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ABOUT THE LEGISLATIVE DEFINITION OF THE CONCEPT OF ADMINISTRATIVE OFFENCE[1]

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Noting the shortcomings of the current Code on Administrative offences of the Russian Federation, the author argues the need for its exercising and inadmissibility of selective enforcement. He offers to scientific community to finally close a discussion as to whether an administrative offence a socially dangerous deed or not.

Here is provided an author's correction of the normative definition of the concept of administrative offence.

Keywords: administrative offence, concept of administrative offence, public danger, correlation of crime and administrative offence, signs of an administrative offence.

July 1 of this year marked the 10th anniversary of the entry into force of the Code of the Russian Federation on Administrative Offences [2] (hereinafter –CAO). This period, especially if you add to it 18 years' experience of application the preceding the said legislative act Code of the RSFSR on Administrative Offences [1] (hereinafter – CAO RSFSR), is enough for reaching by the domestic administrative-legal science the new level of understanding of the essence and social destination of administrative responsibility in the state, which has called itself constitutional. This, unfortunately, is not happening. Continuing to take place low elaboration,

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inconsistency, and even the erroneousness of a number of conceptual provisions of CAO do not leave any doubt that the theory of administrative-tort law, at least, to the extent to which it is opened up by the developers of CAO and almost two with a half hundreds of corrective federal laws, still is at stop, more precisely goes round in circles. In support of such a disappointing conclusion, I would like to focus only on one point – legislative definition of the concept of administrative offense.

Proper legal definition of the concept of administrative offense is extremely important because it is a fundamental reference point for taking by the federal and 83 regional legislators of adequate to social, political-legal realities decisions on bringing to or termination of administrative responsibility for certain deeds.

CAO RSFSR (part 1 article 10) determined administrative offense as "an infringing upon the state or public order, socialist property, rights and freedoms of citizens, established order of management wrongful guilty (intentional or negligent) action or inaction, for which the legislation provides for administrative responsibility".

In accordance with part 1 article 2.1 CAO, administrative offence is recognized as "a wrongful, guilty action (inaction) of a natural person or legal entity, which is administratively punishable under this Code or the laws on administrative offences of subjects of the Russian Federation". Since in the domestic jurisprudence the very term of "encroachment" is usually mated with the words "socially dangerous", it can be argued that the former legislative definition of the concept of administrative offense contained at least a remote hint on such its substantive sign as public danger. The specified hint is absolutely absent in the current legal interpretation of the concept of administrative offence. Such legal regulation allows a number of specialists, including prominent practicing lawyers, to argue that unlike crimes administrative offenses do not fall into the category of socially dangerous deeds (See: Dissenting Opinion of the Judge of the Constitutional Court of the Russian Federation A. L. Kononov on verification the constitutionality of the provisions of article 113 of the Tax Code of the Russian Federation [4]).

Thus, the federal legislator assigns to itself and provides to other subjects of administrative-tort law-making a completely unnecessary, virtually unlimited freedom in the announcement of any unwanted (or only seemingly unwanted) for them deeds of individuals and legal entities as administratively punishable.

I believe that the definition of the concept of administrative offense, as enshrined in part 1 article 2.1 of CAO, was formulated by people who sought to link the norms of CAO with the norms of the Criminal Code of the Russian Federation [3] (hereinafter – CC), but at the same time were not clear about the essence of

the last. Indeed, in accordance with part 2 article 14 CC, action (inaction) is not a crime, although formally containing signs of any deed provided for by CC, "but because of insignificance it does not represent public danger". Hence a simple but wrong conclusion: public danger – sign only of a crime, but not of an administrative offence. Meanwhile, after careful reading the text of part 2 article 14 CC, it can be seen that it deals only with an action (or inaction), which formally contains signs of any deed under CC. The compositions of the majority of administrative offences do not have their analogues in CC. Therefore, part 2 article 14 CC affirming the given by part 1 of the same article description of crime as always socially dangerous deed, in principle, contrary to popular belief, does not deprive, administrative offences of the sign of public danger.

From my point of view, the concept of "action (inaction), although formally containing signs of any deed provided for by CC, but because of insignificance does not represent public danger", covers such deeds, which are neither a crime nor (very important!) an administrative offence. Different understanding would not let proper addressing of the issue of responsibility while the competition of the norms of the Special parts of CC and CAO.

Part 2 article 10 CAO RSFSR contained a rule, according to which administrative responsibility arose if violations provided for by the Code by their nature did not entail criminal responsibility. This rule was not included in its general form in CAO, however, in the wordings of compositions of administrative offences envisaged by 38 articles of the Special part of CAO (articles 5.16, 5.18-5.20, 5.46, 5.53, 5.63, 6.16.1, 6.17, 6.18, 7.27, 7.27.1, 8.28, 10.5.1, 11.1, 11.4, 13.14, 14.12, 14.13, 14.16, 14.25, 14.29, 14.33, 14.35, 15.14, 15,17-15.19, 15.21, 15.24.1, 15.27, 15.30, 19.7.3, 19.24, 20.2, 20.2.2, 20.8, 20.30), it found its enshrining ("if these actions do not contain a criminally punishable deed", "in the absence of signs of crime", "if it does not entail criminal responsibility"). It is noteworthy that at the time of its adoption CAO provided for only 4 articles of this kind. Deprivation of administrative offenses, the compositions of which compete with the compositions crimes, of the sign of public danger ("due to insignificance") will automatically cause the inability of application the relevant rules of the Special part of CC, while the intention of the legislator was just the opposite. In other words, the correlation of crimes and administrative offenses is not a question of presence or absence of public danger, but the question of its nature and extent. However, it might be that the time has come to reconsider existing views on how the conflicts of criminal-legal and administrative-legal norms should be resolved. It seems that in order to ensure effective protection of the rights and freedoms of citizens the issue of what of competing norms – CC's or

CAO's – should be applied in this particular case should be resolved in favor of the latter.

Conclusion that an administrative offense is a socially dangerous deed is also confirmed by coincidence, up to the complete identity, of the tasks of CC (part 1 article 2) and tasks of the legislation on administrative offences (article 1.2 CAO) – "protection rights and freedoms of man and citizen", etc. Noteworthy in this regard also part 2 article 2 CC, according to which the specified code "determines which dangerous to the person, society or the state acts are recognized as crimes". Legislator makes it clear that not all socially dangerous acts are crimes, and there is possible other state-legal assessment of such deeds, including recognition them as administrative offenses.

The authors of CAO found it useful to keep in it the former norm on the possibility of release from administrative responsibility "when a committed administrative offense is insignificant" (article 2.9 CAO). What can underlie the division of administrative offenses into insignificant and, if we may say so, "non-insignificant"? Of course, it is the nature and extent of public danger of deeds. Insignificance is one of the qualitative-quantitative characteristics of such danger. And it had to be announced with certainty that public danger is inherent to administrative offences.

The current legal definition of the concept of administrative offense coupled with the provisions of articles 2.2 and 2.7 CAO, out of which derives the possibility of occurrence of "harmful consequences" of administratively punishable deed, as well as possibility of causing by committing of an administrative offense of "harm to legally protected interests", can be interpreted in the sense that the legislator finally has decided on the corresponding substantive sign of an administrative offense , having abandoned "public danger" in favor of "public harmfulness". It appears that the dilemma of socially dangerous or socially harmful administrative offence, which has long denoted and still seriously discussed in the literature, is completely contrived. In Russian language the word "dangerous" means "capable to cause, inflict some harm, misfortune", and the word "harmful" means "causing harm, dangerous" [6, 89, 388]. In other words, public harmfulness is a materialized public danger of a deed, and it is senseless to seek on this way any differences between crime and administrative offense. Another thing is that the degree of public danger of an average administrative offense, in general, is lower than the degree of public danger of a crime. In the gradation adopted by CC (article 15), administrative offenses could be placed somewhere between "non-grave crimes" and deeds that contain elements of a crime, but because of insignificance not representing public danger.

I hope that from informative point of view the stated above allows us to completely close the debate about whether an administrative offense is socially dangerous deed or not. As the formal act of completion of that discussion can be considered the adoption of the Resolution of the Constitutional Court of the RF No. 9-R from June 16, 2009 "On the Case on Verification the Constitutionality of a Number of Provisions of Articles 24.5, 27.1, 27.3, 27.5 and 30.7 of the 2 Code on Administrative Offenses of the RF, clause 1 article 1070 and paragraph 3 article 1100 of the Civil Code of the RF and article 60 Civil Procedural Code of the RF in Connection to Claims of the Citizens M. Yu. Karelin, V. K. Rogozhkin and M. V. Filandrov", in which, finally, clearly stated that "... the administrative offenses ... unlike crimes entailing criminal responsibility, represent a lower public danger..." [5].

Along with the public danger, wrongfulness is an inherent sign of administrative offence. There is no doubt that it should be enshrined in the legal definition of its concept. Objection is that how it has been done by the developers of CAO.

According to part 1 article 2.1CAO that repeats part 1 article 10 CAO RSFSR, "wrongful … action (inaction) of a natural person or legal entity, which is administratively punishable under this Code or the laws on administrative offences of subjects of the Russian Federation", shall be regarded as an administrative offence. Literal interpretation of this provision leads to the conclusion that the fact of prohibition a deed by the legislation on administrative offenses under the threat of an administrative penalty is insufficient for consideration the deed as an administrative offense; it is required that it has to be additionally recognized wrongful, but, at that, it is not clear by whom.

Some of deeds stipulated by CAO are, indeed, prohibited or declared wrongful by normative legal acts of various legal force, which do not contain norms on legal responsibility (for example, paragraph 2.7 of traffic rules prohibits a driver to operate a vehicle while intoxicated). But there are such (e.g., disorderly conduct), which are textually not defined as wrongful in any of the current normative legal acts, and therefore, do not formally fall under the statutory definition of administrative offense.

It seems that in order to avoid unnecessary doubts, we should get rid of pleonasm that has crept into part 1 article 2.1 CAO through deleting the word "wrongful". Wrongfulness of a deed is fully shown by its prohibition under threat of punishment. The legal definition of the concept of crime was formed exactly on these positions (part 1article 14 CC).

With that said, we can offer for the enshrining in CAO the following definition of the concept of administrative offense:

"Socially dangerous action (inaction) committed by a guilty physical or legal person, which is prohibited by this Code or the laws of the subjects of the Russian Federation under threat of administrative punishment, shall be regarded as an administrative offence".

In conclusion of the present study, it should be noted that CAO to some extent repeats the fate of the Criminal Procedure Code of the Russian Federation, which began to be subjected to extensive changes in just a few days after the adoption. Obviously, the issue of elaboration and adopting a new codified Federal law on administrative responsibility is long overdue.

At the same time, however, we should not forget that the shortcomings of the current law in any way cannot serve as justification for its non-performance or selective enforcement. It is important to understand that strict, exact adherence to the law, as a result of which the society entirely feels the social effect (including negative one that is due to errors or legislator's inadvertence) of its action, is precisely the best way, by which the shortcomings of the law can be eliminated with the least social cost.

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