Universal Decimal
Classification 342

Channov S. E.

TOWARDS THE QUESTION ABOUT ONE RULING OF CONSTITUTIONAL COURT

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The article analyzes the ruling of the Constitutional Court of the Russian Federation from 14.02.2013, in respect of the constitutionality of application in the Russian Federation an administrative penalty in the form of compulsory works. The author criticizes the arguments of the Constitutional Court, and notes that in the present form compulsory works violate international legal obligations taken by the Russian Federation.

Keywords: Constitutional Court of the RF, compulsory works, forced labor, sentence of a court, criminal sanctions.

'When I use a word,' Humpty Dumpty said in rather a scornful tone,
'it means just what I choose it to mean – neither more nor less.'
'The question is,' said Alice, 'whether it obeys you.'
'The question is,' said Humpty Dumpty,
'which of us is the master here – that's all!'

L. Carroll. Alice through the Looking Glass

Immediately after the adoption in June 2012 of the Federal Law "On Amendments to the Code on Administrative Offences of the Russian Federation and the Federal Law "On Meetings, Rallies, Demonstrations, Processions and Picketing" [4], it became clear that very soon many of its provisions (as well as the procedure of its acceptance as a whole) will be subject to verification by the Constitutional Court of the Russian Federation. And so it happened, and February 14, 2013 the Constitutional Court of the Russian Federation adopted a resolution [5], in which

it recognized that the law did not contradict the Constitution of the Russian Federation on the procedure of its adoption by the State Duma of the Russian Federation (with three different dissenting opinions of judges V. G. Yaroslavtsev , Yu. M. Danilov and S. M. Kazantsev), but acknowledged the unconstitutionality of certain provisions thereof.

This resolution itself, which is quite significant in volume, and the contained in it reasoning of the Constitutional Court of the Russian Federation certainly deserve a separate study. As part of this article, we want to mention only one of the issues considered by the Constitutional Court – concerning the constitutionality of the introduction to the Code on Administrative Offences of the RF a new administrative punishment in the form of compulsory works.

The discrepancy between the institute of compulsory works, in the form in which they are introduced into Russian legislation nowadays, and the Constitution of the Russian Federation, drew the attention of both the deputies of the State Duma in the period of the draft bill reading [13] and various scholars after its adoption [15, 2; 14, 63-76; 16, 2-11; 10, 10-18]. The question of the constitutionality of compulsory works was also studied by the Constitutional Court of the Russian Federation, which devoted to it paragraph 3.2 of the motivation part and paragraph 8 of the resolutive part of the resolution. And, to what conclusions did it come?

Getting started consideration of the issue on compulsory work, the Constitutional Court of the Russian Federation rightly stated that the enshrined in article 3.2 of the CAO RF list of administrative penalties is not considered as a closed and may be supplemented and refined by the federal legislator that has wide discretion in establishing measures of response to committing administrative offenses that contribute to the most efficient accomplishment of the purposes of administrative responsibility for this or that specific historical stage of development of the state. In connection with this, the extension by the Federal Law No. 65-FL from June 08, 2012 of the list of administrative penalties through including in it compulsory works cannot be regarded as inconsistent with the Constitution of the Russian Federation.

Next, the Constitutional Court emphasized that the presence in the Constitution of the Russian Federation explicit prohibition of forced labor (article 37, paragraph 2) and the lack of indications on the prohibition of compulsory works is not due to any significant differences between them, but on the contrary should be seen as an admission that compulsory works are nothing like an analogue of forced labor. Provisions of the International Covenant on Civil and Political Rights (paragraph 3 article 8) and the Convention for the Protection of Human Rights and Fundamental Freedoms (paragraph 2 article 4), according to which no one shall be brought to perform

forced or compulsory labor, that correspond to the mentioned constitutional requirements do not differentiate between forced and compulsory labor.

Thus, the question of the constitutionality of punishment in the form of compulsory works is directly related to not contradiction of their introduction to the Russian legislation to the Convention for the Protection of Human Rights and Fundamental Freedoms [2] and the ILO Convention No. 29 "Concerning Forced or Compulsory Labor" [1], since these documents, recognized by the Russian Federation mandatory for applying in its territory, do not only contain a general prohibition against the use of forced labor, but also determine the cases, in which, in an exception to the general rule, it is still acceptable.

The most important international legal instrument containing a ban on the use of forced labor and, at the same time, establishing exceptions – when a labor without consent of a person would not be considered forced (in fact pointing to the "allowed" cases of forced labor) is the ILO Convention No. 29 "Concerning Forced or Compulsory Labor". According to article 2 of this document in the sense of this Convention the term of "forced or compulsory labor" shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

Nevertheless, for the purposes of this Convention, the term of "forced or compulsory labor" shall not include:

a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

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;

d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

e) minor communal services of a kind, which are performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives

shall have the right to be consulted in regard to the need for such services (text of the Convention is given in the official Russian translation published in the publication: Bulletin of the Supreme Soviet of the USSR, July 02, 1956, No. 13. article 279) [17, 219-232; 9, 197-208]

As can be seen, in this case the Convention does not consider forced (compulsory) labor any work or service which is exacted from any person as a result of a *conviction* in a court. As we have already noted in this respect before, a verdict in the domestic legal system shall be made only in criminal matters (article 296 Code of Criminal Procedure), when administrative penalties (including punishment in the form of compulsory works) are imposed by decisions (article 29.10) [14].

Must be said, that on the basis of the above official translation of the text of the ILO Convention No. 29 were also prepared Russian normative documents, in particular, the Labor Code of the Russian Federation. As a result, in particular, article 4 states: "For the purpose of this Code the forced labor shall not include... the work being done as a result of a final court judgment under the supervision of the public authorities responsible for the enforcement of legislation in the execution of conviction".

As you can see, in this case the authors of the LC RF also used the quite particular term of "conviction".

However, this understanding of the ILO Convention No. 29 was rejected by the Constitutional Court of the Russian Federation in preparing the considered resolution. In paragraph 7 clause 3.2 of the motivation part of the resolution it indicated that forced labor, "according to subparagraph "c" of paragraph 2 article 2 of ILO Convention No. 29 from 1930 on forced labor, does not include 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 placed at the disposal of private individuals, companies or associations". At that, the Constitutional Court of the Russian Federation also referred to the adopted in 2007 ILO General Overview (Report) concerning the 1930 ILO Convention No. 29 on forced labor and the 1957 ILO Convention No. 105 on the abolition of forced labor, which, in the opinion of the court, also comes from the fact that the exception from the general prohibition established by paragraph 2 article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms may take the form of compulsory labor in prison or labor required as a result of imposing other forms of punishment, such as a condemnation to public (under terminology of the General Overview) works (paragraph 48); convention's prohibition of forced labor does not include public works if they meet

the necessary conditions, namely, are the measure of punishment that is imposed solely by the court, and performed for the state or its institutions – governments, regions, public services, institutions, etc. (paragraph 125)".

Thus, in this case, the Constitutional Court replaced the term of "conviction" used in the official translation of the ILO Convention No. 29 and then reproduced in the Labor Code of the RF by a few vague term of "imposing". Is such a change permissible?

It should be noted that in the science of international law have been developed specific approaches to the concepts of "official text" and "official translation". So, Professor I. I. Lukashuk notes that an official translation means "translation of an treaty, the authenticity of which is established in other languages". The implementation of such translations Vienna Conventions consider as one of the functions of a depositary, which can be both a state and an international organization (article 77 of the Vienna Convention 1969)... An official text is also a translation by a State-participant of an authentic text in its language" [11].

"Of course,' continues on I. I. Lukashuk, 'there is a question about the legal status of an official text. By this text the State is guided in its domestic and foreign policies. The exceptions are cases when a discrepancy is found with the authentic text of the treaty. The State ratifies an official text, and it is a must for all its bodies. However, this does not mean ignoring of the genuine text. Law of the USSR on the procedure of conclusion, execution and denunciation of international treaties of the USSR in 1978 stipulated that the treaties, "authentic texts of which are written in foreign languages, are published with an official translation into the Russian language" (article 25). Federal law on international treaties of the RF of 1995 does not contain such a rule. However, the Bulletin of international treaties complies with it. From this we can see that if in applying of an official text any discrepancy with the authentic text is detected, then the last should be applied" [11].

Thus, international law does not preclude the existence of differences between the official text (translation) of an international legal treaty and its authentic text, with priority given to the latter, which is quite logical. In doing so, however, is not revealed the mechanism of choosing: who and in what order can recognize the existence of such differences and apply the meaning different from the official translation.

It seems that the Constitutional Court of the Russian Federation, as the highest body of constitutional control, may be granted such a right. However, such understanding of the text of the document should have a detailed and extremely convincing reasoning.

If to talk about the literal meaning of the text of the ILO Convention No. 29, it should be noted that the term "conviction" used in the official translation, really isn't quite accurate.

Thus, in the English text of the Convention the paragraph is as follows:

– 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;

The term "conviction", which is a stumbling block, in the context of the entire phrase, more precisely, can be translated as "condemnation".

A similar situation has occurred with the French original source:

– tout travail ou service exigé d'un individu comme conséquence d'une condamnation prononcée par une décision judiciaire, à la condition que ce travail ou service soit exécuté sous la surveillance et le contrôle des autorités publiques et que ledit individu ne soit pas concédé ou mis à la disposition de particuliers, compagnies ou personnes morales privées, – condamnation (f) – from French – condemnation (you will notice that the term "condemnation", but not "sentence", has been used in more modern translations of the ILO Convention No. 29 [8]).

However, this does not change the essence of the present situation, because the term "condemnation" is used in *domestic jurisprudence* in respect only to criminal penalties.

Of course, there can be other interpretations, because the notion of "condemnation" may have a different meaning (wider) in other legal systems. In connection with this an analysis of the current international legal practice on the application of the International Labour Organization Convention No. 29 would be a compelling argument in favour of the use by the Constitutional Court of the Russian Federation the term of "imposition". However, the admissibility of such a broad interpretation of the terms "conviction" (English) and "condamnation" (Fr.) does not follow unequivocally from the General Overview [18], which the Constitutional Court refers to, as it generally speaks about compulsory labor in prison or labor required as a result of imposition other forms of punishment such as condemnation to public works (without specifying whether it is the condemnation to a criminal punishment or to any other). At the same time, in the same General Overview experts in considering the permissibility of State compulsion to work, in some cases clearly indicate that it is only about such labour as a criminal punishment (paragraph 51, 52, etc.).

Meanwhile, N. Valtikos wrote that the decisions of the ILO control bodies "...should be considered as a kind of case law that had made some contribution to

the clarification and, in some fields, to the development of standards established by the Statute and Conventions of ILO" [21, 179]. N. L. Lutov also believes that the decisions of the ILO control bodies (such as the Committee of Experts) should be considered as international legal traditions [12, 17-19]. And in this case the position of the Constitutional Court of the Russian Federation is clearly contrary to the position of the ILO experts.

However, if in respect to the interpretation of the provisions of the ILO Convention No. 29 the Constitutional Court's position does not look convincing enough, then regarding another document, which was subjected to analysis in the considered Resolution, it is extremely doubtful. This refers to the Convention for the Protection of Human Rights and Fundamental Freedoms, also mandatory for application in the territory of the Russian Federation.

Thus, noting that "within the meaning of paragraph 3 article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with its article 5, any work that is typically required of a person lawfully detained, subjected to detention (arrest) or custody or conditionally released from such detention cannot be regarded as a derogation from the prohibition of forced or compulsory labor", the Constitutional Court further states that "this exception is not directly linked to the use of coercion only in respect of persons suspected or accused of committing a crime, its meaning is not limited to the sphere of criminal prosecution...". In support of its position, it refers also to the Resolution of the European Court on human rights dated July 07, 2011 [6].

In theory, such an interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms is valid because its article 5 really contains a list of legal restrictions on the right to freedom and personal inviolability (which is referred to in article 4), including the detention of persons by an administrative procedure. However, without linking the permissibility of the use of forced labor exactly to criminal prosecution, the Convention, however, expressly and unequivocally prohibits its use except in the case of applying to persons who are in detention or conditionally released from such detention (under paragraph "a" part 3 article 4). It may be noted that a similar approach is used in article 8 of the International Covenant "On Civil and Political Rights" from 16.12.1966 [3]. Meanwhile, on the basis of article 3.13 of the CAO RF, administrative punishment in the form of compulsory works is applied to persons who are not in custody (for example, subjected to administrative detention) and not freed from such with substitution on compulsory works.

Of course, as pointed out by the Constitutional Court of the Russian Federation, the Convention for the Protection of Human Rights and Fundamental Freedoms "is a living instrument to be interpreted "in the light of the concepts currently prevailing in democratic countries", however, hardly its "liveliness" is so great to interpret its provisions diametrically to their literal content. By the way, in the decision of the European Court on human rights on the case of "Stummer v. Austria", to which, in this case, the Constitutional Court of the Russian Federation considers necessary to refer, it is still about forcing to labor a person serving a sentence in prison; the development of European law and standards' change, marked by the European Court of Justice, deals with the changes of social insurance systems.

In connection with this, it is necessary to recall that in most countries of the world community service, even applied as a criminal punishment, is not enforced or compulsory. This is expressed in the fact that the Court may impose such punishment only with the prior consent of the defendant. This is true for almost all countries, where community service is applied [20, 113], including those not participants of the European Convention on human rights [19], and is usually formulated in the law (see article 49 and 83 of the Criminal Code of Spain, article 131-8 of the Criminal Code of France). This is due to the fact that *other ways to comply with the prohibitions of the Convention and to use community service that is an effective alternative to custody are unknown to the European legislations and legal practice* [7].

Thus, the practice of European States currently bases on prohibition of punishment in the form of compulsory works for persons not in detention, without their consent. Recognition by the Constitutional Court of the Russian Federation the principle of admissibility for the use of compulsory works as an administrative punishment in its current form looks against this backdrop extremely doubtful and inconsistent with evolving trends in the use of forced labor in the world.

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