrators to administrative responsibility [11, 52-54]. Violation of article 67 of the Labor Code, which requires the employer to conclude an employment contract with an employee in writing, no later than three working days after the actual admission of the employee to work. Responsibility for this offence is stipulated by part 1 of article 5.27 of the CAO RF. Indeed, the application in court instances interpretation of continuing offenses, which is given in paragraph 14 of the Decree of the Plenary Session of the Supreme Court of the Russian Federation No. 5 from March 24, 2005, in respect to the situation described by A. Zharov fosters impunity of a flagrant offender.

Analysis of the articles of the Code on Administrative Offences of the RF coupled with criticism of scientists allows drawing a conclusion about inconsistency of wording of some articles of the Code with the theoretically grounded by many scientists concept of continuing offense.

It seems appropriate to use the existing experience for the formulation of the objective side of continuing offenses. For example, as in part 3 of article 16.23 of the CAO RF – "**Failure or breach of the term** (emphasis added by authors) of the report to the customs authority on changing the information specified in the application for inclusion in the register of persons working in the field of Customs Affairs; in part 1 of article 19.7.1. "**Failure to submit** information to the body authorized to perform state regulation of tariffs, if the mandatory submission of information is provided for by normative legal acts for the establishment, changing, introducing or abolition of tariffs, and exercising by this body the powers of control (supervision), **as well as failure to submit the information in terms specified by the authorized body** (emphasis added by authors)".

The formula, describing a continuing offense coupled with the delay in the performance of legal obligations, in the Special Part of the Code could be as follows: "non-performance of a legal obligation and / or violation of the terms of its performance".

Introducing of proposed amendments to certain articles of the Special Part of the Code on Administrative Offences of the RF seems to be more effective measure than the considered in this article means of solution of this legal problem, which consist in making amendments to the General part of the Code in the form of a broader definition of a continuing offense. Adjustment of separate articles of the Special Part of the Code, first, allows a differentiated approach to the establishment of administrative responsibility for non-performance of legal obligations, and second, deprives the possibility of negligent public servants to "draw out" the instituting of an administrative case and its consideration.

However, we believe, that for a rather long time there will be issues in law-enforcement regarding the attribution to continuing offences administrative ones related to the continuing wrongful deed of a perpetrator after the expiry of the deadline stipulated by a norm of public law for performing of a certain obligation.

In common usage, the concept "continuing deed" is considered in terms of time, so artificial restriction in the administrative-tort legislation of category of continuing in time unlawful acts (including after a deadline established for performance of a public-law obligation) in determining limitation for bringing to administrative responsibility quite reasonably causes aversion of some jurists

(scholars and practitioners). In essence, any wrongful deed connected with the failure to comply with the imposed by a norm of law obligation is a continuing in time offense, until the detection of this offense, no matter whether the term of execution of obligation has expired, or such is not enshrined in a norm of law. As we see it, public interests, which are protected by the CAO RF, in the matter of determining continuing offences lie in the other – in bringing to administrative responsibility of perpetrators whose crimes are of latent nature. This is evidenced by amendments of article 4.5, which have been made since the adoption of the CAO RF, and which have increased the number of state-regulated areas, limitation period for which is set at one year or more. It is because of the latency of most administrative offenses has been introduced a rule on the calculation of the statute of limitations from the time of its revealing. However, the wording of this rule in relation to continuing offenses is not successful, due to the fact that the majority of administrative offences are connected to non-performance of public-law duties with established terms of their execution.

As we see it, the legislator has confused himself with the application of category of continuing offenses and got in a stalemate situation, which has no effective solution in terms of concurrent complying with the rights and interests of individuals (limiting of law enforcer's discretion) and ensuring the realization of public interests. In our opinion, the introduction of categories of "public" (open) and "latent" (hidden) administrative offenses to the administrative-tort legislation would remove a number of questions in application of the provisions on the limitation on holding a person administratively responsible. In this case, the category of public administrative offenses will be constituted by those offenses in which the wrongful act of a guilty person is visible for an indefinite number of persons both subjects of an administrative tort legal relation [19, 14-113], and persons who did not participate in this legal relations. Public offense is committed by a delinquent ostentatiously. In this connection, it is easy to reveal it and place on record the time of an event. Setting hard deadlines for an administrative jurisdiction authority to bring to administrative responsibility the person guilty of tort is quite reasonable for the case of a public offense, because the value of any punishment not only in its inevitability, but also in the quickness of its application to a delinquent.

Bringing to administrative responsibility in cases of latent administrative offenses involve primarily the problems of their establishment (revealing). Enumerating by the legislator in part 1 of article 4.5 of the CAO RF of the legislation (covering almost all the chapters of the Special part and regulating the majority of public-law relations in Russian society), in the regulation area of which the limi-

tations for bringing to administrative responsibility is a year or more, shows the understanding that offenses in these areas are of latent nature, and their revealing is only possible in the exercise of control and supervisory activities of the administrative jurisdiction bodies. Different limitation periods in the category of latent offences can be explained by different assessment of the legislator the degree of torts' public danger (harmfulness) and desire of the legislator to punish a guilty person. Given that the procedure for revealing a latent offense may take time, the legislator should be clear how dangerous to leave unpunished this or that administrative offense of this category. As we see it, if there are no victims (private individuals or public formations) and damage to the budget, it is quite possible to limit limitation period for bringing to responsibility for latent offenses to six months (max a year) from the time of revealing (or from the time when the latent offense should have been revealed). In other cases, it would be possible to establish a common preclusive term by analogy with Civil Code of the RF – three years.

In view of the above, parts 1, 2 of article 4.5 of the CAO RF could have the following content:

"Article 4.5. Limitation on Holding a Person Administratively Responsible

1. Decision with regard to case concerning administrative offence cannot be made after two months (on the case on administrative offence, considered by a judge – after three months) from the date of committing a public (open) administrative offense and after one year from the date of detection of a latent (hidden) administrative offense.

2. In the context of this Code a public (open) offense is recognized as an administrative offense, which at the time of its committing was visible (demonstrably committed) for an indefinite number of persons, both for the subjects of administrative-tort legal relation, and persons who did not participate in this legal relation.

Latent (hidden) offense is recognized as an administrative offense, the committing of which is invisible for an indefinite number of persons, and cannot be revealed without implementation of control and supervisory measures of the relevant authorities and officials".

Realizing that this suggestion is an innovation in the administrative-tort legislation, it should be noted that a bunch of definitions of "public (open)" – "latent (hidden)" administrative offense is more effective in law-enforcement than continuing and non-continuing offense, as publicity and latency of an offense are quality characteristics. Delineation of administrative offenses on the grounds of time, carried out in the CAO RF, is unsuccessful and confuses law-enforcement.

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