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ABOUT OPTIMIZATION OF ADMINISTRATIVE-TORT LEGISLATION[1]

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The author proves the need for the third codification of the Code on Administrative Offences of the RF on the basis of comparative analysis of such legal regulation methods as penal prohibition and administrative-legal prohibition in terms of their effectiveness and efficiency in law enforcement practice and the proportionality of the amount of rights restriction, legal guarantees of tort relations participants.

Excessive divergence of a number of administrative-tort norms, their both intrabranch and interindustry competition with the norms of criminal legislation, which negatively impacts on law enforcement practice, is revealed in the article.

A lack of visible border between the upper limit of administrative penalty and the lower limit of a similar criminal penalty, which leads to arbitrary, sometimes illogical laws, is noted by the author.

Keywords: administrative-tort legislation, legislation on administrative offences, code on administrative offences, administrative offences, crimes.

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In countering any form of tort a special role is given to the adjusted, socially-mediated, evidence-based and qualitative legislation. At that, legal norms providing for these or those kinds of responsibility are subject to higher demands both in terms of the possibility of their effective practical application and compliance with the rights and guarantees of participants of tort relations, the fundamental principles of law.

The Russian legislation on administrative offences is quite young. The first codified act devoted to this legislation appeared in 1984. The new Code on Administrative Offences of the Russian Federation (hereinafter CAO RF) has been exercised since July 01, 2002. More than 500 articles of CAO RF formulate compositions of administrative offences and establish administrative penalties for their commission. At that, a considerable number of articles of the Special Part of CAO RF contain description of several compositions, so their total number more than twice exceeds the number of articles of the Special Part.

In addition to CAO RF, the legislation on administrative offences includes laws of constituent entities of the Russian Federation (codes on administrative offences), which also formulate many compositions of administrative offences. So, the code on administrative violations of the Moscow city includes more than 260 compositions of administrative offences.

Basic researches on the analysis and development of administrative-tort legislation, specificity and practical application of substantive and procedural norms began to be carried out mainly at the end of the last century and beginning of the 21 century [1; 2; 3; 4; 5; 6; 8; 9; 10; 11].

Analysis of administrative-tort law-making practices of recent years shows that this activity is very dynamic. CAO RF is regularly updated with new compositions of administrative offences. So, since its entry into force more than 260 amendments and additions have been made, with that separate legislative acts provide for over 800 changes in the articles of the Special part regarding specific compositions of offences and penalties for their commission. In our view, not only an ordinary citizen, but also a lawyer-specialist cannot timely comprehend and keep a close watch on such significant changes.

It seems that the constant, permanent and often hasty legislative reforms do not improve the quality of administrative-tort legislation. Comparative-legal analysis finds excessive contradiction of a number of administrative-tort norms, their both intra- and inter-branch competition with the norms of criminal legislation. This fact, in our view, has an extremely negative impact on law-enforcement practice. The need to distinguish between same-type offenses often leads enforcers to

a specific legal impasse in legal assessment of deeds, sectorial affiliation of which is not only unclear, but also within the existing regulation has received a dual characteristics and accordingly on the merits dual legal nature. It appears that this circumstance may contain a corruption component – presence of a so-called "backlash of discretion", moreover, not because of a lack of regulation, but on the contrary because of excessive, tangled tort regulation.

Let us illustrate the foregoing by specific examples.

Comparison of article 5.38 CAO RF (violation of the legislation on meetings, rallies, demonstrations, marches and pickets) and article 149 of the Criminal Code of the RF (obstruction of meetings, rallies, demonstrations, marches, picketing or participation in them) shows that in case when obstruction or coercion to participation is committed by an official, it must be said about a complete coincidence of the compositions of offence. Reasonable question arises – what responsibility should be applied?

Another example is part 4 article 222 of the Criminal Code of the RF (unlawful sale of civilian smoothbore long-barrelled firearms, firearms with limited lesion, gas weapons, edged weapons, including missile weapons) and part 6 article 20.8 CAO RF (unlawful acquisition, sale, transfer, storing, transporting or bearing of civilian smoothbore long-barrelled firearms or firearms with limited lesion).

In fact, one deed at the same time is recognized as a crime and as an administrative offence. At the same time, on the merits, a legal confusion must be noted – there is criminal responsibility for the illegal sale of gas arms, cold steel weapons, and there is administrative responsibility practically for the same actions in relation to firearms!?

Paragraph b) part 3 article 158 of the Criminal Code of the RF (theft of oil pipeline, oil-products pipeline, gas pipeline) directly "competes" with article 7.19 CAO RF (unauthorized connection and use of electrical, heat energy, oil, or gas). Such examples, unfortunately, are not isolated.

It should be noted that the list of administrative punishments under the current legislation has expanded considerably, and their repressive component has significantly increased.

Article 3.2 CAO RF establishes ten kinds of administrative punishments that may be imposed and applied for commission of administrative offences. Moreover, these penalties vary widely in nature of contained in them deprivations and right restrictions, i.e., in the degree of repressiveness (e.g., warning and administrative detention, administrative penalty and administrative expulsion, etc.). In addition, the volume of right restrictions (deprivations) contained in a particular form of

punishment varies greatly. So, the period of deprivation a special right for various offences can be established from one month to three years; the term of administrative detention from one day up to thirty days, mandatory works from twenty to two hundred hours, and so on.

Obviously, such a wide range of administrative punishments and volume of right restrictions contained in each form of punishment are due to the various degree of public danger of administrative offences (acts that are subject to punishment).

Administrative punishments established by the legislator for this or that type of administrative offence must be commensurate with its danger. The reverse violates the principles of fairness and equality before the law (unfortunately, the general legal principle of fairness has not been enshrined in the legislation on administrative offences, although it most reflects the social essence of law as a fair and effective regulator of social relations).

Analysis of legislation on administrative offenses shows a disproportionality of a range of administrative punishments in respect of public danger of administrative offenses. It is undoubtedly recognized that administrative offenses are different from crimes by lesser degree of public danger. Consequently, imposed for them administrative punishments should have less repressive nature than criminal punishments. Existing situation, in which the maximum size (period) of administrative punishments exceeds the minimum size (period) of similar and identical in nature of right restrictions (deprivations) punishments under the criminal law, appears unjustified and unacceptable. So, in accordance with paragraph 2 article 46 of the Criminal Code of the RF, fines are imposed in the amount of five thousand to five million rubles. Moreover, a fine of more than 500 thousand rubles may be imposed only in certain cases specifically provided for by the relevant articles of the Special Part of the Criminal Code of the RF (CC RF currently contains more than 20 such offenses), except for cases of calculating the amount of fine on the basis of a sum that is multiple of the amount of commercial bribery or bribe (CC RF contains 15 offenses with such sanctions).

At the same time article 3.5 CAO RF under general rule allows imposition on citizens a fine of up to 5 thousand rubles, and on officials up to 50 thousand rubles. At that, there are fines of up to 300 thousand rubles and up to 600 thousand rubles for certain types of administrative offences. Thus, the maximum amount of administrative penalty for individuals is by two orders of magnitude greater than the minimum size of a similar criminal punishment (CAO RF contains more than

450 administrative offences, sanctions of which are greater than 5 thousand rubles, not including penalties involving calculation of fine at times).

This situation leads to the blurring of borders between administrative offences and crimes. Judging by the sanctions of some articles of the CC RF and CAO RF, public danger of certain administrative offences is estimated by the legislator higher than public danger of crimes with similar signs. So, insult contained in a public speech provides for administrative punishment for citizens in the amount from 3 to 5 thousand rubles, and for officials from 30 to 50 thousand rubles (part 2 article 5.61 CAO RF), and public insult of a representative of authority is punishable by a fine up to 40 thousand rubles (article 319 of the Criminal Code of the RF), i.e., an administrative offense (insult) committed by a citizen is estimated by the legislator in respect of the degree of public danger similarly to the lowest bound of the degree of public danger of a crime (insult of a representative of authority), and offence committed by an official is estimated as superior to the degree of public danger of a crime (similar disparity can be found in correlation of sanctions of other articles of the Criminal Code of the RF and CAO RF, which, in addition to fines, also provide for other punishments. For example, part 4 article 20.2 CAO RF and article 214 of the Criminal Code of the RF and other).

Such distortions in the process of criminalization of deeds can be avoided by introducing amendments to the norms of the general parts of CAO RF and Criminal Code of the RF that establish the types and amounts (periods) of punishments. Their essence is the "moving apart" of upper bounds (limits) of administrative punishments and lower bounds of similar criminal punishments, i.e. between them should be left a "gap", a kind of space, not allowing the legislator to overstate the degree of public danger of an administrative offence up to the level of public danger of a crime. The solution to this problem is possible by lowering the upper bounds of the amounts (periods) of administrative punishments or increasing the lower limits of criminal punishments. Simultaneous concerted modification of administrative-tort and criminal legislation is also possible.

If however, in the opinion of the legislator, public danger of a deed really requires punishment, which is similar in nature and size to a criminal punishment, it is obvious that such deed is subject to subsumption to administrative offense, and not subject to criminalization.

The current situation, in which an administrative offense entails punishment that is by nature and amount (period) equal to criminal punishment or even exceeds it, significantly violates the principles of justice and equality before the law.

In fact, the same legal consequences affect persons who have committed an administrative offence and a crime, and this seems unfair.

In addition, bringing to administrative responsibility does not involve special procedures and procedural guarantees of legality and justification of bringing to responsibility that are inherent to criminal process (solely judicial process; preliminary investigation; approval of a prosecutor's indictment, act, decision; special procedure for the appeal against actions and decisions of a person conducting investigation, prosecutor, etc.). That is, the same (similar in essence) punishments provided for the commission of a crime and administrative offence are applied to offenders under different procedures and different procedural guarantees of legality and justification for their application. This situation cannot be considered acceptable because it is contrary to the principle of equality before the law.

In addition to creation of legal prerequisites for implementation of the principles of justice and equality, making the above amendments to the legislation would facilitate optimization of the processes of subsumption to administrative offense and criminalization of socially dangerous deeds, more reasonable legislative assessment of the degree of their public danger and, accordingly, establishment of adequate punishments.

In the absence of precise and strict criteria allowing flawless determination the degree of social danger of a deed referred to administrative offense and establishment of appropriate administrative penalty it is necessary to compare the deed, which is subject to subsumption to administrative offense, with other administrative offenses and crimes. The presence of visible border between the upper limit of administrative punishment of and the lower limit of similar criminal punishment will help the legislator to most adequately estimate public danger of a deed and decide on the need for establishing of administrative or criminal responsibility for its commission, establish the optimal type and amount of punishment. The absence of such a boundary generates arbitrary, sometimes illogical legislative settings.

So, in presence of the norms of the Criminal Code of the RF that provide for responsibility for intentional infliction of light injury, which has caused temporary damage of health, in the form of fine of up to 40 thousand rubles or compulsory works of up to 480 hours (article 115 CC RF), and for wilful destruction or damage of other people's property, if these acts involved the infliction of considerable damage, in the form of fine of up to 40 thousand rubles or compulsory works of up to 360 hours, the legislator attributes to administrative offences deeds associated with the violation of established order of organizing or holding meetings, rallies, demonstrations, marches and picketing, which have caused harm to human health

or damage to property, if such deeds do not represent a criminal offence, and establishes for their commission a fine on citizens from 100 thousand to 300 thousand rubles or mandatory works for up to 200 hours; on officials – a fine from 200 to 600 thousand rubles (part 4 article 20.2 CAO RF). A similar norm that provide for a fine for citizens from 150 thousand to 300 thousand rubles and for officials from 300 thousand to 600 thousand rubles is contained in part 2 article 20.2.2 CAO RF.

Comparative analysis of the norms contained in articles 115 and 167 of the Criminal Code of the RF and articles 20.2 and 20.2.2 CAO RF indicates that infliction of injury to a person or damage to property, which does not contain signs of a crime, the legislator has estimated as more socially dangerous than crimes under articles 115 and 167 of the Criminal Code of the RF, and there are established punishments for individuals in the form of a fine, the amount of which is 15 times higher than the maximum fine for the relevant crimes, and the period of compulsory works is more than 3 times higher than the minimum period of compulsory works, which can be imposed for these crimes.

Differentiation of amounts (periods) of administrative and similar criminal punishments would allow the legislator through comparing the public danger of a deed subject to subsumption to administrative offense with the public danger of already criminalized similar deeds to properly assess the degree of this danger and establish corresponding administrative punishment (or make a justified decision on the need to criminalize such a deed).

So, the foregoing indicates a need for significant adjustment to the administrative-tort legislation with taking into account new, evidence-based approaches that are based on fundamental principles of law, social conditionality of responsibility and its commensuration with the damage inflicted.

Often the haste in adopting and insufficient elaboration of laws providing for criminal and administrative responsibility leads, as a rule, to the need to repeal in future unconstitutional provisions of these legislative acts by the Constitutional Court of the Russian Federation. A rather recent example is the Decision of the Constitutional Court of the Russian Federation on the case about the verification of constitutionality of the Federal Law No. 4-P from February 14, 2013 "On Amendments to the Code on Administrative Offences of the Russian Federation and the Federal Law "On Meetings, Rallies, Demonstrations, Processions and Picketing".

If you carefully consider other same-type tort institutes, you can find the following paradoxical moments.

Period of limitation for the institution of administrative proceedings for certain offences is 6 years, and for non-grave crimes – 2 years.

However, there are almost two times more mitigating circumstances in the Criminal Code of the RF than in CAO RF. At the same time, CAO RF contains circumstances that aggravate responsibility, which are not provided for in the Criminal Code of the RF. For example, commission of administrative offence in a state of intoxication. Another paradox. If you commit a theft in this state up to 1 thousand rubles – an aggravating one, and if more than 1 thousand rubles, it is not recognized as an aggravating circumstance?!

These examples, and many others, including concerning procedural elements of responsibility, procedural guarantees, indicate the need for further improvement of legislation with taking into account a balanced model of interaction of administrative and criminal responsibility. We should fully support the position of A. P. Shergin about the root idea of further integration of criminal and administrative responsibility, which should govern the common efforts for the system research of counteraction of crime and administrative delinquency [14, 20].

It seems that such methods of legal regulation as a penal prohibition and administrative-legal prohibition need further understanding in terms of their effectiveness and efficiency in law-enforcement practice on the one hand, and the proportionality of the volume of right restrictions, legal guarantees of tort relations participants – on the other. Here we come to the problem of technology of scientific elaboration and preparation of corresponding draft legislative acts and we are fully in agreement with the opinion of the leading scientists about the need to the batched consideration of offenses' structures and thorough joint scientific elaboration of these issues both by criminal law experts and legal scholars [14, 18].

Scientific community actively discusses the idea of introducing the institute of criminal misconduct and establishing the criminal liability of legal persons. The implementation of these ideas would, in our view, unload CAO RF, which is overloaded with relevant compositions – especially related ones, with increased public danger, with serious sanctions.

If these idea is not brought to its logical conclusion, do not get embodiment, in addition to serious improvement of substantive issues of legislation on administrative offenses, there will be a need for optimization of the procedural component of the legislation in terms of a significant increase in the procedural rights and guarantees of administrative-tort process participants, compliance with the fundamental principles of law, including constitutional principle of adversarial proceedings within the framework of judicial review of cases on administrative offenses.

We should express solidarity with the opinion of N. G. Salishcheva on the need to ensure the stability of the legislation on administrative offences [7, 30-31]. But

her proposal in this regard about introduction of fundamentally significant changes to the current version of CAO RF on the basis of system scientific analysis will not solve, in our view, the problem. Further serious optimization of administrative-tort legislation is possible only in the case of adoption of new third codification [12; 13].

In this connection, should intensify a debate about the need for the third joint or separate codification of substantive and procedural norms of the legislation on administrative offences with a view to the further development of relevant drafts, their elaboration and active support in the special-purpose committees of the State Duma of the Federal Assembly of the Russian Federation.

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