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ADMINISTRATIVE PENALTIES IN THE CODE ON ADMINISTRATIVE OFFENCES OF THE RUSSIAN FEDERATION: SOME ISSUES OF LEGISLATION DEVELOPMENT

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Considers amendments to the norms of the CAO RF regarding the introduction and excluding of types of penalties adopted by the legislator from the moment of adoption of the Code. The focus is on having place collisions in the legislation of the Russian Federation in part of the determination and scope of compulsory labor. Here is given an analysis of the correlation of compulsory labor with administrative penalty in the form of binding works. In the article is raised the question of the constitutionality and compliance with international law of current norms on the application of administrative penalty in the form of binding works.

Keywords: administrative penalties, types of administrative penalties, compulsory labor, binding works.

For more than ten years since the adoption of the Code on Administrative Offences of the Russian Federation (hereinafter CAO RF) this document was repeatedly subjected to various changes that objectively reflects the desire of the legislator not only to optimize the system of administrative responsibility, but also adequately respond to changes in society, which generate the necessity of administrative and legal protection of new areas of public relations.

At the same time, against this background, certain conservatism distinguishes the legislator's approach to the definition of the system of administrative penalties for administrative offenses. Over the past 10 years, list of administrative punishments was changed only three times:

First, the Federal Law No. 45-FL from 09.05.2005 introduced the punishment in the form of an administrative suspension of activity. This punishment, as follows from part 1 of article 12.3 of the CAO RF, 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 subdivision, production sites, as well as operating units, facilities, buildings or structures, implementing specific activities (works) , provision of services. This administrative punishment 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 as well as in many other cases of a threat of significant harm. In fact, it is, first of all, not of punitive, but of administratively-preclusive nature. Specified essence of administrative suspension of activity supported by the fact that part 3 of article 12.3 of the CAO RF permits early termination of its execution.

Second, the Federal Law No. 398-FZ from 28.12.2010 excluded such administrative penalty as payable seizure of instrument or subject of administrative offence. This administrative penalty initially had narrow application in the Code, and was provided for only for committing certain acts relating to a violation of the handling of weapons and ammunition. In practice, it was used even rarer, which was associated with a number of difficulties involved in its execution. This fact was noted as a reason for excluding an administrative penalty in the form of payable seizure of instrument or subject of administrative offence in the explanatory note to the bill [3].

Finally, in the third, the Federal Law No. 65-FZ from 08.06.2012 introduced an administrative penalty in the form of compulsory works. This law, is known, was adopted in record time, which objectively could not facilitate thorough elaboration of all its provisions.

In the explanatory note to the bill submitted by the responsible State Duma Committee on Constitutional Legislation and State Building, it was indicated that compulsory works were proposed to be applied for the commission of administrative offenses as a "soft" form of punishment. Also, it was noted that the penalty of compulsory works in domestic jurisprudence had a broad historical practice.

It is worth noting that the idea of imposing an administrative penalty in the form of compulsory works was repeatedly expressed by many domestic scholars. So, for example, V. N. Vasil'ev suggested establishing mandatory community service as an administrative penalty in the case of non-payment of an administrative fine [6]. A similar proposal was also put forward by A. V. Zhil'cov [7]. T. A. Smagina proposed introducing to the CAO RF an administrative penalty in the form of compulsory works for certain offenses against minors [11]. A. P. Stukanov also attributed to the measures of administrative responsibility compulsory works which consisted of execution free community service by a person found guilty of an administrative offense, in his/her spare time [12, 74].

However, the implementation of these proposals faced a very serious objection. The matter is that the compulsory works representing, as is evident from their names, non-voluntary labor activities of administratively punished persons in their characteristics fall under the concept of forced labor.

In accordance with part 2 of article 37 of the Constitution of the Russian Federation forced labor is prohibited in the Russian Federation. At this, according to article 4 of the Labor Code of the RF: forced labor – is a performance of work under threat of any penalty (forced impact), including:

in order to maintain labor discipline;

as a retributive step for participating in a strike;

as a means of mobilizing and using labor force for the purpose of economic development;

as a penalty for holding or expressing the political beliefs contrary to the established political, social or economic system;

as a discriminatory measure on the grounds of race, social, national or religious status.

But, the same article 4 of the Labor Code of the RF contains a list of cases that are not forced labor (despite the fact that they fall within the definition of forced labor). They are:

the work whose performance is required by the law on military duty and military service or the alternative civil service in lieu of it;

the work, performing of which is conditioned by introduction of emergency

or martial law in accordance with the procedure established by federal constitutional laws;

work performed in cases of emergency, that is, in the case of a disaster or a threat of disaster (fires, floods, hunger, earthquakes, intense epidemics or epizootics) as well as in other situations threatening life or normal living conditions of the whole population or its part;

the work performed pursuant to the final court verdict under supervision of the official state bodies responsible for enforcing legislation in execution of court verdict.

In fact, these cases are also forced labor, but, if I may say so, "approved" forced labor. In any case, it is easy to notice that compulsory works as a measure of administrative punishment does not fall under any of the above exceptions. Closest to them the case of performing work under sentence of court (this exception does not allow to recognize forced labor compulsory works as a measure of criminal sanction), but a sentence, as it is known, is issued only on criminal cases (article 296 of the Criminal Procedural Code of the RF), however administrative punishments (including punishment in the form of compulsory work) are imposed by passing resolutions (article 29.10).

Here it is necessary to say that this circumstance drew attention of opponents of the law in its discussion in the State Duma. So, the deputy G. Gudkov representing a party "Fair Russia" ("Spravedlivaja Rossija" in Russian) said that, in accordance with European legislation, forced labor is prohibited. In response, the Chairman of the committee on constitutional legislation and nation-building, a deputy from the party "United Russia" ("Edinaja Rossija" in Russian) V. N. Pligin said, that according to article 2 of the Convention No. 29 of the International Labor Organization on Forced or Compulsory Labor "the terın "forced or compulsory labor" in the sense of this Convention did not include (subparagraph "c ") any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations. Thus, the correlation of these norms indicates the conformity with law of introduction of actually common in the world practice compulsory works" [5].

As is seen, in this case, PhD of jurisprudence, Honored Lawyer of the Russian Federation V. N. Pligin failed to distinguish the concepts of "sentence of a judicial authority" and "decision on the case of an administrative offense".

Meanwhile, the ILO Convention "On Forced or Compulsory Labor" (adopted in Geneva on 06/28/1930 at the 14th session of the General Conference of the ILO), as well as the Labor Code of the Russian Federation, allows forced labor as a criminal punishment only for persons who have committed a criminal offense and have been convicted in connection with this. By the way the Russian Federation committed itself to comply with this Convention as a legal successor of the USSR, which had ratified it in 1956.

Even more severely limits the possibility of imposing sanctions in the form of compulsory works another international legal instrument that is mandatory for observance in the Russian Federation – the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. According to article 4 of the Convention will not be a forced labor, one not simply appointed by a court, but the labor that has to be carried out by a person in prison or person on conditional discharge from such custody. In this sense compulsory works cannot be used even as a separate criminal penalty.

In view of the above, we cannot help but support the opinion I. V. Maximov, who rightly points out that in the entire utility, in the practical sense, of compulsory works, their introduction "has no legitimate macro reason (at international and constitutionally-legal levels)" [9, 239], that, however, did not prevent Russian deputies introduce it in the CAO RF. Inconsistency of an administrative penalty in the form of compulsory works to the Constitution of the Russian Federation and assumed by the Russian Federation international legal obligations was also noticed in their conclusion by members-participants of the Working Group on civil liberties and citizen participation of the Russian Federation President's Council on the development of civil society and human rights, but without a detailed justification of this thesis [16].

Thus, the current edition of the CAO RF, taking into account the interpretation of forced labor given in article 4 of the Labor Code of the RF is in direct contradiction to part 2 of article 37 of the Constitution of the Russian Federation. And it is impossible to correct this situation by amending the Labor Code of the RF, because, as stated above, these provisions of the labor legislation fully consistent with assumed by the Russian Federation international legal obligations.

Against this background cannot help but surprises that this fact, in principle, has not been seen during the legal review of the draft Law by Legal Administration of the State Duma, which twice gave it a positive opinion without any comments [1, 2].

However, everything falls into place, if take as a basis the words of State

Duma deputy from the party "Fair Russia" A. V. Rudenko, who, during the discussion of the bill explicitly stated that compulsory works – "it is, of course, a certain kind of humiliation for an individual, but we clearly understand that considering compulsory works as a punishment we aim to humillate the man – to give him a broom" [5]. Actually, the same was said by one of the authors of the bill, the deputy of the faction "United Russia" A. G. Sidjakin, who pointed out in his speech: "Why on earth, tell me please, people who violated the legislation on rallies, who only wants to be detained by police officers in front of TV cameras, must become in the eyes of the international organizations a prisoner of conscience? Will be much more adequate to give them brooms and let him go and clean up after themselves what was left after disturbance during mass events" [4].

Quite "natural", that in presence of specified goals of introduction to the CAO RF compulsory works, their supporters did not pay particular attention to the justification of the legitimacy of this administrative penalty.

Here it is necessary to clarify that the author of this article is not an opponent of the introduction to the Russian administrative legislation such punishment as compulsory works. We fully agree with the fact that in the current economic realities compulsory works (of course, with proper organization) can bring substantial benefits to the organizations in which they are carried out, and for society as a whole. However, their introduction should be done in such a way that norms of the Russian Constitution would not been violated.

In this regard, we see necessary to amend article 3.13 of the CAO RF (as well as corresponding articles of the Special part of the CAO RF) through stating therein that an administrative penalty in the form of compulsory works may be imposed *as an alternative to administrative fine only with the consent of the person brought to administrative responsibility.* In this case, when bringing to administrative responsibillty in cases where the sanction of a specific article of the CAO RF will include the *possibility* of imposing compulsory works, the person that has been brought to responsibility will have of real choice: to be subjected to penalties in the form of compulsory works or pay an administrative fine. Of course, in this case, the severity of these punishments must be comparable. Taking into account low income among majority of the population of the Russian Federation, in our opinion, there will be many willing to do socially useful labor instead of paying large fines. Introduction of an alternative punishment in the form of compulsory works would markedly reduce the severity of the problem of imposing and subsequent exaction of administrative fines from unemployed persons. In this form compulsory works could be used widely in the CAO RF, not being limited by the above two articles.

Giving reason the possibillty of introducing compulsory works as a punishment applied only with the consent of the person being called to account, it is possible to refer to the experience of other countries. In most countries of the world, to experience of which in relation to the presence of punishment in the form of compulsory works cited many supporters of the adopted law, community service, even applied as a criminal punishment, are not forced and compulsory. It is expressed in the fact that the court may impose such punishment only with the prior consent of the defendant. This rule is typical for almost all countries where community service is applied [14, 113], including non-members of the European Convention on Human Rights [13, 1044], and is usually enshrined in the law (see, for example, article 49 and 83 of the Criminal Code of Spain, article 131-8 of the Criminal Code of France). It must be noted that the Statute of the Russian Empire penalties imposed by Justices of the peace in 1864 providing for this punishment as an alternative to a fine, also provided for, that it was applied to convicted "only in the case of their own request" (the only exceptions were the representatives of the peasant and commoner classes) [8].

But again this is applicable only with respect to criminal punishments – some experts say that such consent is largely a fiction, since a convict in such cases, in fact, have a choice: agree to participate in compulsory works or be subject to the penalty of deprivation of liberty. As rightly pointed out I. A. Klepitsky, "it can hardly be considered as "consent" the defendant's choice between alternatively offered to him punishment in the form of imprisonment and "voluntary" works for the benefit of society. Behind formal voluntariness hides a real coercion" [8]. French parliamentarians, in turn, expressed reasonable doubts about such a deep penetration of "pactional beginnings» (contractualisation) in criminal law that the imposition of punishment requires the harmonization of the state will with the will of a defendant, who himself chooses a sentence [15, 669].

However, European legislation and juridical practice do not known other ways to comply with the prohibitions of the Convention and simultaneously use community service, which is an effective alternative to custody [8].

In addition, if the choice between compulsory works and imprisonment really in most cases looks formal, then, an alternative in the form of compulsory works and administrative fine is more balanced (again, if there are adequate correlation of terms of compulsory works and size of administrative fines).

At this the presence of consent of a person brought to administrative responsibility to imposition a sentence of compulsory work will help to avoid many of the excesses that may well arise in the application of the considered norms in

the present form. For example, judging by the content of article 3.13 and 32.13 of the CAO RF, proponents of compulsory works proceeded from the fact that the compulsory works must be worked out by administratively punished persons, both at the weekend (no more than four hours per day), and during the week – after the end of work, service or study (two hours), at all – at least 12 hours a week. However, the Code does not allow to take fully into account the various challenging life situations. For example, a person with respect of whom has been assigned an administrative penalty in the form of compulsory works, can combine work with study and after a full working day continue his studies up to 9-10 p.m. Of course, it is actually possible to bring him to compulsory works, and after at this time, however, first, not all organizations, where is possible to perforın compulsory works, will operate at this time (and not all work can be carried out at this time), second, in accordance with Part 1 of article 35 of the Federal Law "On Execution Proceedings" executive actions are exercised and enforced execution measures are applied on weekdays from 6 a.m. to 22 p.m. Similar problems arise with people working, in addition to the main work, also at inner or outer secondary job and often finish their working day in later time (and, often, they also work on weekends).

In this case, as is typical, the prohibition on the imposition of punishment in the form of compulsory works in respect of the military personnel, citizens called for military training, as well as having special ranks employees of the internal affairs bodies, bodies and institutions of the criminal executive system, the State Fire Service, Bodies for control over the traffic of narcotics and psychotropic substances and customs authorities (part 3 of article 3.13 of the CAO RF) has been explained by the developers by their employment and specific of job [5]. Employment and labor specificity of other citizens, respectively, is not taken into account at all. By the way, this number of other individuals may well include also public civil and municipal servants, many of whom also work in conditions of a non-normalized official (working) day, work at secondary job, combine work and study, etc.

I must say that a number of other provisions of the CAO RF relating to compulsory works, besides the already mentioned, raises questions.

For example, in accordance with the same part 2 of article 3.13 of the CAO RF, in addition to law enforcement officials and military personnel, compulsory works are not applied to pregnant women, women with children under three years old, disabled persons of groups I and II. The question immediately arises: why only for women with children under the age of three? And if it comes to a single father? It turns out that he can be brought to compulsory works after the end of a full day

regardless of the fact whether he has the opportunity to instruct someone to pick up his children from pre-school educational institutions, to sit with them in the evening at home, etc. It is fair to say that the issue of this type of discrimination in respect of other administrative punishment – administrative detention already has been raised before the Constitutional Court of the Russian Federation, whose position (which found it corresponding to the Constitution of the Russian Federation) may only cause immense surprise.

On the other hand, some of the provisions of the Code concerning imposition and execution of the penalty in the form of compulsory works look just uncoordinated. For example, part 7 of article 32.13 of the CAO RF is designed to resolve the situation related to changes in life situation of the person against who have been imposed compulsory works. According to it, the person, who has been assigned an administrative penalty in the form of compulsory works, has the right to apply to the court for release from further serving mandatory works if he/she is recognized invalid of Group I or II, pregnant or a seriously ill that interferes serving of compulsory work. When satisfaction of the petition, the judge shall issue an order to stop execution of the decision on administrative punishment in the form of compulsory works.

However, part 2 of article 3.13 of the CAO RF, which we have already mentioned above, provides a wider range of individuals who may not be imposed such penalty. The question arises: what to do if the person, who is sentenced to compulsory works, conscripted into military service? Or for military training? He cannot continue to serve his punishment in the form of compulsory works, however, release from further serving compulsory works (or the suspension of serving compulsory works) in this case is not provided. It turns out that such a citizen, willy-nilly, will again become an offender. Meanwhile, on the basis of part 12 of article 32.13 and part 4 of article 12.25 of the CAO RF, the punishment for evading compulsory works is an administrative fine in the amount of from one hundred fifty thousand to three hundred thousand rubles or administrative arrest for up to fifteen days.

And – on the contrary – a person struck with a serious illness that interferes serving of compulsory works has the right to apply for exemption from further serving of compulsory works. However, it is quite possible to impose a person, who already has a serious illness, punishment in the form of compulsory works, as part 2 of article 3.13 of the CAO RF does not prohibit it.

Also the very content of such concept as "a serious illness that interferes performing of compulsory works" looks unclear. What diseases should be considered serious? Who should determine their severity? It can be assumed that in

the future the list of diseases that interfere serving of compulsory works will be defined by-law. However, a person called to account, can get sick also with not heavy, in principle, diseases that, however, require compliance with bed rest and are badly combined with work associated with significant physical activity (influenza, SARS, bronchitis, etc.). Unlikely they will appear in such a list. However, the bringing of a sick person with fever and other quite unpleasant symptoms to compulsory works seems, to say the least, inconsistent with the principles of humanism. Perhaps in that case should be provided for the suspension of the execution of the penalty in the form of compulsory works.

Overall, it appears that the institution of compulsory works, in the form in which it was introduced to the CAO RF by the Federal Law No. 65-FL from June 08, 2012 "On Amendments to the Code on Administrative Offences of the Russian Federation and the Federal Law "On Meetings, Rallies, Demonstrations, Processions and Picketing" looks very raw and underdone, which is not surprising, given the conditions in which the law was being drafted and adopted.

Russian President Vladimir Putin, having signed the considered law, at the same time noted that in the future it is possible to adjust it [10]. We believe that with regard to the matter, it is absolutely necessary. Given the high degree of politicization of the whole law considered in this article, it can be assumed with a high degree of probabillty that in the near future the issue of its compliance with the Constitution of the Russian Federation will be brought before the Constitutional Court of the Russian Federation. And even if the Constitutional Court finds a way to recognize these norms not inconsistent with the Constitution of the Russian Federation or to avoid making a decision, in front of the applicants will be open a direct route to the European Court of Human Rights, which is unlikely to recognize permissible direct violation by Russia of article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, Russia will be forced once again to pay large sums in compensation to the victims of application to them of the law norms that are contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms. Whether it is necessary to bring to this – as they say, is a rhetorical question.

All of this, in our view, requires the adoption of operational solutions on improving the administrative legislation on compulsory works.

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