From the editors of the magazine.

The present article was firstly published in the proceedings of the II All-Russian scientific-practical conference held in the settlement Nebug, Tuapse district of Krasnodar region on October 5-7, 2007 under the theme «The theory and practice of administrative law and procedure». Critical views of the author on administrative and tort legislation of Russia set out in the article, in the opinion of the editorial board, are worthy of attention after five years from the date of bringing them to public disclosure. In respect that the materials from the annual conferences of administrative jurists are not available to a wide range of people, the editors, with the consent of the authors, will publish in the journal «The topical issues of public law» the most interesting and not losing relevance articles.

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DOMESTIC LEGISLATION ON ADMINISTRATIVE RESPONSIBILITY: ILLUSIONS OF PERCEPTION

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Outlines critical views on some of the approaches of the legislator in adopting laws on administrative responsibility, provides an alternative assessment to the normative consolidation of administrative and tort legislation principles, the objectives of administrative punishment, and in general to the process of codifying the legislation on administrative offenses.

Keywords: administrative responsibility, administrative offences, legislation on administrative responsibility, presumption of innocence, administrative punishments.

Many have seen the so-called picture-changelings when the same graphic image from one angle is seen, for example, a princess, and from another – the old woman. Psychologists call this effect the illusion of perception. Without going into the details of the nature of this effect, I will note only that it is caused as by a specific construction of human attention, and by features of the perceived object.

The same associations I have when analyzing the Russian legislation. Emerges a feeling that the deputies regard adopted laws as samples of perfection although in fact they are not such.

Several years ago, on the pages of the magazine "Juridicheskaja mysl'" there was a rubric suggested by Professor V. D. Sorokin: "Reportages from the country of legal thoughtlessness". Unfortunately, the state of domestic legislation on administrative offenses is such that the rubric may be in demand for a long time.

In Russia they always say: "Beautiful babies are born from great love." I think that the "birth" of the qualitative laws is hardly possible when indifferent pragmatic attitude of legislators towards their future "baby".

Code on Administrative Offences of the RF (hereinafter CAO RF) was adopted in December 2001, only at the second attempt, a year after the rejection of the previous edition by the President of the Russian Federation. However, the time "wasted" by deputies on rework of the CAO RF, did not make it more perfect. Frankly, such a conclusion is not very easy to make in relation to the Code, the adoption of which we all have been waiting for, and which, no doubt, has become a step forward in the development of domestic administrative and tort legislation, but I am deeply confident in its legitimacy and at our last year conference was justifying my position on the issue [12, 31-44].

I remind that at that time it was a disagreement with the legislator on a number of fundamental, in my view, moments, in particular, with the name of the Code, which by its content would rather be called as Code on Administrative Responsibility; with the concept of "a legal entity guilt" and also with that the content of article 2.1 of the CAO RF in reality expresses the position that guilt is a mandatory feature of an administrative offense, committed not only by a physical person, but also by a legal entity; with absence of a legal concept of "an administrative offense structure" and its elements, that is conditioned by the need to increase informational awareness of citizens who do not have legal education, and also with the fact that one of conditions for compliance with the law by the citizens is their understanding of the essence of legal norms.

I do not know how the expression "constant dropping wears away a stone;" applies to the field of jurisprudence, but the desire to "reach out" lawmakers

does not leave me. Because of that, again, I want to draw attention to some legal novelties, which I perceive as illusions of the legislator.

The first illusion: with the adoption of the Code on Administrative Offences of the RF has been overcome the decodification of legislation on administrative offenses.

Let me remind that in 1999 in the article "On the two trends that destroy the integrity of the administrative responsibility institute" [16, 46-54] Professor V. D. Sorokin wrote: "The first destructive tendency is manifested in a kind of "erosion" the single legal framework of administrative offenses, and consequently the integrity of the very category of administrative responsibility. Practically this is the case, that in the last few years, many structures of administrative offences turned outside of the Code on Administrative Offences".

Code on Administrative Offences of the RF incorporated the norms on administrative offenses, formerly contained in the number of codes (see e.g.: articles 230-289, 291-299, 306-366, 368, chapters 49-51 of section X, chapter 63 of section XIV of the Customs Code of the Russian Federation [3]; paragraphs 2 and 4 of article 66, paragraph 2 of article 73 of the Town Planning Code of the Russian Federation [1]), dozens of laws [4, 5, 6], and even decrees of the Presidium of the Supreme Council of the RSFSR [7, 8, 9]. Therefore, the provision of part 1 article 1.1 of the CAO RF, which determined that the legislation on administrative offenses consist of this Code and adopted in accordance with it laws on administrative offences of subjects of the Russian Federation should instill optimism. Its text literally implies the following: the norms which contain structures of administrative offense cannot be and should not be outside of the CAO RF and the laws of the subjects of the Russian Federation on administrative offences. However, the analysis of federal legislation proves the opposite. The Budget Code of the Russian Federation (articles 281-284), Tax Code (articles 116-120, 122, 123, 125, 126, 128), the Federal Law No. 119-FL of July 21, 1997 (as amended from 26.06.2007) "On Execution Proceedings" (articles 85-87), still contain norms that provide for as a matter of fact administrative responsibility.

Having recognized today as a separate type of legal responsibility, for example, tax responsibility to the same extent must be recognized customs, environment responsibility, and so forth, and in the process of formation, for example, medical, sports, space law, we will have to recognize the existence of the medical, sports, space responsibility.

The second illusion: the principle of presumption of innocence enshrined in the CAO RF adequately reflects the Russian society democratization process and the purposes of administrative responsibility.

Firstly, as rightly noted Denisenko E. V., the presumption of innocence principle – it is not impossibility to bring a person to administrative responsibility, but a special procedure to prove the guilt of the person [13, 311]. Indeed, the ascertainment of a person's guiltiness is not the basis for holding him administratively liable, due to the limitations taking place in respect of military servicemen and citizens called up for military training, police officers, bodies of the Criminal-Executive System, the State Fire-Fighting Service, bodies for control over the circulation of narcotics and psychotropic substances, customs authorities; as well as immunity from administrative liability of deputies, judges, prosecutors, some categories of foreign citizens.

Therefore, should be supported the suggestion that along with the presumption of innocence should be legislatively enshrined the presumption of impunity, the main points of which are as follows.

1. An administrative penalty cannot be imposed on a person who is not subject to administrative responsibility.

2. Person who is subject to administrative responsibility cannot be subject to administrative penalty until his guilt of an administrative offense is proven in prescribed by law procedural order and the decision on the case on an administrative offense does not enter into legal force [13, 312].

Along with the foresaid, article 5.1 of the Code on Administrative Offences of the RF attracts attention due to the fact that in accordance with the Federal Law No. 210-FL of 24.07.2007 from the 1st of July, 2008, this article will be added by the following Note: "Note. Provision of part 3 of the article [2] does not apply to administrative offences provided by chapter 12 of the current Code, in the case of their recording by special automatic technical equipment which have functions of photographing and filming, video recording or by equipment of photographing and filming, video recording".

I think the time comes for more detailed analysis and of those changes that accompany the introduction of the note to article 5.1 of the CAO RF. We are talking about the addition from the 1st of July, 2008 of article 28.6 by part 3, which determines the procedure of making and formalization the decision on case on an administrative offense without the presence of the person against whom has been instituted a case on an administrative offense under chapter 12 of the CAO RF, as well as about the addition of article 4.1 of the CAO RF by part 3.1, which imperatively establishes obligation of imposing for a specified category of cases, the smallest administrative penalty within the sanctions of applied article of the Special part of the CAO RF.

I do not mind the changes that really clarify certain procedural actions or lead

to reduction in the discretion limits of law-enforcement officials, but only when it is really justified. However, I'm skeptical about that the exception to the rule only emphasizes the rule. Unfortunately, knowing "our" legislators, there is no guarantee that the mentioned note will not be followed by others exemptions from the scope of principle of the presumption of innocence, which, in the end, will change its originally intended purpose.

The third illusion: the legal age of incurrence of administrative responsibility allows its application to all physical persons who are guilty of committing administrative offences.

Under the general rule laid down in part 1 of article 2.3 of the CAO RF, a person may be a subject to administrative responsibility if at the time of an administrative offense he or she is sixteen years old or older. Of course, that the not reaching a specified age is attributed to the circumstances precluding the proceedings on an administrative offence (clause 2 article 24.5 of the CAO RF). At first glance, this legislators' approach can lead only to the debate on whether to decrease or increase the starting age to bring an individual to administrative responsibility. However, each time considering the provisions contained in part 1 of article 2.3 of the CAO RF, I remember the television program shown by the First Russian TV channel on the 1st of October, 1997. From that day passports were firstly awarded to Russian citizens who are at least 14 years old (previously age was 16 years), and the leaders of the major parties did not fail to take advantage of this event. So, a boy, just received passport of the Russian Federation from the hands of the chairman of LDPR (Liberal-Democratic Party of Russia) Vladimir Zhirinovsky, asks for an autograph from a famous politician, who to universal glee of surrounding makes a record in the passport and displays it on the television camera absolutely not thinking about the fact that in front of millions of TV viewers he has committed an administrative offense under article 179 of the Code on Administrative Offences of the RSFSR (which was in force at that time) "Intentional damage or loss of the passport by negligence". There can be no doubt that the recording was made not by negligence, but namely intentionally, for the purpose of personal PR.

Also in the CAO RF are included the articles which show that the following acts shall be punishable:

- residence or stay of the Russian Federation citizen, who is required to have identity card (passport), without identification card (passport) or by an invalid identification card (passport) or without registration at the place of stay or residence (part 1 article 19.15);
- intentional destruction or damage of ID (Passport) or careless storage of ID (Passport), which caused the loss of ID (Passport) (article 19.16).

Taking the Code on Administrative Offences of the RF, the deputies did not pay attention to such a "trifle" as the fact that according to the decree of the President of the Russian Federation No. 232 from March 13, 1997 "On the main document certifying the identity of a citizen of the Russian Federation" [10] and the decision of the Government of the Russian Federation No. 828 from July 8, 1997 "On approval of the Resolution on the passport of the citizen of the Russian Federation, the blank form and description of the passport of a citizen of the Russian Federation" [11] it is required to have a passport by all citizens of the Russian Federation, reached the age of 14 years old and living on the territory of the Russian Federation. As a result young Russian citizens between the ages of 14 to 16 years old can totally with impunity do with their Passport everything that comes into their heads.

The fourth illusion: goals of imposing administrative punishment are reduced to private and general prevention of administrative offenses.

In accordance with article 3.1 of the CAO RF an administrative punishment is established by the state measure of responsibility for administrative offence and is applied in order to prevent the commission of further offenses by the offender as well as by others. Thus the definition combines the content of administrative penalty and the purpose of its application.

Proposed structure directly indicates of only two purposes, namely private and general prevention. In the traditional understanding of "punishment" is defined as "the measure of impact against the person committed a crime, misconduct" [14, 325]. Thus, the legislator declares the goal to impact only on future behavior of the person committed misconduct, and does not focus attention on the more than obvious goal of prosecution the person for an already committed unlawful act.

The fifth illusion: administrative suspension of activities (remark by the author. Article 3.12 of the CAO RF was introduced by federal law No. 45-FL from 09.05.2005) organically fits in the system of administrative penalties.

In accordance with paragraph 1 of article 3.1 of the CAO RF, the administrative penalty is an established by the state measure of responsibility for administrative offence... In other words, not committing of an administrative offense should not lead to administrative responsibility. However, the legislator does not think so.

In part 1 article 3.12 of the CAO RF is established that "administrative suspension of activity is a temporary cessation of the activities of persons engaged in entrepreneurial activities without forming a legal entity, legal entities, their branches, representative offices, structural subdivisions, production sites, as well as operating machines, facilities, buildings or constructions, performing specific activities (works), provision of services." Formally, this measure can be considered

as a measure, the application of which is associated with undergoing by persons to whom it is assigned some discomfort, what is inherent to measures of administrative punishment. However, its imposing is provided not only "in the case of an administrative offense in the field of trafficking narcotic drugs, psychotropic substances and their precursors, in the field of countering the legalization (laundering) of proceeds of crime and terrorist financing, in the field of restrictions on the exercise of certain activities established in accordance with federal law in respect of foreign nationals, stateless persons and foreign organizations, in the field of rules to attract foreign nationals and stateless persons for work carried out on the trading facilities (including hypermarkets), and in the area of urban development activities" but also "is applied in case of a threat to life or health of people, emergence of epidemic, epizooty, infection (contamination) of under quarantine facilities by quarantine facilities, occurrence of a radiation accident or man-made disaster, infliction significant damage to the state or quality of the environment".

Along with the fact that the Code is full of internal contradictions, I have the impression that the legislators do not consider it necessary elementary to read texts of adopted by them laws.

Let me give you an example. Article 23.3 of the CAO RF established jurisdiction of cases on administrative offenses to internal affairs bodies (police). In part 1 of the article in the list of cases on administrative offences, consideration of which is implemented by the bodies of internal affairs (police), in the original version was included article 6.8 establishing the administrative responsibility for the illegal purchase, storage, transportation, manufacturing, processing, without the purpose of sale of narcotic drugs, psychotropic substances or their analogues. However, in part 2 of this article legislator "forgot" to determine who of officials of the law enforcement bodies (police) are entitled on their behalf to consider such cases. In other words the decision to impose an administrative penalty under article 6.8, taken by any official of internal affairs body (police), including its head, must be regarded as rendered by an unauthorized by law person. This misunderstanding was terminated only when article 6.8 of the CAO RF was withdrawn from the jurisdiction of the internal affairs bodies (police) and attributed to the jurisdiction of judges.

Among the officials authorized on behalf of the internal affairs bodies (police) to consider cases on administrative offenses the CAO RF classifies senior district inspectors, district inspectors (paragraph 9 of Part 2 of article 23.3), although the staffing of city and regional law enforcement bodies does not have such positions, but there is – the senior district commissioners of police and district commissioners of police. Strictly speaking, any lawyer can easily appeal the decision taken by senior

district commissioners of police or district commissioners of police, as rendered by an inappropriate person, i.e. a person not named in the law.

By this the misadventures regarding competence of officials of the internal affairs bodies (police) in respect of consideration cases on administrative offences assigned to their jurisdiction, are not limited.

In accordance with paragraph 3 of part 2 of article 23.3 of the Administrative Code, the duty shifts' chiefs of front office of linear offices (departments, divisions) of Internal Affairs on transport, chiefs of linear police stations may on behalf of the internal affairs bodies (police) consider cases on administrative offenses provided for in parts 1, 3-5 of article 11.1 and articles 11.9, 11.14, 11.15, parts 1-3 of article 11.17, articles 13.24, 20.1 and 20.20 of the Code. Simultaneously, in part 3 of article 23.3 of the CAO RF is established a restriction of rights of these persons regarding the fact that they have the right to impose administrative penalties only in the form of a warning or an administrative fine of up to three hundred rubles. In the 17 corpus delicti, consideration of cases on which falls within the competence of persons listed in paragraph 3 of part 2 of article 23.3 of the Code, these requirements are fully met by the sanctions provided for in parts 4 and 5 of article 11.1, part 3 of article 11.14, parts 1-3 of article 11.17 (6 corpus delicti), partially met by (for certain types of subjects of an administrative offense) – part 3 of article 11.11, part 2 of article 11.14, part 1of article 20.20 (3 corpus delicti). For other eight corpus delicti sanctions of articles do not provide such a type of administrative penalty as a warning, in addition the minimum size of an administrative fine ranging from five hundred to one thousand rubles. Thus, consideration of cases on administrative offenses formally reduced to the fact that according to the results can be made only a resolution on the transfer of a case, in accordance with paragraph 1 of part 2 of article 29.9 of the Code, to an official of internal affairs body (police) who is authorized to impose administrative penalties of other type or amount.

Quality of legislation of the subjects of the Russian Federation is not much better than federal legislation on administrative offenses. Vivid confirmation of this fact is a regional law of the Rostov region No. 273-3S from October 25, 2002 "On Administrative Offences". Preparation of a draft of the law was entrusted to eminent legal practitioner, who has been working in a regional prosecutor's Office for a long time. However, a good connoisseur of criminal procedure, turned out to be not so experienced in the field of administrative law. I'm not mentioning the name of the author of the regional law, because the reason of the birth of a "stillborn baby" is not the result of his unsuccessful work, but the result of malpractice when drafting of bills and adoption them by non-specialists.

Here is just one example of how a good idea turns in nothing. In accordance with article 2.3 of a Regional law, committing actions that violate the silence and tranquility of citizens, from 11 p.m. to 7.00 am, with the exception of emergency and rescue operations and other emergency operations or other actions necessary to ensure the safety and protection of citizens' rights or functioning vital infrastructure – entails a warning or an administrative fine on citizens in the amount ranging from 100 to 2,000 RUR, on officials – from 500 to 3,000 RUR, on legal entities – from 1,000 to 20,000 RUR.

First of all, attention is drawn to the scatter between the upper and lower amount of an administrative fine: for officials to 6 times, and for citizens and legal persons to 20 times! This raises the question – what purpose did pursue legislators, when they were establishing the sanction? Perhaps they intended to give law-makers wide possibilities in the determination of an administrative penalty taking into account the nature of an offense and individual features of the subject of an administrative offense. But then we can only envy of the imagination, which should have a person determining the amount of an administrative penalty for breach of silence and tranquility of citizens, for example, depending on the noise level in decibels, or, more simply, on the type of noise source: a tape recorder, a car horn, siren etc. Although, this scheme provides a "favorable" situation for municipal officials for trivial abuse of their official position. We are talking about well-known practice, when a guilty person "is suggested" to pay half of the amount in cash of the maximum administrative fine provided for under a sanction of this or that article. Personally, I have no doubt that the provision to an official of the right to take decision at the discretion in inexplicably wide limits indicates a significant corrupt nature of such a law.

Though law-abiding citizens are usually interested not in the problem of the application the rules of law, but another, and, above all, the issue of where and whom to ask for help. It is logical to assume that if at 3 a.m. someone breaches the silence and tranquility of citizens, most of them will call the number "02" (universal police telephone number). And they will do it in vain, as from part 1 of article 11.1 follows that "the right to draw up a record of administrative offense, under this regional law, belongs to officials of the agencies authorized to consider cases on administrative offenses, within the competence of an appropriate body". At the same time the cases on administrative offenses provided by article 2.3 are considered by municipal administrative committee (article 10.7), formed in accordance with the Regional law of the Rostov region No. 274-ZS from October 25, 2002, later Regional law No. 281-ZS of 28.11.2002

"On municipal administrative committees in the Rostov region".

Unfortunately, the number of examples proving the poor quality of national legislation and the appropriate level of legislators is enough to write a separate book.

Sometimes there is a feeling that, like a character of Saltykov-Shchedrin M. E. the city mayor of Glupov City Benevolensky, our legislators firmly believe that "the purpose of making laws is dual: some are issued for the greater nations and countries administration, others – for legislators not to sink in idleness ... ". Frankly, I do not want today's Russia to be covered by ""dusk of laws ", that is, such laws that, with the benefit occupying spare time of legislators, cannot have any inner concern regarding others" [15, 398].

Is it possible to change for the better? Yes it is. In this case, not focusing attention on the fact that the legislative process does not suffer fuss, I note that, to obtain a high quality of laws we need not only the availability of professional knowledge and skills. The legislator should also be guided by the fact that in a constitutional state the priority is given to an individual, his rights and freedoms, and to appreciate the results of his legislative activities, at least not lower than his deputative post. And in case if our "legislators" do not believe that "the purpose of making laws is dual: some are issued for the greater nations and countries administration, others – for legislators not to sink in idleness" and that Russia needs the "dusk of laws ", that is, such laws that, with the benefit occupying spare time of legislators, cannot have any inner concern regarding others" [15, 398].

Frankly I want to be hoped that I was wrong about the true abilities and capabilities of Russian legislators. And if so, then there is a probability that legislative illusions will dissipate gradually.

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