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LEGAL RISKS IN PUBLIC ADMINISTRATION: INVITATION TO DISCUSSION

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The authors examine interpretation of public-law risks as a potential danger, the probability of events that have negative consequences for social relations, which are the subject of legal regulation of certain publicly-law branches in view of approval, implementation and interpretation of legal prescriptions.

Examine the reasons that cause the emergence of public-law risks, among which there are legal gaps, imperfection in constructions of legal prescriptions, subjective mistakes of law-enforcers, as well as political factors driving adoption of authoritative decisions motivated by political expediency.

Keywords: public administration, legal risks, constitutional-legal risks, criminal-legal risks, environmental-legal risks, essence of legal risks, risks of law-enforcement nature, administrative-legal risk.

The notion of "legal risks" is immature and not included in the scientific vocabulary. However, due to the fact that its scope is expanding, there is an actual problem of analysis of the methodological and theoretical aspects of this category.

Study of legal risks in the system of public administration is a principally new scientific direction in all areas of public law. The first studies that appeared several years ago in the scientific literature focus on the wording of the legal notion of "legal risks" and determining its essential signs.

The authors of this article consider it necessary to analyse the existing scientific research results on the subject and to propose their own notion of legal risks in public administration – administrative-legal risks.

One of the first studies on the issue of legal risks in the system of public management was the article of V. V. Kireev "Constitutional Risks: Issues of Legal Theory and Political Practice" [11]. Initial theoretical and methodological precondition of determination the essence of constitutional risk, according to the author, is the postulates of the general theory of risk concerning the fact that constitutional risks arise due to the unfavorable development of public relations, which are the subject of constitutional law [11]. V. V. Kireev focuses on the fact that risky situations arise when the prevailing political environment in the sphere of authorities' relations is not included in the scope of the constitutional-legal impact, i.e., in fact, one of the main causes of constitutional risks is legal gaps arising from the lack of regulatory prescriptions governing the authorities' relations [11].

The scientist distinguished few signs of constitutional-legal risks, among which he included:

first, the constitutional-legal sphere of their occurrence, i.e. norm-making, enforcement and interpretative activity in the field of constitutional law;

second, the specificity of existing historical realities that stipulate the uniqueness of constitutional situations, within which certain actions have been performed in risk conditions;

third, the relationship between the constitutional-legal and economic, political, spiritual and cultural achievements and shortcomings [11].

V. V. Kireev distinguishes two forms of the constitutional-legal risks embodiment. On the one hand the constitutional risks affect the subjects of constitutional legal relations, on the other hand, the risks may entail negative phenomenon in all areas of public life (politics, economy, culture) [11].

As a result, the scientist formulates the concept of constitutional risks as "specific historical characteristics of adoption, maintenance, implementation, including interpretation, of the norms of constitutional law, which express the correlation between the conditioned by these factors legal and eventually economic, political, spiritual, cultural and other social acquisitions and losses" [11].

The problem of "criminal-legal risks" was analyzed in the monograph A. E. Zhalinskii "Criminal Law in Anticipation of Changes: Theoretical and Instrumental Analysis" [10]. The author treats criminal-legal risks as "the risk of being criminally prosecuted without lawful substantive reasons for this or undergoing various restrictions associated with provisional or final, entered in force or repealed

valuation of deed as a crime" [10]. According to A. E. Zhalinskii, criminal-legal risks are generated by criminal law, but "they are implemented in criminal-procedural decisions and amplified by them" [10]. Therefore, according to the scientist, one must consider criminal-legal risks in the widest sense as everything that is stemming from the criminal law, and, as a matter of fact, criminal-legal risks as those that are associated with enforcement practice of criminal legislation and its interpretation [10].

In fact, the researcher when considering criminal-legal risks emphasizes that their theoretical understanding and methodological aspects lie in the plane of law-enforcement forms of public management, as well as in judicial interpretation of criminal and criminal-procedural legislation.

The exploration of environmental-legal risks can be found in article A. P. Anisimova and O. E. Novikova "Environmental Law-protective Risks: Issues of Theory and Practice" [9]. The authors rightly point out that the legal structure of environmental risk was embodied in the environmental legislation. So, article 1 of the Federal Law No. 7-FL from January 10, 2002 "On Environmental Protection" explains the concept of environmental risk as "the probability of an event, which has adverse effects on the natural environment and is caused by the adverse effects of economic and other activities, natural and man-made emergencies" [9]. According to researchers, from the standpoint of legislative aspect the category of legal risk is most fully developed in the sphere of environmental insurance. In accordance with paragraph 1 article 18 of the Federal Law from January 10, 2002 "On Environmental Protection", environmental insurance is to protect the property interests of legal entities and natural persons in the case of environmental risks [9]. Normative-legal regulation of environmental risks, according to the authors, is reflected in the environmental expertise, one of the main principles of which, in accordance with article 3 of the Federal Law No. 174-FL from November 23, 1995 "On Environmental Impact Assessment", is a "presumption of potential environmental danger of any intended economic and other activity" [9].

The authors formulate the concept of environmental risk as "a complex inter-industry category designed to forecast and mitigate the adverse effects of environmentally hazardous or other activity on the state of human rights, including the human right to a healthy environment" [9].

It should be noted that the author's wording of the notion of environmental risk is in conflict with formally legal outlining of the specified category, set out in the law, because researchers have focused on the prediction and mitigation of consequences of negative human activity, rather than on the potential threat and

probability of adverse events resulting from the implementation of economic activity.

Thus, having analyzed the above conceptual provisions relating the essence of legal risks in public management, we should note a number of methodological nuances that are used by researchers specializing in various areas of public law in the interpretation of the corresponding category.

1. The scope of occurrence of public-law risks lies in plane of social relations that are the subject of legal regulation of certain public-law branch. Researchers distinguish different kinds of public-law risks depending on the affiliation to the branch of law – constitutional-legal, criminal-legal, environmental-legal, financial-legal informational-legal, etc.

2. Common to all researchers is the interpretation of public-law risks as a potential threat, the probability of events that have negative consequences for the public relations, which are the subject of legal regulation of certain public-law branches.

3. Classification public-law risks is not the subject of authors' consideration, but presented judgments show that public-law risks are divided into: standard-setting ones, i.e., arising from the structure of legal regulations; enforcement ones related to the implementation of legal regulations, as well as interpretive ones arising from the interpretation of law norms.

4. Among the reasons for the occurrence of risks the authors include legal gaps, inadequate structures of legal regulations, human errors of enforcers, political factors stipulating the adoption of authoritative decisions by the motives of political expediency.

Administrative-legal risks have a number of distinctive features in contrast to public-law risks occurring in other areas of public law, because of the nature of the regulated public relations.

Thus, specific features of relations regulated by administrative law are their public-managerial and executive-administrative nature. Specific subjects of the mentioned relations are state executive authorities, which, by virtue of entrusted to them functions, on the one hand are lawmaking entities, i.e. adopt by-laws governing the management of the various areas of public relations, and on the other hand they carry out enforcement activity related to the resolution of specific legal cases.

At the federal level, the subjects of subordinate law-making are the Government of the Russian Federation and the federal bodies of executive power (usually federal ministries). The mentioned public-authoritative structures can act as

subjects adopting legal regulations, which in some cases pose a risk situation of adoption of potentially dangerous public-managerial decisions. This category of administrative-legal legal risks is of standard-setting nature. Among the reasons for the emergence of standard-setting risks should be distinguished human errors in the development of normative legal acts, juridical collisions arising from conflicts of law norms and subordinate legal acts; between normative legal acts issued by federal bodies of state power and public authorities of the subjects of the Russian Federation; between normative legal acts issued by public authorities on matters of joint jurisdiction (in accordance with paragraph "j" part 1 article 72 of the Constitution of the Russian Federation, matters of joint jurisdiction include administrative, administrative-procedural, labor, family, housing, land, water, forest legislation, legislation on subsoil and on environmental protection).

Activity of executive bodies in exercising of law-enforcement functions for adoption of individual legal acts aimed at resolving specific cases and taking specific managerial decisions involves the taking of managerial decisions that bear the risk of causing adverse effects to the established management order in a certain sphere of public relations. Consequently, this category of administrative-legal risks can be characterized as risks of law-enforcement nature.

Among the reasons for the emergence of law-enforcement risks should be noted the potential possibility for law-enforcer in the face of an authorized body of public administration to make a decision within "administrative discretion", i.e., the possibility to select a specific, optimal model of managerial decisions within the framework of alternative disposition formulated in a legal regulation. Selection of optimal model of managerial decision is fraught with subjective costs and does not exclude negative consequences.

It should be noted that, according to sub-paragraph "c" paragraph 4 and sub-paragraph "d" paragraph 5 of the Decree of the RF President No. 314 from March 09, 2004 "On the System and Structure of Federal Executive Bodies", federal service and federal agency does not have the right to exercise normative-legal regulation in the assigned area of activity, except for cases stipulated in decrees of the President of the Russian Federation or resolutions of the Government of the Russian Federation [4]. Therefore, in cases where the agencies and services are entrusted with standard-setting functions, along with law-enforcement risks, standard-setting administrative-legal risks can take place.

Public authorities having standard-setting competence possess the right to issue official acts of interpretation of law (letters, explanations, methodical recommendations and instructions, etc.) aimed at clarifying of previously adopted by

them normative legal acts. The risk of applying these official acts of interpretation lays in the fact that the substitution of interpretation of legal regulations by the normative content of a document, the provisions of which are realized by lower public-authoritative instances as legal norms, may occur. The mentioned group of administrative-legal risks can be characterized as interpretation risks existing in administrative-legal sector of public relations

Interpretation risks arising in administrative-legal relations may include interpretation of the competence of state bodies of executive power by judicial instances. While not questioning the legality of judicial interpretation of normative legal acts that clarify the competence of administrative public authorities we should draw attention to the potential adverse effects which may occur in the administrative activity of law-enforcers in the face of state bodies of executive power on the basis of acts on interpretation of law initiated by the judiciary.

There are often problems of opposite assessment of similar factual circumstances of cases and, as a consequence, taking opposite judicial decisions in judicial practice. Illustrative in this regard is the interpretation by arbitration courts the circumstances of cases within the signs of "extreme necessity", as defined in article 2.7 of the Code on Administrative Offences of the Russian Federation (hereinafter – CAO RF) [1].

For example, the Fourteenth Arbitration Appellate Court took Decision from March 11, 2011 on the case No. A05-13775/2010, according to which the court rejected the arguments of applicant (organization) concerning commission the offense in a state of extreme necessity [7]. The organization, which is the only company in the area to carry out activities on the collection and disposal of solid household waste, has been brought to administrative responsibility, under part 2 article 14.1 CAO RF, for the implementation of entrepreneurial activity without a special permit (license), if such a permit (license) is required. The legal position of the Court was that the person who had committed an administrative offence shall be released from administrative responsibility if it was trying to avert the danger that threatened the national interests or the legitimate interests of subjects of private law. Where the danger could be eliminated only through the commission of an administrative offence. In this case there were not such circumstances. The organization was carrying out the activity subject to licensing, without an appropriate license.

The Court explained that, in this case the defendant's guilt of the implied offences was that it had an opportunity for compliance with legislation, but it had not taken all the measures to comply with the legislation. Case file has no evidence that the Organization has requested the licensing authority for a license to operate

on the collection, transportation and disposal waste of 4 and 5 classes of danger, however, for reasons beyond its control, such a license has not been issued to it.

Opposite decision on a similar composition of administrative offense was taken by the Seventeenth Arbitration Appellate Court by Decision from April 22, 2011 No. 17AP-1922/2011-AK (case No. A60-43164/2010) [8].

In proceedings against the enterprise on an administrative offense under part 2 article 14.1 CAO RF arbitration court of first instance concluded in actions of municipal unitary enterprise "Hot Water Supply of settlement Atig" composition of an imputed administrative offense, however, being guided by provisions of article 2.7 CAO RF, found it possible to release the enterprise from administrative responsibility.

Refusing to meet the requirements on bringing to responsibility, the court of first instance was guided by the provisions of article 2.7 CAO RF. The Court took into account that the enterprise was an organization that provided services for heating, water supply of dwelling stock and socially significant institutions located in the settlement, and the operated by the enterprise boilers were the only objects with which it was possible to implement this activity.

Lack of heating and water supply could inflict negative social consequences, threat to the health and lives of the population of the settlement. These circumstances enabled the Court to describe the activities of the Organization in the absence of the necessary licenses as committed in the presence of extreme necessity.

Thus, based on the above, it is possible to offer the following broad interpretation of the notions of public-law risk and administrative-legal risk.

Public-law risk is a potential threat of adverse development of socially significant, public-law relations as a result of the adoption, implementation and interpretation of legal regulations.

Administrative-legal risk is a kind of public-law risk associated with standard-setting, law-enforcement and interpretive activity of executive authority bodies, which may inflict adverse effects for the established order of management in various areas of public administration.

The proposed concept of public-law risks corresponds with the concepts of "danger" and, consequently, "safety", "ensuring security" and so on, which are normatively defined in a number of laws and by-laws. So, the National security strategy of the Russian Federation describes the procedures and measures to ensure national security [5].

In accordance with paragraph 4 of the analyzed Decree of the President of the Russian Federation this strategy is "the basis for the constructive interaction

of public authorities, organizations and public associations to protect the national interests of the Russian Federation and to ensure the security of individuals, society and the State".

It should be noted that paragraph 6 of the Decree of the President of the Russian Federation from May 12, 2009 No. 537 formulates the concept of "threat to national security" that is defined as "direct or indirect ability to damage to constitutional rights, freedoms, decent quality and standard of living of citizens, sovereignty and territorial integrity, sustainable development of the Russian Federation, the defense and security of the State".

The main priorities of national security, in accordance with paragraph 23 of the Decree of the President of the Russian Federation from May 12, 2009, include national defense, state and public security.

Along with the main priorities, the paragraph of the Decree sets priorities of sustainable development, which include:

- increasing the quality of life of Russian citizens by guaranteeing personal safety, as well as high standards of living;
- economic growth;
- science, technologies, education, health and culture;
- ecology of living systems and environmental management
- strategic stability and equal strategic partnership.

The Concept of Public Safety in the Russian Federation, approved recently by the President of the Russian Federation [6], formulates the main sources of threats to public safety in the Russian Federation. The importance of the considered document for the analysis of the set theme is that there are key areas of the public safety and identification of potential risks, prevention and neutralization of which should be in focus of the public authorities' efforts.

Thus, in accordance with subparagraph "a" paragraph 6 of the Concept of public safety, the threat to public safety is understood as "direct or indirect ability to inflict harm to the rights and freedoms of man and citizen, material and spiritual values of society".

The main sources of threats to public safety, in accordance with the provisions of section II of the the Concept of public safety, include:

- ordinary crimes;
- extremist and terrorist activity;
- alcoholism and drug addiction;
- corruption;
- illegal migration;

- deteriorating of the technical condition of transport infrastructure and its runout;
- condition of nuclear facilities;
- economic human activities that threaten the environment;
- fires;
- hydrological regime of water objects;
- seismic hazard.

In this document, public safety is closely linked to environmental safety of economic activity. For example, in paragraph 20 section II of the Concept of public safety in the Russian Federation "The main sources of threats to public safety" it is noted that "analysis of the situation in various areas on ensuring biological and chemical safety leads to the conclusion that there are serious risks of infliction harm to people's life and health, the environment. New biological and chemical threats to public security have appeared against the background of the significant deterioration of ensuring the sanitary-epidemiological, veterinary-sanitary, phytosanitary and environmental safety, as well as the decline of the biotechnological and chemical industry".

In fact, the definition of "public-law risk" and "administrative-legal risk" proposed in this article and the concepts of "threat to national security", "threat to public safety" are close in semantic content, as they have a common methodological approach that lays in their interpretation as potentially adverse phenomena. However, there are also fundamental differences. The sources of "threat to national security" and "threat to public safety" are defined in plane of events and actions entailing negative consequences, but the concept of "public-law risks" includes a law-making context – adoption, implementation and interpretation of legal regulations.

The authors of this article invite all those wishing to respond to this article, to offer its own vision of the issue of public-law risks and constructive discussion with the aim of developing a fundamentally new scientific direction in science of administrative law.

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