© O.V. MOISEEVA
moiseeva.olga.1980@mail.ru

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THE EXPEDIENCY OF THE APPLICATION OF ADMINISTRATIVE ARREST AS A FORM OF ADMINISTRATIVE PUNISHMENT

SUMMARY. The opinion that the procedure of applying administrative arrest violates some articles of the Constitution of the Russian Federation and some provisions of the European Convention on Human Rights is unreasonable. The Constitution of the Russian Federation entertains the possibility of limitation of the right to liberty and security of a person when it is required according to the procedures provided by the legislation, in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, which says that detention of a person convicted by an authorized court is a permitted violation of the prohibition of deprivation of liberty. Administrative penalty as a form of administrative arrest is one of the methods of public enforcement applied to the most malicious offenders. Executors of law represented by judges have quite an effective instrument to control the situation in the cities and towns of the country.

KEY WORDS. Administrative arrest, administrative penalty, limitation of Human Rights and Fundamental Freedoms.

There is no consensus among lawyers about the advisability of applying administrative arrest as a type of administrative penalty in the Russian system of administrative penalties, as an administrative arrest represents the most severe type of administrative penalty, coupled with the restriction of fundamental and inalienable human rights such as the liberty and security of the individual [1].

Some specialist authors criticize the proposal to apply administrative arrest for a number of serious offences.

Opponents of applying administrative arrest as a type of administrative penalty in the Russian Federation complain about the violation of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and the norms of the Constitution of the RF in the Code of the Russian Federation on administrative offences, since it provides for a simplified procedure for the appointment of administrative arrest. The order of execution ("serving") of this criminal penalty, in effect connected with the limitation of the personal freedom of citizens, is not set in Russian Federation by federal Law but by subordinate legal acts. Thus, in the example of administrative arrest, traditionally bordering with criminal sanctions by its negative impact on the human psyche, and also causing mental and physical suffering, they see a clear tendency towards "criminalization" of administrative responsibility through the actively used and constantly replenishing rate of emergency measures of state coercion in the RF Administrative Code [2].

In Soviet periodicals there were also disputes on the subject and much criticisms was voiced about short-term detention. I.A. Galagan wrote directly: "We should refuse such measures as arrest [...] The educational effect of arrest is negligible. Offenders are not widely used for labour to the extent assumed by the Decree; they do not even justify the costs the state spends on their keeping. Some drinkers [...] even dream of being arrested since they are guaranteed by the state to be fed for 15 days" [3; 39]. At the same time, D.N. Bakhrakh did not agree with this point of view, considering that there is no need at present to withdraw such penalties as short-term (administrative) detention, as in carrying out enforcement the state has to bear the costs of maintaining the offenders. It cannot be required that institutions be self-sufficient. They should not be expected to profit since they face very different challenges [4; 132].

In our view, the opinions that the use of administrative arrest violates articles of the Constitution of the Russian Federation and the provisions of the European Convention for the Protection of Human Rights are unreasonable.

In the Russian Federation, recognition, respect and protection of the rights and freedoms of man and the citizen as a supreme value is a constitutional obligation for the State (art.2) [5]. As follows from the related provisions of art.10, 17 (parts 1 and 2) and 18 of the Constitution of the Russian Federation, that duty implies the activities of the public authorities including the judiciary, which are designed to ensure the inherence and inalienability of the fundamental rights and freedoms of the individual and citizen.

The Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights [6]. Belonging to everyone from birth, the right to liberty and security is one of the basic human rights. Within the meaning of the Constitution of the Russian Federation, art.17 (part 2), 21 (part 1) and 22 (part 1), it embodies the most significant social good which, based on the recognition of the dignity of the individual by the state, determines the inadmissibility of interference in its sphere of autonomy, creates the conditions for the full development of the individual and for democratic society. Hence by providing an increased level of guarantees of everyone's right to liberty and security, the Constitution of the Russian Federation is subject to restrictions on this right only to the extent that it is necessary as defined by it purposes, and only in accordance with the law (part 3 art. 55), and arrest, detention and custody are allowed only by court decision (part 2 art. 22).

The possibility of limiting this right is provided in subparagraph "a" p. 1 art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with which detention of the individual convicted by a competent court is a valid deviation from the prohibition of imprisonment [7].

This Regulation does not distinguish the legal nature of the offence of which the person is found guilty; it is applied to any "conviction" of imprisonment handed down by a court – whether for a criminal or disciplinary matter, in accordance with the domestic law of the State [8].

According to the Code of the Russian Federation on administrative offences, administrative penalty is set by the state as a measure of responsibility for committing

administrative offences and is used to prevent the commission of further offences by both the offender and other persons; administrative arrest is a type of administrative penalty; administrative arrest can be set and used only as a major administrative punishment; administrative arrest is designated by the judge; administrative arrest is set and designated only in exceptional cases for certain types of administrative offences [9].

An example of constitutionality of the use of administrative arrest in part 1 art. 20.25 of the Code of Administrative Offences of the Russian Federation is decision №374-0 of the RF Constitutional court dated 11.07.2006 "To refuse to accept for consideration the complaint of the citizen Sukhov Vladimir Petrovich on the infringement of his constitutional rights according to the provision of part 1 art. 20.25 of the Code of the Russian Federation on administrative offences" [10]. In his complaint to the Constitutional court of the Russian Federation, V.P. Sukhov asks the court to recognize part 1 of article 20.25 of the RF Code of Administrative Offences in the part providing punishment as administrative arrest of up to 15 days not relevant to article 55 (part 3) of the Constitution of the Russian Federation. According to the complainant, for failure to pay an administrative fine administrative arrest may not be applied, since this sanction does not meet the requirements of justice, is not commensurate with the constitutionally fixed goals protected by law, the interests and nature of the offence, and its function is not justified in the conditions of the possibility of application of measures of liablity to the debtor provided by the Federal law "On enforcement proceedings" [11].

In accordance with the contested provision in the complaint of Sukhov concerning of part 1 art. 20.25 of the Code of Administrative Offences considered in conjunction with the above provisions of the Code, an administrative arrest as a type of administrative penalty for failure to pay an administrative fine is imposed only by a court in exceptional cases, subject to a number of procedural safeguards (part 1 art. 25.1, part 2 art. 28.8, part 4 art. 29.6, part 2 art. 30.2, part 3 art. 30.5). The offence must encroach on public order, the need for the respect and protection of which, including administrative and administrative-procedural legislation, stems directly from the duties of citizenship to observe the Constitution of the Russian Federation and its laws. Imposition of an administrative punishment for the commission of an offence should be maximally individualized for each offender, given that this takes into account the nature of the administrative offence committed by the person, the identity of the guilty party, his property status, the circumstances mitigating administrative responsibility, and circumstances aggravating administrative responsibility [9].

Consequently, the applicant's arguments about the arbitrary nature of the sanctions provided by part 1 art. 20.25 of the Code of Administrative Offences of the Russian Federation, their disproportion to the administrative offence for which they are imposed, are unfounded.

We cannot agree with those lawyers who advocate the complete abolition of this type of punishment. Administrative arrest holds a very special place in the system of

administrative enforcement measures. In some cases, it stands as the only possible way to impact the marginal part of modern Russian society. As shown by the practice of application of the law, the vast number of people who commit administrative offences under articles 6.9, 20.1, 20.21 of the Code of Administrative Offences are petty hooligans, household drunks, drug addicts, beggars, etc. Such citizens are "chronically insolvent", so for them an administrative penalty is useless: at best, the fine is not paid, at worst, it will fall heavily on the shoulders of the injured party. It is hard to imagine a more absurd situation than when the police who answer a call from a wife fine the husband offender. It is clear that the money to pay can only be taken from the family budget, to the constitution of which the domestic drunkard may make the most insignificant contribution.

Confirmation of the above is found in the opinion of V. G. Tatarian, who aptly noted that "if administrative punishment were removed from legal turnover, without in return an equivalent measure of state coercion applied to its most prolific offenders, law enforcers, judges and officials of internal affairs will be left without sufficient impact on the operational situation in the cities and towns of the country, as used, for example, on an idle petty hooligan or a domestic drunk, the measure of responsibility of an administrative fine is not possible due to chronic insolvency" [12].

Thus it can be concluded that there is no effective alternative to administrative arrest in order to influence a particular category of offenders, and in general, the operational situation in modern Russian society.

REFERENCES

1. Stepanova, O.A. Administrative arrest through the prism of decisions of the Constitutional Court of the RF. Zhurnal rossijskogo prava — Journal of Russian law. 2008. No. 12 (in Russian).

2. Kirin, A.V. Conceptual and legal status of the arrest as an administrative penalty. Administrativnoe pravo i process — Administrative law and process. 2011. No. 9 (in Russian).

3. Uchenye zapiski VNIISZ [Proceedings of the the All-Union Scientific Research Institute of Soviet Legislation]. 1965. Issue 5. P. 39 (in Russian).

4. Bahrah, D.N. Administrativnaja otvetstvennost' [Administrative responsibility]. Moscow, 1966. P. 132 (in Russian).

5. Constitution of the Russian Federation. Rossijskaja gazeta — Russian newspaper. No. 7. 2009. 21 January (in Russian).

6. See: Art. 1 of the Universal Declaration of Human Rights. Rossijskaja gazeta — Russian newspaper. No. 67. 1995. 5 April (in Russian).

7. Sobranie zakonodatel'stva RF [Collection of the Legislative Acts of the Russian Federation]. 8 January 2001. No. 2. Art. 163 (in Russian).

8. See: Judgment of the European Court of Human Rights of 8 June 1976 Engelet al. v. Netherlands. Evropejskij sud po pravam cheloveka. Izbrannye reshenija — The European Court of Human Rights. Selected decisions. Vol. 1. Moscow: Norma, 2000. P. 103-137 (in Russian).

9. See: ch. 1, art. 3.1, p. 6, ch. 1, art. 3.2, ch. 1, art. 3.3, ch. 1, art. 3.9, ch. 2, art. 3.9 of the Code of Administrative Offences of the Russian Federation of 30 December 2001, No.

195-FZ. Rossijskaja gazeta — Russian newspaper. No. 256. 2001. 31 December (in Russian).

10. Reshenija vysshih sudov (Decisions of supreme courts). SPS Konsul'tantPljus. Available at: http://www.consultant.ru/svobodnyj Zagl. s jekrana (in Russian).

11. Sobranie zakonodatel'stva RF [Collection of the Legislative Acts of the Russian Federation]. 8 October 2007. No. 41. Art. 4849 (in Russian).

12. Tatarjan, V.G. Genesis of administrative legislation and torts: from the all-union basics to codes of countries-participants of the CIS concerning administrative violations. Aktual'nye problemy pravovoj reformy v Rossijskoj Federacii i gosudarstvah-uchastnikah Sodruzhestva Nezavisimyh Gosudarstv — Current issues of legal reforms in the Russian Federation and countries-participants of the Commonwealth of Independent States. Collected works: in 2 vol. Vol. 1. Ed. by V.G. Tatarjana. Moscow, 2002. P. 14 (in Russian).