

DOI: <https://doi.org/10.34069/AI/2021.45.09.10>

How to Cite:

Paryzkyi, I., Humin, O., Matvieiev, S., Marchenko, O., & Chukaieva, A. (2021). Administrative offense as deterrent to prove objective aspect in criminal proceedings. *Amazonia Investiga*, 10(45), 99-104. <https://doi.org/10.34069/AI/2021.45.09.8>

## Administrative offense as deterrent to prove objective aspect in criminal proceedings

### Адміністративний делікт як стримувальний чинник доведення об'єктивної сторони в кримінальному судочинстві

Received: August 16, 2021

Accepted: September 29, 2021

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#### Abstract

The purpose of the article is to study administrative offense as a deterrent to proving the objective element in criminal proceedings. The research methodology includes the use of general scientific and special methods of scientific cognition: dialectical, epistemological, logical and semantic, system and structural, normative and dogmatic, monographic, legal modeling methods. Research results: The article examines the problems of co-existence of administrative and criminal offenses. The signs of delimitation of these illegal acts are determined, as well as difficulties in defining and differentiating between administrative and criminal offences are established, which creates legal gaps and conflicts. The problem of administrative offense as a deterrent to proving the objective element in criminal proceedings is described. Practical implications: The main obstacles to legal accountability related to the consideration of administrative offenses are identified. Value / originality: The ways to overcome the above problems are proposed.

#### Анотація

Метою статті є дослідження адміністративного делікту як стримувального чинника доведення об'єктивної сторони у кримінальному судочинстві. Предмет дослідження: Предметом дослідження є адміністративний делікт у кримінальному судочинстві. Методологія: Методологія дослідження включає використання загальнонаукових та спеціальних методів наукового пізнання: діалектичного, гносеологічного, логіко-семантичного, системно-структурного, нормативно-догматичного, монографічного методів, методу правового моделювання. Результати дослідження: У статті досліджено проблеми співіснування адміністративних деліктів та кримінальних правопорушень. Встановлено ознаки відмежування цих противоправних діянь та одночасно виявлено складність визначення та розрізнення адміністративних та кримінальних порушень, що створює правові прогалини та колізії. Охарактеризовано проблему існування

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**Keywords:** administrative liability, administrative offense, criminal liability, criminal offense, criminal proceedings.

адміністративного делікту як стримувального чинника доведення об'єктивної сторони в кримінальному судочинстві. Практичні наслідки: З'ясовано основні перешкоди у притягненні до юридичної відповідальності, пов'язані із розглядом адміністративних деліктів. Цінність / оригінальність: Запропоновано шляхи подолання вищевказаних проблем.

**Ключові слова:** адміністративний делікт, адміністративна відповідальність, кримінальна відповідальність, кримінальне судочинство, правопорушення.

## Introduction

Nowadays, the legislation on administrative offenses is undergoing numerous changes, accompanied by the decriminalization of many illegal acts related to the abolition of criminal liability for certain offenses, as well as making criminal offences administrative offenses, because often the punishable acts (crimes and misdemeanours) are similar, the boundaries between these public law torts are blurred and difficult to define. This causes certain complications due to human rights violations, or failure to adequately protect violated rights. In view of this, the possibility of considering illegal acts as administrative offenses, rather than criminal offenses, is a deterrent to proving the objective element in criminal proceedings, which as the consequence of not incurring responsibility may have a significant public danger.

The fundamental differences that eliminate arisen limits of administrative and criminal liability is the determination of different features (Statkienė & Granickas, 2017, p. 149). It should be noted that administrative liability is distinguished from criminal one on the following grounds:

- 1) administrative liability arises for the commission of an administrative offense, the composition of which is determined both by laws and by-laws (decisions of local governments). Criminal liability arises for the commission of a crime, the composition of which is determined exclusively by the provisions of the Criminal Code of Ukraine;
- 2) the right to initiate cases on administrative offenses, as well as the right to consider such cases is endowed with a wide range of subjects of public administration. The right to initiate criminal cases is vested exclusively in the bodies of inquiry and

preliminary investigation and the bodies of the prosecutor's office with the power of review vested solely in the courts;

- 3) only natural persons are held criminally responsible, and both natural and legal persons are held administratively liable;
- 4) bringing a person to administrative responsibility and applying administrative sanctions do not lead to such consequences as criminal record, which is further manifested in certain limitations of his (her) legal personality (for example, free travel outside Ukraine);
- 5) administrative liability is realized both out of court and in court; criminal liability is realized only in court;
- 6) bringing a person to administrative responsibility takes place in a shorter time and under a simplified procedure.

At the same time criminal liability takes advantage over administrative liability. According to the legislation of Ukraine administrative liability occurs if the nature of the violation does not make it a criminal offence under the law. Thus, the aim of the Article is to distinguish administrative offense from criminal offense and to study administrative offense as a deterrent to proving the objective element in criminal proceedings.

## Methodology

General and special methods of scientific knowledge were used as the methodological basis for the research. In particular, dialectical method helps to examine the problem of administrative offense in criminal proceedings as a separate and distinct issue. Epistemological method, as well as logical and semantic method are used to clarify the concepts of administrative offense and criminal offense. The application of

system and structural method contributes to the investigation of the factors, which hinder proper consideration and bringing the perpetrators to justice in criminal proceedings. Normative and dogmatic method helps to examine legal acts, which regulate the issues connected with administrative and criminal offenses (the Code of Administrative Offenses and the Criminal Code of Ukraine). Monographic method allows to study the view of scientists on the problem of administrative offense in criminal proceedings. The use of legal modeling method allowed to formulate the relevant conclusions.

## Literature Review

Clarification of the essence of the subject matter of administrative offense and criminal offense, establishing its objective nature, place and role in the structure of public relations, protected by appropriate sanctions, is of great importance for the correct administrative offense or criminal qualification and the correct imposition of administrative penalties or criminal charges. As Kirchengast (2008, p. 114) correctly notes "the separation of tort and criminal law is now affirmed by the institutionalisation of criminal prosecutions in a state authority and the severe limitation of victim power in the criminal courts". Richards (2009), in his turn, stresses that "it is important to understand the parallels between criminal and administrative law, because most of the criminal prosecutions arise from administrative law problems".

However, the distinction between administrative and criminal illegal acts has a number of difficulties, as administrative and criminal liability have common features; in particular the former is punitive in nature and does not differ substantially from criminal liability (except where a warning or injunction has been issued, which have no punitive effect). In this regard Paeffgen (1991, p. 247) notes that their co-existence, based on different legal concepts and serving different purposes, creates specific problems of interaction and even interference. In his turn Simons (2008, p. 720) adds that structural difference is sometimes given a more substantive gloss: criminal law prohibits "public" wrongs and tort law "private" wrongs. According to Dyson (2014) tort law and criminal law are closely bound together but their relationship rarely receives sustained and rigorous scrutiny

There is increasing recognition in the legal and administrative literature that administrative offenses are criminal offenses by their nature, and administrative and tort liability derives from

criminal one, given that it appeared in the legislation due to the decision of the Soviet authorities to separate certain socially dangerous encroachment from other crimes with the establishment of an administrative procedure for the consideration of the relevant cases (Onishchenko et al, 2013, p. 220; Kolpakov, 2005, p. 117).

Although many scientists (Khavroniuk, 2015, p. 252; Lukianets, 2013; Hryshyna, 2014; Hrytenko et al, 2021) believe that there are differences in object, degree of assault, procedural characteristics, the nature of the offense and punishment between administrative offenses and criminal offenses.

## Results and Discussion

Nowadays, there is a situation when it is impossible to distinguish administrative offenses from criminal offenses, as a significant part of criminal offenses that have nothing to do with public administration, provided for by the Code of Administrative Offenses (Law No. 80731-X, 1984) and other laws. On the contrary, the composition of administrative offenses is enshrined in the Criminal Code of Ukraine (Law No. 2341-III, 2001), and sometimes the same acts are envisaged in both of these Codes.

The norms of the special part of the current Code of Administrative Offenses of Ukraine envisage misdemeanors that are not related to the sphere of public administration (Khavroniuk, 2015, p. 252). For example, misdemeanors provided for in Article 51 "Petty theft of alien property", Article 51-2 "Violation of intellectual property rights", Article 52 "Spoil and pollution of agricultural and other lands", Article 89 "Animal cruelty", Article 104 "Poisoning of crops, damaging or destroying crops, damage to plantations of collective agricultural enterprises, other State and public or peasant (farmer) farms", Article 173 "Petty hooliganism" and many others (Law No. 80731-X, 1984). Accordingly, criminal penalties are applied for administrative violations, and administrative fines and other administrative penalties are applied for criminal misdemeanors.

Thus, the combination of offenses in the area of public administration and offenses of a general criminal nature (petty theft, petty hooliganism, etc.), enshrined in our in the codified act do not correspond to the European concepts in the field of administrative offense law (Khavroniuk, 2020). Such torts are not directly related to the

sphere of public administration, do not encroach on administrative legal relations, are not subordinate to public administration bodies and do not "fit" into the modern paradigm of administrative responsibility (Hurzhii, 2014), because some administrative offenses in Ukraine are criminal in their nature (e.g. infringements in the spheres of public safety and traffic, which are subordinate to the National Police of Ukraine). This complicates the possibility of distinguishing between administrative and criminal violations and, accordingly, reduces the possibility of correctly establishing responsibility for the committed illegal acts.

Regarding the causes of this phenomenon, we agree with claim that it is not clear to distinguish between the offences under investigation in public law, because (Azarov, 2018):

- public danger, as the capacity of an offence to cause substantial harm or create a threat of its infliction, is not a sign that distinguishes these types of offenses, as public danger is a rather subjective concept and is inherent in both criminal offences and administrative offenses. Therefore, the transfer of the article on liability for a particular offense from the Criminal Code to the Code of Administrative Offenses does not change the ability of this offense to cause harm or create a threat of its commission;

- the body authorized to impose penalties by law does not characterize the legal nature of the tort as well. Determining the jurisdiction of cases is largely a technical problem, the issue of rational use of State resources, the compliance with the procedural form of the essence of the offense;

- the assertion that the imposition of an administrative penalty does not entail a criminal record is only correct only from a formal point of view. Although the Code of Administrative Offenses (Law No. 80731-X, 1984) does not contain the term "criminal record", the main manifestation of a criminal record – its impact on the qualification of encroachment and punishment in the case of a new crime – is also applied to administrative liability. Repeated violation throughout the year is qualifying ground of many types of administrative offenses and a circumstance that aggravates liability for an administrative offense (Article 35 of the Code of Administrative Offenses). Besides, the imposition of penalties for administrative offenses sometimes entails social restrictions, such as the inability to hold certain positions or engage in certain activities.

We believe that the emergence of such gaps and conflicts creates additional restrictions on the possibility of proving the objective element in criminal proceedings, because the consideration

of offenses from the standpoint of administrative offense, rather than criminal misconduct and criminal offense creates opportunities for evasion.

Therefore, even the detection of the facts of offenses is not always a guarantee of their proper consideration and bringing the perpetrators to justice. This is facilitated by various factors:

- 1) lack of coherence between the Criminal Code of Ukraine and the Code of Administrative Offenses of Ukraine on the composition of the relevant offenses, as a result of which criminal offenses can often be considered as administrative offenses, taking into account low level of public danger of illegal acts;
- 2) poor collection of evidence leading to the dismissing of proceedings because of the absence of all the elements of administrative offense;
- 3) insignificant amount of sanctions provided for the commission of administrative offenses is also the factor that does not contribute to the fight and their prevention in the future. In many cases, judges' decisions in cases of administrative offenses are reduced to a minimum administrative penalty (fine), which is considered not only a measure of responsibility, but also serves to educate the person who committed the tort. Besides, there is a practice of combining several cases into one proceeding and imposing a minimum fine within the sanction of the norm. This, on the one hand, relieves the courts, but on the other one it does not perform a preventive function, which contributes to legal nihilism that further generates new torts;
- 4) sometimes the courts release the offender from administrative liability, taking into account the facts of the case and the nature of the tort, as well as the fact that no serious consequences resulted from his (her) actions, making only an oral comment under the provisions of Art. 22 of the Code of Administrative Offenses (due to the insignificance of the offense);
- 5) delay and dismissal of the cases in connection with the expiration of the term of bringing to administrative liability or in connection with the expiration of the term of imposition of an administrative penalty;
- 6) return of case files for completion (rectification of defects) and their proper registration in local police departments and in the National Agency on Corruption Prevention. As a result, the proceedings

usually end with the dismissal of the case due to the expiration of the term of administrative prosecution. This applies in particular to the improper execution of protocols on administrative offenses, which are often returned for completion because of the following reasons:

the essence of the administrative offense is missing (the fact is vague and it is not clear what exactly constitutes the offense);

it is not specified which normative acts of Ukraine were violated;

there is no information about witnesses of events or their absence in the column "witnesses" of the protocol on administrative offense;

there is no date of the tort with reference to a specific number of months in the report on the administrative offense in the column "composition of the administrative offense";

the time of the offense is not specified;

the report on the administrative offense does not specify which part of the article qualifies the alleged wrongdoing;

the sentences of the protocol are not completed with a logical meaning, which deprives the court of the opportunity to establish the essence of a particular tort;

7) Obstacles to prosecution may also arise at the stage of consideration of cases in the administrative court, which in some cases revoke the judge's decision and close the proceedings.

In order to address these gaps and harmonize administrative and criminal law, it is necessary to create an effective system for detecting and combating offenses, respect the rights and freedoms of those prosecuted, and establish clear criteria for distinguishing illegal acts, which makes it impossible to prove the objective element of criminal proceedings and avoiding offenders by improper incrimination. Therefore, we consider it is appropriate:

- to apply the institution of criminal misdemeanor (Law No.2617-VIII, 2018) in the system of criminal law with the harmonization of administrative offense norms in administrative law;
- to implement of the correct qualification of violations of administrative offense and criminal law;
- to establish the signs of administrative offenses and offences and criminal misdemeanors and offenses, according to which it will be possible to distinguish these illegal acts in the relevant codes;

- the distinction between crimes, criminal and administrative offenses should be made on the basis of such criteria as the degree of damage to public relations, the type of object of the offense, the objective element of the offense, the subject of jurisdiction, severity and type of penalties provided, the subject of the offense;
- to respect the rule of law when bringing to administrative or criminal liability, depending on the nature of the offense and reduce the possibilities of unfair actions on the part of relevant authorities aimed at minimizing the consequences of the crime in order to reduce sanctions. It should be noted that criminal liability takes precedence over administrative liability (Part 2, Article 9 of the Code of Ukraine on Administrative Offenses (Law No. 80731-X, 1984) states that administrative liability for offenses under this Code occurs if these violations are not criminal offences under the law of criminal liability).
- to harmonize administrative and criminal justice procedures.

## Conclusion

Based on the results of the study, the following conclusions can be drawn:

- 1) administrative offenses and criminal offenses have common features and are not clearly defined in the codified acts, so the correct definition of the subject matter of administrative offense and criminal offense, the establishment of their objective nature is important for unmistakable administrative or criminal characterization and proper imposition of administrative fines or criminal prosecution;
- 2) taking into account the problems of distinguishing administrative offense from criminal offense, the existence of legal gaps, the problem of proving the objective element in criminal proceedings and the probability of avoiding liability is exacerbated;
- 3) currently, despite amendments to some legislative acts of Ukraine to facilitate the pre-trial investigation of certain categories of criminal offences, introduce and allocate "criminal offense" into a separate category, there is a need to clearly develop universal criteria for all cases of delimitation of administrative offenses, formulate the rules for resolving conflict situation, which entails the need to improve the rules of domestic administrative and criminal law.



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