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JUDICIAL CONTROL OVER DISCRETIONARY ADMINISTRATIVE ACTS AND PROCEDURES IN THE RF: LEGAL PROBLEMS AND POSSIBLE WAYS OF THEIR RESOLVING

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The author analyzes and criticizes the attempt of prohibition of administrative discretion by Russian legislator. By analogy with the experience of some foreign countries here is offered to distinguish several forms of administrative discretion, the intensity of judicial monitoring of which should be different.

The thesis that judicial verification of complex administrative acts and administrative procedures cannot be limited to the formal-legal legitimacy, but should also gradually expand to individual requirements for validity and appropriateness, is given in the article

Keywords: discretion, administrative act, administrative procedures, principles of administrative law, principle of proportionality.

Absence or incompleteness of administrative procedures, lack of the procedure for fulfillment by public authorities or local self-government bodies (their officials) of certain actions or one of the elements of such procedure is qualified by the current Russian legislation as one of the corruption-factors that is the basis for the recognition administrative act invalid (see paragraph 3 of the Methods of anti-corruption expertise of normative legal acts and drafts normative legal acts [3]). One more of the most important requirements to administrative procedures – establishing of decision criteria (including, denial of taking positive decision).

Of course, the establishment of a legal framework for discretion is a necessary undertaking. However, excessive reliance of the Russian legislator on administrative procedures sometimes plays with it a bad joke. If we carefully examine the same administrative regulations, it is easy to see – enshrined "criteria" are often of too evaluative nature that may at any time be subject to judicial contesting, especially in the field of providing of rights. Indeed, if the absence of necessary documents is an easy formalized reason for refusal, then how to enshrine legal significance of the results substantial evaluation of submitted applications? Let's take as an example one of the administrative regulations of the Federal Agency for Management of Special Economic Zones [4]. According to paragraph 2.8 of the regulation, the number of grounds for refusal of providing corresponding state services includes non-compliance of business plan, attached to the application for conclusion an agreement on the carrying out of techno-innovation activity, with business plans' evaluation criteria established by the authorized body of executive power. The last ones are enshrined by an independent normative act [5] and include: the compliance of the project provided for by business plan with the objectives of creation of special economic zones, as well as with approved perspective plan of development a special economic zone, the degree of financial sustainability of the project provided for by business plan, the availability of necessary infrastructure, the level of elaboration of marketing strategy, the achieving of a positive social and economic effect associated with the implementation of the project, and so on and so forth. It is easy to see: these evaluation "criteria" need independent evaluative interpretations. In general, there is a vicious logical circle.

This means that the Russian legal order (as once other legal orders that rationalized public administration through administrative procedures) has faced a situation where even the most powerful "pressure" on discretion cannot to reduce it to zero. Like the horizon line, which moves away as we approach it, in management areas always remains a sphere that is elusive for administrative procedures. This means that the Russian courts must learn to "work" with discretionary administrative acts and administrative procedures.

Unfortunately, the Russian doctrine has not developed a theory of administrative discretion. And judicial practice has gradually embarked on the path of empirical implementation of the principle of proportionality. At that, most willingly the latter was used within the framework of constitutional court procedure, when evaluating predominantly rulemaking discretion from the standpoint of both public legal order and protection of the rights of citizens (organizations) (read more on this subject: Tolstykh V. L. Constitutional Justice and the Principle of

Proportionality [15]). Administrative court procedure very carefully implements this principle; taken attempts are reduced mainly to the scope of administrative coercion, responsibility – for the purpose of ensuring the protection of rights of powerless entities [16].

Another means of "counteraction" discretion (including – abuse of powers by state executive bodies) can be the established by the Constitutional Court of the Russian Federation requirement of certainty of legal prescriptions [6; 7; 8], which even has been reproduced by the Supreme Court of the RF in one of the decisions of its plenary session [9]. However, until recently this extremely evaluative judgment has been rarely used by the courts exercising administrative legal proceedings. It is not surprising that, when faced with any form of discretion, the courts (not related to the constitutional branch) preferred to evade relevant checks [10]. However that may be, already then another trend of increasing the role of judicial practice has begun to brighter manifest itself.

However, at some point, the situation with the discretionary acts and procedures has undergone significant change. Continuing to refuse isolation of discretion forms, determination their relation to the degree (density) of judicial control, the Russian legislator simply tried to prohibit administrative discretion. According to article1 of Federal Law No. 172-FL from July 17, 2009 "On Anti-corruption Expertise of Normative Legal Acts and Drafts of Normative Legal Acts" [1], "corruption-factors are the provisions of normative legal acts (draft of normative legal acts) that establish for law enforcer unreasonably wide margins of discretion or the possibility of unjustified application of exceptions to the general rules, as well as provisions containing vague, exigeant and (or) onerous requirements for citizens and organizations and thereby creating conditions for corruption". The corresponding resolution of the Government of the Russian Federation has listed corruption factors, enumerating among such:

1) breadth of discretionary powers – the absence or uncertainty of time terms, conditions or reasons for taking decision, the presence of duplicated powers of public authorities or local self-government bodies (their officials);

2) definition of competence according to the formula "has the right" – dispositive providing of the ability of public authorities or local self-government bodies (their officials) to carry out actions against citizens and organizations;

3) selective modification of the scope of rights – the possibility of unjustified making exceptions from the general procedure for individuals and organizations at the discretion of public authorities or local self-government bodies (their officials);

4) excessive freedom of sub-legislative rulemaking – presence of blanket and reference rules that leads to the adoption of bylaws invading the jurisdiction of public authority or local self-government body that has adopted an original normative legal act;

5) adoption of a normative legal act beyond the competence – violation the competence of public authorities or local self-government bodies (their officials) when adopting normative legal acts;

6) filling legislative gaps using bylaws in the absence of legislative delegation of appropriate powers – the establishment of universally binding rules of conduct in a subordinate act in the absence of law;

7) absence or incompleteness of administrative procedures – the lack of procedure for fulfillment by public authorities or local self-government bodies (their officials) certain actions or one of the elements of such a procedure [3].

On the one hand, the relevant provisions are largely sensible and commendable. But on the other hand, they suggest that the legislator has decided to fight with discretionary acts and procedures through "preventing" them at the stage of elaboration and adoption of normative acts. However, immediately raises the question: what shall we do if such corruption factors "break through" the sieve of multiple monitorings and expertizes? In the scientific literature even suggested that their judicial contesting is impossible, because the mere existence of corruption factors cannot be recognized as a violation of an act of greater legal force [14]. Indeed, the fight with evaluative provisions through providing courts other evaluative norms is a contradictory step. But Russian courts have independently tried to sort out this complicated situation.

We believe, that using the German classification of discretion forms, one can (with a known share of convention, of course) distinguish two approaches of Russian courts to the intensity of verification of discretionary administrative procedures and administrative acts.

First, discretion in the narrow sense (concerning commission of an action, failure to commit such or choice of conduct patterns) is indirectly, reluctantly – but recognized in the competence administrative authorities. Thus, the object of verification in the Supreme Court of the Russian Federation was the provisions of the administrative regulations on the oversight function in the field of fire safety. The contested norm of the regulations, providing a responsible official in the case of detection of violations the right to issue a prescription and take necessary measures to control the elimination of violations detected, directly enshrined the power of inspector to independently determine deadlines for eliminating these violations.

The Supreme Court of the Russian Federation stated that this discretion does not mean arbitrariness, since, according to legislation requirements, there was a criterion for calculation of designated time terms: they must be defined with taking into account the nature of violation of technical regulations requirements [12]. The position of the court, which, to put it mildly, found such weakly formalized norms sufficient, leads to the conclusion on recognition of the increased autonomy of subjects of public authorities within the framework of administrative procedures on taking discretionary decisions (in the narrow sense). Thus, the density of judicial control over this form of discretion should minimize, what, to some extent, puts Russian judicial practice closer to the German one.

But with respect to uncertain legal concepts Russian legislator, as has already been mentioned, takes openly hostile stance, urging the courts, within the framework of normative control, to "scrape" them as corruption-factors. Of course, the uncertain legal concepts are a peculiar instrument of legal regulation. But, not always appropriate. So, for example, the approved by the Ministry of Justice of the Republic of Tatarstan administrative regulations of rendering state services on providing permits for the use in the names of legal entities such titles as "Republic of Tatarstan" (and similar) contained the following grounds for refusing to render state services: the nature and scope of activities of legal entity do not have essential significance for the Republic and the citizens living in it; the position of organization in the relevant field of activity or in the markets of the Republic of Tatarstan and the international market is insignificant; types of goods (works, services) produced by a legal entity are not unique, unique to the Republic of Tatarstan. Courts of general jurisdiction rightly determined such non-formalized concepts as vulnerable from the standpoint of anti-corruption legislation and recognized them inoperative [11]. But if in certain circumstances we should agree with such assessment, then it seems not possible to support an aprioristic attribution of all uncertain legal concepts to corrupt factors. Repeat: bringing this logic up to absurd conclusion, the relevant provisions of anti-corruption legislation themselves can be recognized inoperative exactly because of their incorrectness. A constructive way out from the logical impasse should be an unspoken "legalization" of uncertain legal concepts with simultaneous deep judicial verification of not so much administrative procedures (within the framework of normative control), but administrative acts taken on their basis.

So, the initial attack on the administrative discretion through the judicial application of the principle of proportionality (mainly for the purpose of protecting the rights of powerless entities) in Russia had a known similarity with European

experience. However, in recent years this principle has gained an original, "Russian" direction – combating corruption (as a rule, within the framework of normative control). Incompliance with the "requirements" of anti-corruption legislation becomes a ground for cancellation of legal norms, including administrative procedures, especially in relation to uncertain legal concepts. While agreeing in general with the urgency of the problem of combating corruption, we believe it necessary to adjust the density of judicial control, by analogy with the German experience, on the one hand, concerning the forms of discretion, and on the other – concerning spheres of regulated relations.

Concerning the forms: we should limit judicial control over the procedures and acts of implementation discretion in the narrow sense (as the performance of certain actions within the competence) and strengthen it in relation to uncertain legal concepts. At that, in the latter case, accents should be moved from the normative control over individual acts.

Concerning the spheres of public relations, it seems advisable to perceive Western approaches that minimize external control over administrative acts adopted on the issues of examinations, planning, political issues, rights providing activity (such as social security, etc.). However, we should consider a gradual decrease of restrictions in the case of verification of administrative procedures and administrative acts of these groups on the subject of corruption. If the Russian doctrine and judicial practice will be able to develop relatively effective mechanisms for action of such direction of proportionality, it would be the Russian contribution to the international experience of judicial control.

The issues of evolution in Russia of density of judicial control over the discretionary acts and procedures are closely related to the problem of development of the grounds for their reconsideration. The above parsed phenomenon of the legislation on combating corruption is in itself confirmed the consolidation in the Russian legal reality of another relevant European trend – extension of the content of legality, the mimicry of other requirements (principles) of law under it. We think it would not be an exaggeration to claim that the recognizing a norm as corruptive says not so much about its illegality (since "anti-corruption norms" are largely devoid of a particular content), but much about its inappropriateness.

Complication of forms of managerial actions has strengthened the tendency of "blurring" the legality. To illustrate this thesis we take one of the most painful themes for the modern Russian society – the problem of public procurement regulation. We should immediately mention that: contracts concluded by public authorities to ensure state needs are not administrative acts. However, even if to deny their

nature of administrative contracts, they absolutely cannot be denied the status of private-legal forms of public management. In addition, conclusion of government contracts forms a complex set of legal facts in the unity with administrative acts. Therefore, a brief analysis of judicial control over the procedures of their conclusion will not be a deviation from the stated topic.

From the very beginning of introduction procedures for conclusion government contracts public opinion gets ample food for discussion, in the first place concerning the validity of procurements. Multimillion sums of repairs of officials' offices (with the cost of toilet brushes from 12 thousand rubles and above), purchase of medical equipment at prices that are multiply higher than average market price, purchase of absolutely necessary in daily administrative work things like a bed made of cherry, decorated with hand-carved and with headboard and footboard covered by a layer of gold 24 carat, Swiss gold watches with rubies, caskets decorated with fish skin, finally, carnival costumes of snowflakes, firebird, witches and sailors [13] – all of this cannot but raise questions. Immediately note: such powers were initially considered not simply as discretionary ones, but as taken out of the scope of judicial control. New Federal Law No. 44-FL from April 05, 2013 "On Contractual System in the Field of Central and Local Government Procurement of Goods, Works and Services" [2] among the novelties established, including, such a requirement as *substantiation of procurements* (article 18). However, having made a very important step for the "legalization" of reasonability as a property of legal form of management, the legislator has evaded a logically deriving next step. In accordance with articles 18 and 99 of the Law, verification of substantiation of procurement (and recognition them unfounded) is implemented in out of court procedure. Thus, following the literal interpretation of the Law, even the most ridiculous public procurements cannot be challenged in court because of their evident groundlessness. It is very difficult to accept such a position. We think it would be very useful to apply the British experience of evaluation managerial actions forms under the test of Wednesbury for their reasonableness. At that, the legal possibilities for such a precedent in Russia are very great; it's not just about the institutionalization of substantiation, but also about the anti-corruption legislation in general. Moreover, the test for reasonableness, seems, should be extended to all administrative procedures, administrative acts and other legal form concerning the issues of disposal of state property (except for "political" kind of interbudgetary relations).

So, constant complication managerial activity has thrown a famous challenge to administrative law in different countries. The main point of this challenge is that

even the "tightest" regulation of public administration through many administrative procedures does not allow us to sneak in some hidden sphere called administrative discretion. If we base on the classic dogmatics, such administrative acts and procedures should not be checked by the courts (after all, the courts are empowered only to identify obvious legal defects of legality). But such "precautionary" approach already is not enough for modern society. Today, for powerless subjects is important to have additional legal instruments (primarily judicial protection) from the obviously erroneous, unreasonable, irrational decisions. Learned Western legal orders try to differently resolve this problem. But here all of them follow the path of not so much adjustments to the legislation, but of elaboration of scientific doctrines and "mobile" judicial practices. The latter increasingly appeal to such principles of law as reasonableness, feasibility, justice (often masked as the legality). The direct tool for their application is most often the principle of proportionality.

Much of this can be useful for Russia. At that, the domestic experience with all its uncertain empirism conducts pretty interesting experiments (adapting, for example, the principle of proportionality for the purpose of combating corruption). Started searches and discussions will not end next few years (maybe decades), thus forming a new look of judicial control over public administration, and it means of forms of managerial actions with the procedures of their development, approval and implementation.

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pravonarusheniyakh – Topical Issues of Legislation on Administrative Offenses: Substantive and Procedural Aspects: collection of scientific works dedicated to the memory of Yu. M. Kozlov and the 10th anniversary of the entry into force of the Code on Administrative Offences of the Russian Federation, Editor-in-chief E. P. Andryukhina, Moscow: 2012.

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CORRELATION OF ADMINISTRATIVE COURT PROCEDURE AND ADMINISTRATIVE PROCESS: THEORY OF THE ISSUE[1]

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Critical analysis of the draft Code of Administrative Court Procedure (CACP) of the Russian Federation is given on the base of author's understanding of the correlation of administrative court procedure and administrative process. The author's statement that the draft Code of Administrative Court Procedure of the Russian Federation "contains many doctrinally inconsistent and sometimes directly controversial provisions" is disclosed in the article.

Keywords: administrative process, administrative court procedure, code of administrative court procedure, administrative justice.

In the discussion of a new draft law we should be based on objective correlation of basis and superstructure. The superstructure in this case is a draft of Law, and the basis – authoritative operational activity of administration. In other words, the parameters of a law may be relevant regularities of social development only then when they are not contrary to the basis. Consequently, the law must also reflect the main feature of administrative process – servicing of namely operational activity of administration, and, therefore, such a law has to ensure the efficiency of justice servicing this activity.

[1]Published on materials of I All-Russian scientific-practical conference of students, postgraduates and young scientists «Modern Problems of Administrative Court Procedure and Administrative Process» (Novosibirsk – 2014)

Discussion of the draft Code of Administrative Court Procedure of the Russian Federation (hereinafter – CACP RF) shows that in the science of administrative law the issue of the concept, principles, essence, and hence the specificity of administrative court procedure still has not been resolved. One of the drafts of such Code is revoked [3], and rightly so. Adoption in such a situation of this draft law is premature and once again it can undermine citizens' respect for the law because of its unpreparedness. At the same time, not having a settled procedure for resolving disputes with administration, it is also impossible to introduce administrative tribunals. Since the courts of administrative justice operate according to the rules of the independent type of procedural law –administrative process [8].

We should agree with the opinion of some scholars that the question of essence and structure of administrative process and administrative-procedural law is inevitably linked "with overcoming of the prevailing in doctrine dichotomy "managerial approach – jurisdictional approach" in its various theoretical interpretations" [16, 4]. However, A. I. Kaplunov believes, that "today there is a reason to talk about three main approaches to the understanding of administrative process: managerial, judicial and integrated (combining the first two approaches)" [17, 23]. While ignoring our researches on this issue, the essence and conclusion of which is the statement that understanding of administrative process requires banal ability to distinguish the substantive law from procedural one, as well as the judicial branch of power from the executive one [13]. Absence of ability to distinguish these elementary for legal profession categories – lack of professionalism, consequence of a long in the history of Soviet Russia neglect to procedural means of defense in courts. At those times, the decision of political party organizations was enough to resolve conflicts.

The term of "administrative court procedure" is taken from article 118 of the Constitution of the Russian Federation of 1993, however, it enters into a conflict with the term of "administrative process" [5; 22; 20].

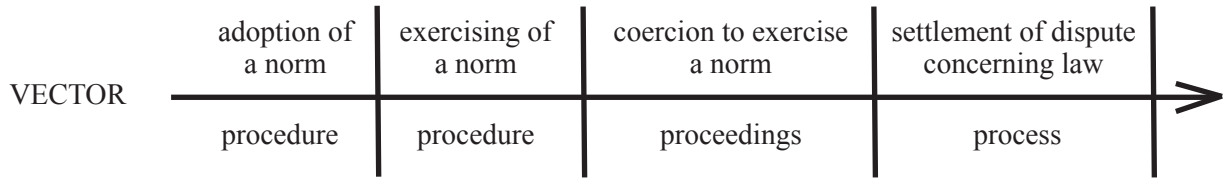
Experts distinguish in civil process judicial acts taken in 1) action 2) special proceedings and 3) proceedings on cases arising from public legal relations [4, 36]. These types of court procedure, as noted by V. V. Argunov, proceed according to the rules of civil process. That is, in his interpretation, process is wider than court procedure. By analogy, in the bowels of administrative process we could also distinguish a number of types of administrative court procedures, for example, taking into account the peculiarities of the process in disciplinary tribunals, regarding other types of management, finally, regarding the peculiarities of the chapters of the Especial Part of Code on Administrative Offences of the RF

and the branch of substantive administrative law. This may also include court procedure on materials of gross disciplinary offences when applying to servicemen disciplinary arrest and on execution of disciplinary arrest on the basis of the Federal Law No. 199-FL from December 01, 2006 [2]. Departmental special quasi-litigation for resolving disputes arising from administrative relations has long implemented and is natural [9]. However, in the countries of Anglo-Saxon legal system, for example, in England or the United States, with such a separation of powers when the existence of any departmental courts is legally impossible, administrative tribunals are also created.

The difficulties of determination the content of the Code of Administrative Procedure are primarily associated with the lack of consistent teachings on the subject matter of procedural legal relations. Therefore, the definition of I. V. Panova, that administrative court procedure is called "consideration of administrative cases according to the norms of administrative-procedural law" [18, 20], doesn't work, because first one has to determine how such an article has appeared in the procedural code, and whether it correctly located in it.

For example, although in the draft CACP RF appropriate relations of a judge with people in courtroom and with the parties to a dispute are equally referred to the measures of *procedural* coercion, they are by their legal essence completely different, where you can feel the difference of which just knowing the difference of substantive and procedural law. If the removal out of courtroom of a violator, such as paparazzi, is possible, then the removal of a party to a dispute out of the courtroom is impossible due to the negation of the very essence of judicial way to resolve legal collisions. It would be tantamount to a denial of justice. Thus, in the first case the relations of judge with the paparazzi are substantive-legal ones, and relations in the second case, with a party to the dispute, – procedural legal ones. Their equalizing presence in the same article 118 of the draft CACP RF is an indication of incorrect theoretical positions of the drafters of the Code, their legal illiteracy, inability to distinguish between the substantive law and procedural law.

We propose the following algorithm of managerial activity and life of the legal norm that allows extracting of material and procedural aspects from the whole range of legal relations. Because the legal norm is implemented in legal relation, otherwise it is almost meaningless. The scheme is such:

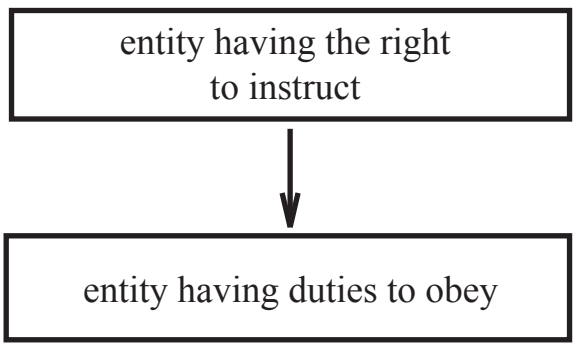


In our view, substantive law defines the specific rights and duties of specific subjects of law. The realization of these rights and duties take place in substantive-legal relations. It does not require attraction of terms related to procedural activity of public authorities. That is why we find managerial concept in the notion of administrative process wrong, despite the fact that it is supported by many highly respected luminaries of administrative law: V. D. Sorokin, A.P. Alehin, Yu. A. Tikhomirov and others. Here is acceptable the other term – *procedures*.

We agree with Yu. N. Starilov that it is necessary to adopt separate "Code of Administrative Court Procedure of the Russian Federation" and the Federal Law "On Administrative Procedures" [21, 28]. Since one of them belongs to administrative substantive law, and the other is obliged to belong to administrative-procedural law. However, the distribution of legal matter into two codes is a big technical difficulty. In the procedural codes still continue to find substantive norms (for example, organization of courts), and in substantive codes – procedural norms. Strictly speaking the issues of organization of courts refer to constitutional law. And they are often included in procedural codes.

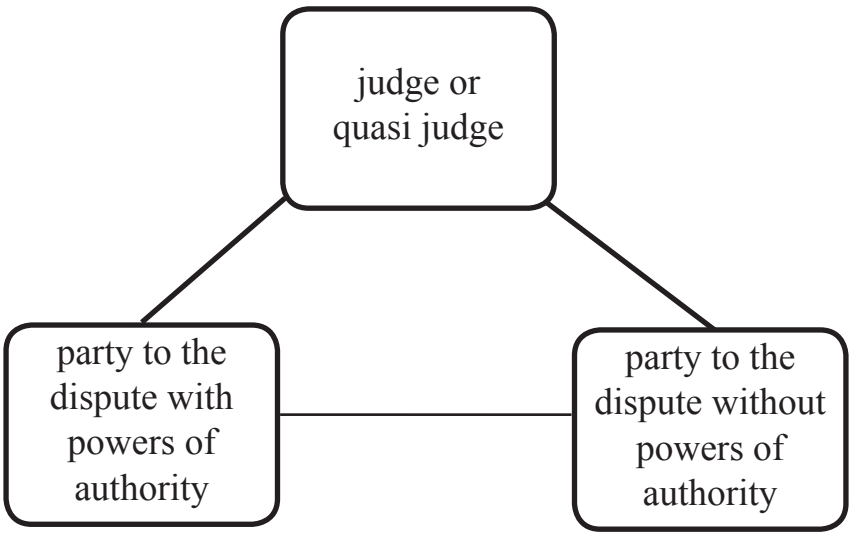
Procedural law regulates specific activity of the specialized state bodies, whose competence includes a special litigation procedure: a) of disputed cases of application of law, b) arising out of authoritative legal relations, c) at a special procedure for the determination of legal truth in a particular conduct of the subjects of a disputed case (process), d) implemented by a special subject of law, court or quasi-court, and e) aimed at the education of the population in the spirit of conscious respect for the law through justification of its justice.

We have a simplified criterion to distinguish between substantive and procedural law. There are two aspects in substantive relations:



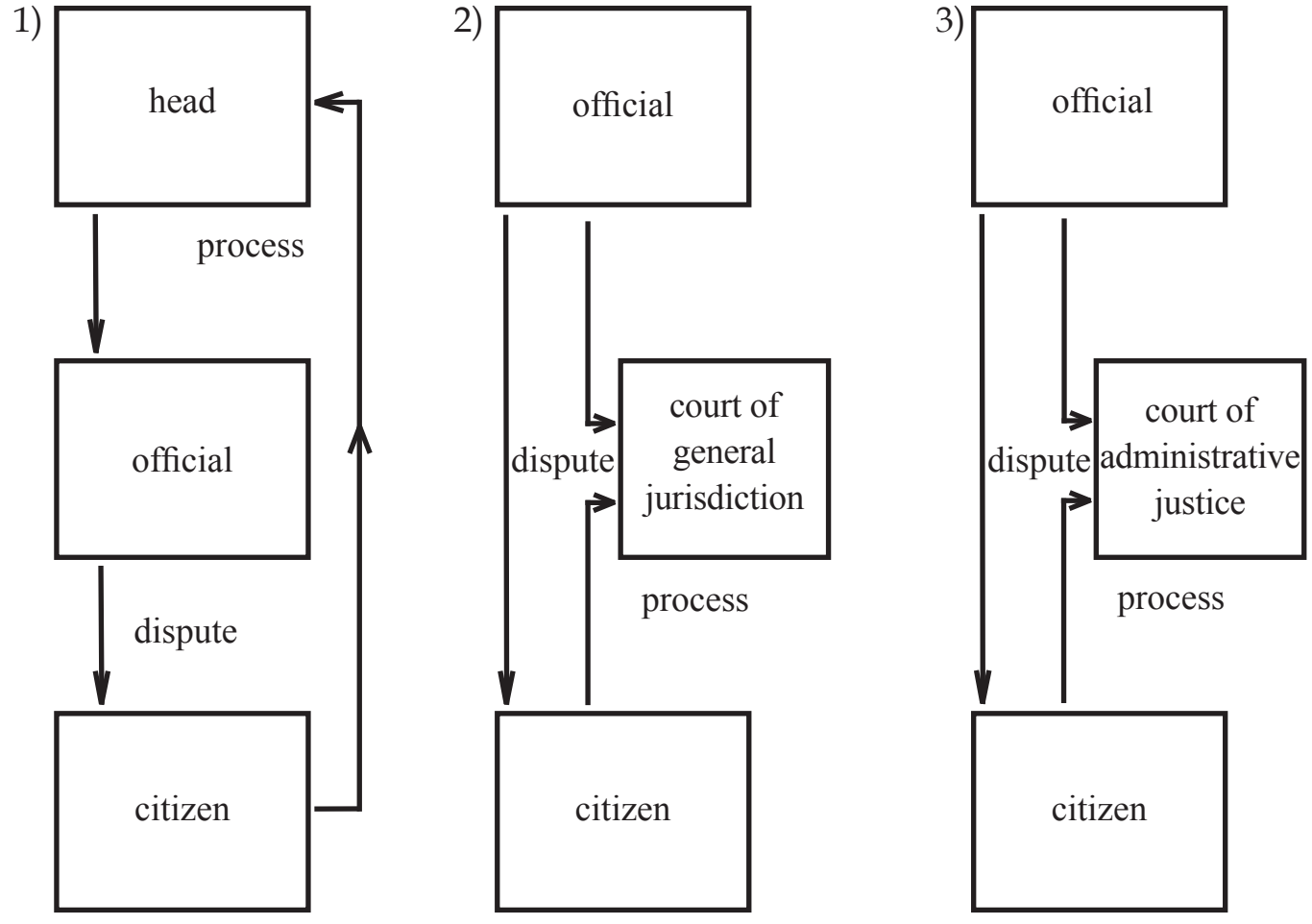
,

and in procedural relations – three:



And in terms of a strict approach to the procedural law of O. Byulow, who defined the process as the relationship of parties with court [6], legal bond in this scheme between the parties to the dispute (the bottom line) should be absent.

In our opinion there are three cases where administrative process, as a procedure to protect rights in administrative court procedure, has or has to have place [11]:



In each of these cases, procedural legal relations are singled out when pass through contacts with an authoritative entity with the powers of resolving administrative disputes. Cases, where the legislator confers not judicial bodies the right to resolve administrative disputes, relate to the quasi-courts. There are such cases in the legislation of the Russian Federation, for example, the Commission for Review of the case on violation of antimonopoly legislation in the bowels of the Federal Antimonopoly Service, the Chamber on patent disputes of the Russian Agency for Patents and Trademarks (now the Federal Institute of Industrial Property), City Housing-conflict Commission based on the decision of Moscow Government No. 321 from May 06, 1997, and so on.

There are quite a lot of features of administrative process as an independent type of procedural law [8], but, generally, they show that administrative process cannot be carried out according to the rules of civil procedure, and therefore administrative courts cannot be included in the system of courts of general jurisdiction. Almost all features are due to the operational nature of the activity of administration and the relatively harmless nature of administrative offenses. In a concentrated expression we note the following features which are to be reflected in the Administrative Procedure Code. They include: inquisitorial nature of administrative process: civil competition in a dispute with the authorities is not justified (that is, court is active, it is not an indifferent viewer of the competition of parties, court is a public authority and through its decision dictates the will of the States concerning an issue that is disputed by the parties); short time terms of limitation periods and resolving of cases; operativity, because this type of procedural law resolves disputes with operational authorities and multi-year civil litigations of disputing parties would paralyze the activity of active administration; onus probandi lays on authoritative party to an administrative dispute, since dissatisfaction of subordinated entity with authorities' decision casts doubt on the competent implementation of authorities' powers (presumption of administration's guilt [12, 102], once subordinated entities question its actions); absence of multi instances (the draft of CACP include appeal, cassation and reconsideration that do not reflect such peculiarity of administrative process in comparison with other branches of procedural law as operativity); symbolic, not cruel punishments aimed at the development of respect for the law; absence of a state duty for functioning of the public authority that resolves administrative disputes (such a body is financed from the state budget, taxes for the formation of which citizens have already paid [14]), and so on.

The real aim of adoption the Code of Administrative Procedure is the establishment of courts of administrative justice, the form of activity of which is exactly administrative process.

Decree developed by N. G. Salichsheva and adopted in 1968 [1], which existed for a long time, seems to us a sample of brief Document governing the operational process for resolving disputes arising from administrative legal relations. Most of it was a procedural mini code, since its foundation was based on the tripartite nature of legal relations in its exercising.

On the basis of the stated positions we carry out an express analysis of the content of the draft CACP RF submitted by the Russian Federation President to the State Duma.

The draft Code of Administrative Court Procedure of the Russian Federation contains many doctrinally inconsistent and sometimes directly contradictory provisions.

The first comment to it – there is no justification for the special title of court procedure on administrative cases. As in any other area of law, its procedural part should be titled as the "Procedural Code". Administrative law should not be an exception. Consequently, the document that governs the procedure of settlement disputes arising from administrative legal relations, like in other areas of law should be titled as Code of Administrative Procedure of the Russian Federation.

The question of authorship of the Code in this case is important because it reflects private views on administrative process [15, 10-13], in our view, distorting its original main features. While criticizing prolixity of the draft law on CACP RF, Professor L. A. Gros' notes that the draft "is cumbersome and fails both "on the merits" and "in publishing" [7, 19]. The authorship of the draft law increases personal responsibility in front of colleagues and enhances the credibility of originator. Draft law of such an important level, as we are discussing, is usually prepared in the Institute of Legislation and Comparative Law under the Government of the Russian Federation. Opinion of Yu. A. Tikhomirov has an authority in this Institute. But the influence of lobbyists and advocateship is also felt in the text of the draft law. This draft of CACP RF represents a characteristic for our time verbiage, the desire to include in that document all the information about the state legal system, not paying attention to specific qualification of exactly administrative cases, and such document immediately becomes heavy, hard to read, and also harder to execute. But its lack of general concepts or rules is a pleasant opportunity for attorneys to implement customers' difficulties in mastering such a complex document. Therefore, in the totality, we see the reactionary nature of

the provision of the draft Code on mandatory conduct of a case when the actual monopoly of the advocateship. That is how we evaluate the essence of part 1 article 57 of the draft, which provides that only persons having higher juridical education may be the representatives in courts concerning administrative cases. This requirement is coordinated with the position of the Constitution of the Russian Federation concerning qualified legal assistance in Russia, but it limits the right of a citizen to personally decide the issue of conducting its case through a trustee, representative. Commercialization of justice should not be indulged. The credibility of the State is based on the "independent" (from lawyers) justice. Justice should not be measured in money. Administration of justice is more important.

This is also accompanied by the issue of opportunity to conduct a case in order to protect the interests of other persons or an indefinite number of persons (articles 41 and 42 of the draft). We also see the reactionary nature in providing a number of persons (authorities, organizations and citizens) the right to speak on behalf of complainant without its consent and without a power of attorney to represent its interests. There is no reason to believe that the interests of these types of the subjects of law are the same or necessarily match each other. The suggestion of the draft of CACP RF to consolidate the right of a wide range of people to act in the interests of other persons, even without the need to request consent of the represented persons, who have not expressed their will, is not even a communist concept of unlimited self-government and destruction (necrosis) of the State. As soon as the will of a citizen is not asked, it may not be recognized as a subject of law in general [10]. The problem of administrative process aimed at protecting the rights of citizens, in this case is removed. Then, completely different interests than the interests of a legally capable person, as a full subject of law, are under protection.

The draft does not meet many of the features of administrative process, such as operativity, low degree of public danger, low cost of process, aim – education of subordinate subjects in a spirit of voluntary compliance with the rules of administrative regulation established in the country.

Administrative disputes, disputes arising out of activity of authoritative entities of administrative law essentially refer to the scope of the administrative justice courts, administrative tribunals, which have gained prestige and place in the judicial system of many countries of the world due to their specific features. They should not refer to the scope of courts of general jurisdiction, the activity of which is based on civil basis – adversarial nature. Still the draft of CACP RF in part 2 article 1 imputes this procedure to the courts of general jurisdiction. It is impossible to do with just a specialization in administrative cases of the judges of

general jurisdiction courts, since the isolation of such judge from the realities of administrative activity of the state apparatus always manifests itself.

The draft of the Code of Administrative Court Procedure of the Russian Federation, unfortunately, has not identified a list of officials, claims of the citizens to which on the issues of their competence fall under its jurisdiction. We recall that the draft Federal Constitutional Law "On the Federal Administrative Courts in the Russian Federation" of V. I. Radchenko [19] contained such a list and included contesting of actions and inactions by the RF President, ministers and other officials of the Russian state apparatus, potential violators of civil rights in administrative-authoritative issues. At the same time, "the resolution of disputes between federal public authorities and public authorities of the constituent entities of the Russian Federation" (paragraph 11 part 1 article 23 of the draft CACP RF) is rather a constitutional issue, and it cannot be regulated by the code of administrative procedure. Executive authorities are not legal entities of public law, therefore, the dispute of two ministries concerning the limits of competence of each of them, which is resolved by their direct supervisor (Chairman of the Government or the President of the Russian Federation respectively), is resolved in the procedure of administrative subordination. Such disputes can be referred to the courts' jurisdiction only if their immediate superiors themselves generate conflicts by acts on creation of countless administrative structures, are not qualified or shirk their duties to coordinate the activities of the state apparatus.

Short time periods for review of administrative disputes are one of the features that separate administrative process into an independent kind of procedural law. They must not potentially slow operative activity of administration. So if there is a need to consider and resolve contentious cases for a long time, with many instances, within full procedure, there is no reason to include such disputes exactly in the Code of Administrative Procedure. For example, if "Administrative cases on contesting normative legal acts are considered by court within a period not exceeding two months from the filing of an administrative statement of claim, and by the Supreme Court of the Russian Federation – within three months from the date of its filing" (part 1 article 215 of the draft CACP RF), it is desirable to subject them to full procedural proceedings in courts of general jurisdiction under the rules of civil court procedure, within an adversarial procedure. Then, it makes no sense to call such disputes subject of administrative-procedural dispute.

It seems that there is a need for development of a new text of such a draft Federal Law. As well as clearer distinguishing between substantive and procedural content of the Code.

The issues of formation the Code of Administrative Procedure of the Russian Federation are not so simple, this is evidenced, including, also by long periods (since 1993) of realization article 118 of the RF Constitution, which provides for the introduction of various types of procedural legal relations. The solving the issue on independent administrative court procedure requires the participation of young, new personnel, who are not overburdened by the stratum of the past in theory and practice.

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LEGAL UNCERTAINTY AND LEGAL RISKS IN ENVIRONMENTAL LAW: PROBLEM STATEMENT[1]

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Legal uncertainty is considered as a state of legal regulation, which is characterized by gaps, collisions, other defects that generate legal and other risks for subjects of legal relations.

The author proves that the legal risks in environmental law, in environmental legal relations are due to "the presence of specific environmental risks, the nature of which is such that, even at the present level of development of science and technology, it is impossible not only to prevent with 100% probability, but even to identify and evaluate all possible risks to the environment resulting from the planned economic and other activity".

Keywords: legal risks, environmental law, legal risks in environmental law, legal uncertainty.

[1]Published on materials of scientific roundtable «Legal Risks in the System of Public Administration» (Moscow: Financial University - 2014)

There is no doubt that ideal laws are the goal of legislative activity, which should be constantly strived. Therefore, continuous attacks in the society on "bad" laws are often associated with a lack of understanding that the rulemaking process is subjective in nature, so the legislation objectively contains defects, such as legal gaps and conflicts. On the other hand, we cannot accept the position often occupied by officials at various levels of government, citing the "bad laws" in justification of their own inaction. The reference to "bad" law in their case is a convenient formal reason not to carry out functions entrusted to an official.

Very often the cause of criticism of the legislation and law, the legal system as a whole becomes a situation of legal uncertainty, in which legal norm exists, but at that, subject of law does not understand how to exercise it. The situation of legal uncertainty also arises when gaps in the legislation.

The relevance of resolving legal uncertainties can be easily proved by analyzing the decisions of higher courts. So, the categories of "uncertainty" and "legal uncertainty" are used in hundreds of decisions and rulings of the Constitutional Court of Russian Federation. In fact, considering specific legal situations, the Constitutional Court of the Russian Federation also resolves legal uncertainties through interpretation of norms for the check of conformity with the Constitution of the Russian Federation [5; 6].

In judicial decisions, of course, the content of these concepts is not disclosed. Therefore, there is a need for scientific analysis of the categories of "uncertainty" and "legal uncertainty" to work out definitions, approaches to identification and elimination or minimization their consequences.

In the legal literature, the uncertainty in law is understood in broad and narrow senses. In the broad sense uncertainty in law refers to the building and functioning of legal system, in which we can observe legal conflicts and contradictions between the levels and forms of legal regulation [11, 12].

According to T. N. Nazarenko, the uncertainty in law is the phenomenon of imperfection of legal regulation due to objective and subjective factors of lawmaking. It means inaccurate, incomplete and inconsistent enshrining and exercising of normative legal will in law. In the narrow sense the uncertainty in law is considered as a technical-legal defect in the text of law as an external, written form of it expression. Uncertainty as a technical-legal defect represents logical-linguistic deviations, deformations in the building and expression of legal norms, which are manifested in the absence of accurate, complete normative legal rules, what inevitably leads to reduction of regulatory properties of law, complicates interpretation of its norms and inhibits their effective implementation [9, 7-8].

In our view, legal uncertainty (uncertainty in law) is such a condition of legal regulation, which is characterized by gaps, conflicts, other defects and causes legal and other risks for the subjects of legal relations. Therefore, not every legal gap, conflict or other legal defect means the simultaneous existence of legal uncertainty.

In scientific papers and publications the terms of "legal uncertainty" or "uncertainty in law" are also widely used. So, as the provision for the defense of the dissertation for the degree of Doctor of Law has been submitted the thesis that legal uncertainty characterizes relations of legal succession of obligations of a peasant (farmer's) enterprise in the case of enterprise's termination by the formation a production cooperative or an economic partnership on the base of the enterprise's property [8, 12]. However, there are not so many works that specifically consider this issue or with regard to particular branches of law [10].

Legal and other risks are inherent feature of legal uncertainty in the provided by us definition of legal uncertainty. "Legal risks" is a multivalue concept, which can be understood in different ways. Firstly, legal risks can be regarded as risks the content of which is negative consequences for the parties of legal relations in the form of juridical sanctions: imposition of an administrative fine, recognition an agreement null and void, initiation of a criminal case or proceedings on administrative offence, deprivation of a special right.

Other approach is to include into composition of legal risks different financial, economic risks (suspension of production, loss of assets), reputational risks. In our view, the legal risks are proposed to be understood narrowly as risks resulting from the presence of legal uncertainty and providing for negative legal consequences. Other categories of risks can also be the result of legal uncertainty. So, in the legal literature distinguish constitutional risk, management risk, budget risk, entrepreneurial risk, risk in the area of labor relations, environmental risk.

According to researchers, the institute of risk is an institute of the theory of law that gets development and concretization both in sectorial legal institutes of risk and in complex institutes. In relation to risk the law performs functions such as legal recognition and assumption of risk, establishment of means for preventing and minimizing risk, determination of a measure of responsibility, as well as the functions of compensatory means [12, 10].

The task of the legislator and law enforcer is to minimize the amount of legal uncertainties and legal risks, since legal uncertainties are often the product of subjective factors in the development of legislation. It is because of the incorrect formulation of legal norms there are legal conflict and legal gaps that lead to emergence of legal uncertainties.

Why, with regard to environmental law, is there a need to study the categories of "legal uncertainty" and "legal risk"? This question requires a separate explanation and justification. The choice of the object of study in this case is absolutely not accidental and caused by multiple causes.

First, by the specificity of ecological-legal relations, peculiarities of the objects of environmental law. Components of the environment, natural resources, environmental information, rights to natural resources – inclusion of the specified objects in the sphere of legal regulation stipulates peculiarities of applied terminology, "binding" of legislation to the laws of nature, the specifics of applied mechanisms [3].

Environmental legislation differs from other branches of law and legislation by the complexity to describe and appropriately reflect in the legislation the laws of nature with help of legislative technique. It can be argued that the laws of nature and the laws of society are not the same in their content and orientation, and sometimes even contradict each other.

Secondly, legal risks in environmental law and in environmental legal relations are due to the presence of specific environmental risks, the nature of which is such that even with the present level of development of science and technology it is impossible not only to prevent with one hundred percent probability, but even to identify and evaluate all possible risks to the environment as a result of planned economic and other activity.

This issue is reflected in the legislation: article 77 of the Federal Law No. 7-FL from January 10, 2002 "On Environmental Protection" establishes the obligation of full compensation for the harm inflicted to the environment, which is expressed in the fact that the environmental damage, inflicted by the subject of economic and other activity, is subject to compensation, even if a project has a positive conclusion of the state ecological expertise [7]. The Federal Law No. 174-FL from November 23, 1995 "On Ecological Appraisal" establishes the principle of the presumption of potential environmental hazard of any planned economic and other activity [2].

Thus, the legislator following the scientists proceeds from the impossibility of guaranteeing the full ecological safety of project or the fact that a project, which has passed all validation procedure established by the legislation, will not harm the environment.

Thirdly, legal uncertainty and legal risks in environmental law are due to the relative youth of the branch itself. Environmental law as a branch of law is at the phase of active formation, scientific understanding. There are discussions concerning the Ecological Code of the Russian Federation, the drafts of Federal Laws "On

Environmental Insurance", "On Environmental Audit", "On Environmental Well-being Zones".

In these conditions, the emergence of legal uncertainties and legal risks is an objective phenomenon. Therefore, as an important task of enhancing the effectiveness of environmental law we should recognize the study on the problem of legal uncertainty and legal risks in relation to this area of the law and legislation.

Thus, the presence of legal uncertainties and generated by them legal risks is a permanent feature of environmental law due to the specifics of regulated by it public relations in the field of environmental protection.

The main source of legal risks in environmental law – the absence of clear rules of conduct. In turn, the lack of clear rules is due to the permissibility of environmental assessments, the absence of clear methods and generally full knowledge about human impacts on the environment. Can we break out of this vicious circle, when we cannot clearly assess the environmental risks, and as a consequence there are legal risks? This is possible if the State will not seek to preserve nature in general, as a whole, and will set more specific but achievable tasks.

Legal uncertainties can be divided into subjective and objective ones. Subjective legal uncertainties – false uncertainties due to the subjects' of law lack of knowledge of legislation and law enforcement practice [14]. Objective legal uncertainties really exist and are due to legal defects. Therefore, it is important to distinguish objective legal uncertainties from subjective ones

You must also distinguish between legal uncertainties and actual uncertainties that take place everywhere in practice. If legal uncertainty is associated with the defects of legal regulation, then actual uncertainty is due to, for example, uncertainty of legal regulation object in a legal regime. So, an uncertainty in the legal regime of a particular land plot (encumbrances and restrictions, assignment to a particular category, borders of the plot) in usage is an example of not legal uncertainty, but actual uncertainty. There are many such examples, particularly with land plots and other natural resources. However, although, the actual uncertainties cannot be a cause of legal uncertainty, they very often lead to considerable legal and other risks.

Legal risks can be divided into potential and real ones. Potential legal risks are identified in the analysis of projects, environmental audits, when risks are identified through analysis of actual data, documents, samples, analysis of judicial practice, decisions of competent authorities. Real legal risks arise in the practice of natural resource users, which with a large degree of probability can lead to various kinds of legal sanctions.

It is essential to distinguish legal uncertainties from the established by law possibility of discretion by the subject of law in choosing one or another legal tool. In this case, the legislator does not "drive" the subject of law into certain strictly defined framework, and allows it to choose the possible option of conduct. In fact, if the subject of law in such legal situation discerns the existence of legal uncertainty, then we have the existence of subjective legal uncertainty.

What is the correlation of legal uncertainties and legal risks? Does the existence of legal uncertainty always mean existence of a legal risk? Does the existence of an identified legal risk determine mandatory existence of legal uncertainty? Seems to be that legal uncertainty is one of the sources of legal risks.

The correlation of legal uncertainties and legal risks is presented in the table.

Table

level of legal uncertainty	criteria of the level of legal uncertainty	degree of legal risk
high level of legal uncertainty	1. Uncertainty of a legal norm; 2. Uncertainty of law-enforcement practice; 3. Uncertainty of judicial practice.	High degree of legal risks
medium level of legal uncertainty	1. Uncertainty of a legal norm; 2. Uncertainty of law-enforcement practice or uncertainty of judicial practice.	medium degree of legal risks
low level of legal uncertainty	1. Certainty of a legal norm; 2. Certainty of law-enforcement practice; 3. Certainty of judicial practice.	low degree of legal risks

The ways to prevent or minimize legal uncertainty and legal risks are of practical interest. To prepare the approaches to prevent legal risks and legal uncertainties it seems appropriate to introduce a number of concepts: legal scenario, legal factor and legal situation. Legal scenario is a future, predicted state of legal reality, which can be characterized by possible set of legal risks or legal uncertainties. Legal scenario differs from legal prediction, which is characterized by commonality and versatility, in that it concerns a future legal situation with taking into account the availability of specific legal factors that individuate legal scenario and allow

distinguishing one legal scenario from another. Several legal scenarios for the development of a legal situation can be formed within the framework of one legal prediction. Legal factor – legal means, including legal risks, affecting the formation and change of legal situation or legal scenario. Legal situation is a current or future state of legal reality, which is characterized by a specific set of legal uncertainties and legal risks.

Extrajudicial procedure is actively used as a mechanism to overcome legal uncertainty. Citizen, an individual entrepreneur or legal person that address a request to a competent body of state power or local self-government that adopts either normative legal acts or law-enforcement acts for clarification of legal situation. Apparently, such a clarification might be required for specified subjects, and could be taken into consideration when similar cases. Though it is far from panacea, because public authorities do not pursue the aim to overcome legal uncertainties, moreover, in some situations it is beneficial for the State.

Examples of legal regulation for the procedure of clarification are pointwise present in the current legislation. Article 2 of the Federal Law No. 326-FL from November 29, 2010 "On Compulsory Health Insurance in the Russian Federation" enshrines that, with a view to the uniform application of the mentioned Federal Law, appropriate clarifications can be issued in accordance with the procedure established by the Government of the Russian Federation.

In accordance with the Resolution of the RF Government No. 1226 from December 31, 2010 "On the Issuance of Clarifications on the Uniform Application of the Federal Law "On Compulsory Health Insurance in the Russian Federation" in order to ensure uniform application of the Federal Law "On Compulsory Health Insurance in the Russian Federation", the Ministry of Health and Social Development of the Russian Federation was endowed the right to issue corresponding explanations, including in cooperation with the Federal Fund of Compulsory Medical Insurance, and in agreement with the Ministry of Finance of the Russian Federation with regard to matters within its competence.

Unfortunately, not all the federal ministries and agencies have a similar function. So, the provision on the Ministry of Natural Resources and Environment of Russian Federation formally does not provide for the power to give clarifications on the issues of application of legislation in the field of environmental protection and environmental management.

The issue concerning legal consequences of giving explanations by relevant ministry also remains not obvious. So, the letter of the Ministry of Economic Development of the Russian Federation No. D09-3425 from December 30, 2011 "On the

Application Norms of the Federal Law "On Protection the Rights of Legal Entities and Individual Entrepreneurs in the Implementation of State Monitoring (Supervision)" notes, that clarifications of a public authority have legal force if this authority is endowed, in accordance with the legislation of the Russian Federation, special competence to issue clarifications on the application of provisions of normative legal acts.

Russian Federation Economic Development Ministry is not endowed the power to clarify the legislation of the Russian Federation either by the current legislation or the Charter of the Ministry approved by the Decree of the Government of the Russian Federation No. 437 from June 05, 2008. At that, the said letter contains an explanation of the application the norms of the Federal Law "On Protection the Rights of Legal Entities and Individual Entrepreneurs in the Implementation of State Monitoring (Supervision)".

The practice of appeal against explanations of authorized bodies of state power is of interest. One would think, how can non-normative explanations be appealed in court? However, the Higher Arbitration Court of the Russian Federation allows for the possibility of such an appeal. A good example is the decision of the Higher Arbitration Court of the Russian Federation No. VAS-4065/12 from July 03, 2012. State Order Committee of Nenets Autonomous District appealed to the Higher Arbitration Court of the Russian Federation with an appeal to invalidate the letter of the Federal Antimonopoly Service No. IA/19712 from 23.05.2011 "On Explaining the Federal Law No. 94-FL from 21.07.2005 "On Placing Orders concerning Goods, Works and Services for State and Municipal Needs" in terms of the legality of combining in one subject of trades works on the preparation of project documentation and works for the organization of construction".

According to the applicants, the contested letter contains provisions of normative nature and is intended for multiple use, what violates their rights and legitimate interests. So, the contested letter has been repeatedly used in the administrative practice of the Federal Antimonopoly Service of Russia and its territorial bodies. At that, as noted by the applicants, generally binding nature of the mentioned act of antimonopoly body is ensured by the possibility of legal consequences in the form of issuing prescriptions on cancellation of tenders.

The applicants also refer to the absence of registration and official publication of the contested letter, that is contrary to the provisions of the Decree of the President of the Russian Federation No. 763 from 23.05.1996 "On the Procedure for the Publication and Entry into Force of the Acts of the President of the Russian

Federation, the Government of the Russian Federation and of Normative Legal Acts of the Federal Bodies of Executive Power".

The antimonopoly body in its turn believed that findings contained in the contested letter are based on the norms of the current legislation, and the contested letter does not match the essential features that characterize normative legal act, and therefore it cannot be recognized as such.

HAC RF came to the conclusion that the stated requirements should be met. Current legislation does not contain provisions defining the competence of the Federal Antimonopoly Service of Russia to clarify the legislation on placing orders. Resolving the issue of jurisdiction of arbitration court concerning the case on an application for invalidation of a normative legal act depends on the specific content of this act, the nature of relations in respect of which the dispute has arisen, including on the fact whether the contested normative legal act affects the rights and legitimate interests of unspecified range of persons in the field of entrepreneurial and other economic activity.

At that, the resolving of the question of whether an act of public authority is normative in nature should be carried out regardless of its form, content and other conditions, such as state registration, publication in an official gazette.

As it follows from the Letter of the Federal Antimonopoly Service of Russia No. IA/19712 from May 23, 2005, the specified act has been issued to explain the Law on placing orders concerning the issue of legality of combining in one subject of trades works on design and construction. The Letter of the Federal Antimonopoly Service of Russia No. IA/19712 from May 23, 2005 is addressed to the federal executive authorities, heads of the subjects of the RF, territorial bodies of the Federal Antimonopoly Service of Russia.

According to HAC RF, the fact that the contested letter has not been registered at the Ministry of Justice of the Russian Federation, does not affect the assessment of the normativity of its provisions, since relates only to the procedure of its adoption and announcement.

Under such circumstances, the court concluded that the contested act was normative in nature, since it contained provisions not provided for by federal legislation, and established conditions entailing legal effects designed for repeated use.

The contested letter of the antimonopoly body was not sent for registration to the Ministry of Justice of the Russian Federation. The official publication of the letter also was not carried out. Since the contested act contains provisions of normative nature and is intended for multiple use, the lack of its registration and official publication is contrary to the Decree of the President of the RF No. 763 from

23.05.1996. A similar position was taken by HAC RF when considering the issue concerning the legitimacy of the letter of the Ministry of Finance of the Russian Federation [1]. However, in this case, the Court dismissed the claim of the applicant, acknowledging the letter of the RF Ministry of Finance as corresponding to the current legislation.

With no doubt one of the legal factors that contribute to legal uncertainty is instability of legislation and law-enforcement practice. This factor is evident in the repeal by authorized bodies of their own decisions through extrajudicial procedure.

So, according to the former Russian Finance Minister L. Kudrin, one of the most important incentives for economic development is the invariance of the rules established by the State. According to him, the stability and invariance of the rules are essential conditions both for business planning and in general for development of economy. This stability, most importantly, is as an institute of these rules; it creates a feeling of freedom [11].

The constant changes in legislation are the strongest factor of creating legal risks. In addition, permanent novelties in legislation may lead to both objective and subjective legal uncertainties. Moratorium on amendments to legislation may be a way out. This proposal implies that during a specific period (1 year, 3 years, another period) amendments to law are not allowed.

Additionally, we have to consider the issue on legislative ban on extra-judicial abrogation by the State of its decisions on granting of a land plot, on harmonization of a project, on building licensing. Otherwise the State is able to break the rules of the game that it sets. If a decision has been made, and the decision has been made without violations, it is impossible to cancel, change it without a court decision or without the consent of the subject of law which is affected by the decision. The compensation to be paid to such person should be determined. And such cases must also be determined in legislation.

In practice ignoring this principle leads to bad consequences. An example is the legal situation that has happened in St. Petersburg in connection with the abolition by the St. Petersburg's executive authorities of their own law-enforcement decisions [4].

So, the ways to eliminate or minimize legal uncertainties and legal risks include:

- legal experiment on the territory of the Russian Federation or the subject of the Russian Federation;
- preliminary consultations and agreements with public authorities and local self-government bodies;

- mediation;
- application of pre-trial procedures in handling disputes;
- official explanations concerning requests of the subjects of law;
- audit of legal-environmental risks;
- insurance of legal-environmental risks.

One of the today's methods of resolving environmental disputes is mediation. This process involves an attempt to involve in discussion all interested parties with a view to taking decision, which would be legally justified and generally supported by all these parties. Such situations often require the assistance of professional mediators. Mediation is a less expensive way of solving problems. However, mediation does not imply the existence of a winner, equally as it also does not imply obligatory for everybody decision. In recent years, the scope of use of mediation and negotiation in settlement disputes concerning environment has significantly increased.

Another way to resolve environmental disputes could be the use of courts or judges with special knowledge in this field. The so-called scientific court could be used to determinate specific scientific facts and the judge, specializing in environmental law, could be appointed to use its knowledge in making decisions on environmental disputes. Perhaps the scope and depth of the impact of results concerning resolving complex environmental disputes justify the transfer of the right of decision-making to professionals specializing in the problems of environment [13, 123-124].

The enumerated ways to eliminate or minimize legal uncertainties and legal risks require detailed consideration. The result can be the development of appropriate methodology and system of measures, which may be reflected in legislation and law-enforcement practice. This proves that the categories of "legal uncertainty" and "legal risk" are of both theoretical and practical interest, as well as need further research.

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THE ISSUE OF THE FREEDOM OF DISCRETION IN STATE PLANNING[1]

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The author proposes to approach the problem of the freedom of discretion not from restrictive positions, but as to a decision-making power. Particularly acute the issue of the freedom of discretion stands in connection with the implementation of strategic planning in the Russian Federation.

Keywords: strategic planning, freedom of discretion, administrative law, financial law.

In the Great Explanatory Dictionary of the Russian language of S. I. Ozhegov and N. Yu Shvedova discretion is understood as conclusion, opinion, decision [7]. Final subjective opinion, conclusion and decision are formed in the process of discretion.

In conditions of existence of the so-called police state, the terms of "arbitrariness" and "discretion" were considered as synonyms. And only in the period of creation of constitutional states these phenomena have become opposable to each other [4, 14]. In science delineate discretion from arbitrariness through the definition of limits (boundaries) of discretion, on the basis that arbitrariness is a going beyond of discretion. Arbitrariness and discretion are synonyms with different semantic nuances. When we talk about discretion we assume the existence of some boundaries that should restrain a subject in the exercise of discretion (the law, internal restraints). Speaking of arbitrariness, we mean the absence of any boundaries.

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Legislator uses the term of "discretion" as a legal category, bearing in mind that discretion should have its limits. Discretion always presupposes the existence of limiters and (or) self-limiters such as norms of moral, morality, conscience, sense of justice [10, 48-52].

Legal characteristics of discretion are determined as follows: "Discretion in the aspect of law is a guaranteed by law choice by an authorized subject of options of decisions and actions within its competence. As a juridical-psychological phenomenon discretion is characterized by such signs: a) the status of an authorized subject of law and set of its powers; b) permissible range of determination of goals and objectives to be resolved; c) independent choice of solutions options; g) implementation of actions in accordance with decision; d) awareness of the responsibility for the consequences of decisions and actions" [9].

In the early 20th century legal scholar A. I. Yelistratov believed that public relations are unordered, if they are defined by the discretion of authorities. Discretion, in his opinion, "in its essence, by its nature is capricious, uncertain and unstable", so he offers to "replace" discretion by law [5, 7-8].

By the end of the 20th century the idea was established in science that executive authorities' discretion should be limited by law. "The possibility of arbitrary application of law is a violation of the equality of all before the law declared by the Constitution of the Russian Federation (article 19, part 1)" [1]. Within the framework of discussions on executive authorities' powers the judge of the Constitutional Court of the Russian Federation A. L. Kononov expressed a tough stance on the issues of regulation of their activity. He believes that "the general principles of legal regulation of authorities and officials activity should be based on the rule "permitted only what is expressly authorized by law", and the main regulation method is a fixed by law closed list of powers, rigid competence with the maximum restriction of discretion limits. These principles also derive from the sub-legislative nature of executive power and its powers provided for, in particular, in articles 114 and 115 of the Constitution of the Russian Federation" [2].

Serious restriction of discretion limits of executive authorities have been repeatedly supported by the European Court of Human Rights. "The law must be drafted in sufficiently clear terms, to give citizens a proper understanding of the circumstances and conditions, under which public authorities have the right to resort to the contested measures. In addition, domestic legislation should provide means of legal protection against arbitrary interference of authorities in the rights guaranteed by the Convention. Concerning the issues affecting fundamental human rights, it would be a violation of the rule of law – one of the basic principles

of a democratic society, guaranteed by the Convention, – to formulate the discretionary powers of an executive authority using the terms showing unlimited possibilities. Consequently, the law must set limits to such freedom of discretion of competent authorities and the manner of its exercise with sufficient clarity, given the legitimate aim of considered measure, for the purpose of providing to person an adequate protection against arbitrary interference with its rights (see the ruling of the European Court of Justice on the case of "Lupsa v. Romania", complaint No. 10337/04, ECHR 2006-... paragraphs 32 and 34; the ruling of the European Court of Justice on the case of "Al-Nashif v. Bulgaria" from June 20, 2002, complaint No. 50963/99, paragraph 119; the ruling of the European Court of Justice on the case of 'Malone v. United Kingdom" from August 02, 1984, Series A, No. 82, paragraphs 67 and 68)" – so the European Court of Human Rights has formulated its position on the case of Liu and Liu v. Russian Federation (complaint No. 42086/05) [3].

However, in today's conditions the tough stance in favor of limiting the discretion of public authorities is questioned. "Replacement" of discretion by law is uniquely applicable only in those cases when it comes to specific measures and when the circumstances and conditions can be assumed with some degree of certainty.

Numerous scientific publications, where scientists look for alternatives to tough measures on limiting the borders of discretion of executive authorities, indicate that the ineffectiveness of rigid frameworks is recognized in science. For example, the norms of ethics and morality are offered as the criteria for the assessment of decisions of executive authorities. The opinion of A. F. Smirnova seems interesting. She believes that administrative discretion is, first of all, a manifestation of the techniques and tactics of the decision-making [8, 87]. Decision-making technique is understood as a totality of methods of preparation of a decision that are known in management science. The tactic is associated with the use decision-making methods depending on a specific situation, in other words, this is an implemented technique. A. F. Smirnova proposes to use the concept of admissibility to evaluate techniques and tactics of decision-making, bearing in mind that the admissibility is regarded as the requirement of compliance with the principle of legality in the choice of specific decision-making methods and their implementation in a particular situation. Given that the decision-making process is not limited to the performance of only enshrined in law forms of activity, additional requirements of compliance with the norms of ethics and morality should be included in the concept of admissibility. Practically using the category of admissibility of managerial decisions, A. P. Smirnova comes to the conclusion that not only illegal

forms of managerial activity, but also those, which, though not against the law, but do not meet the norms of ethics and morality, should be recognized as inadmissible. Simultaneously A. P. Smirnova notes that it is not easy to apply norms of ethics and morality as criteria for evaluating managerial decisions due to of their ambiguity [8, 88]. Not supporting the position, that norms of ethics and morality can play a role of flexible criterion for evaluating actions of executive authorities when making planning decisions, through this example we want to emphasize the urgent need for a flexible approach to the freedom of discretion in the modern world.

Planning is an area where the issue of the freedom of discretion is the most acute. Specificity of administrative decisions in the field of planning is that the conditions and circumstances of taking decision cannot be set initially. At the beginning of the XXI century the science of administrative law began to incline towards the expansion of the freedom of discretion then when the decision should be made in an atmosphere of uncertainty and unpredictability. The idea of the freedom of discretion, which is limited only by the need to achieve set goals, is put forward against uncertainty in external conditions. Legislative limitation through a single power (norm) is no longer suitable for difficult decisions; it should be implemented through a system of norms that include the foundations of application proportionality, organizational and procedural prescriptions [11].

Under conditions of uncertainty the management remains unrestricted in terms of law, except for limiting the scope of decision-making and complication of the procedure for taking of risky decisions. The main means of legal protection in the form of responsibility and guarantees under conditions of uncertainty become insufficient. Measures of monetary compensations for the consequences of state decisions are also ineffective [13, 261-263].

In the literature we can find the belief that discretion itself should not be considered as a restrictive concept, discretion should be considered as a power to specificate law within set goals. Discretion does not mean freedom of choice, discretion assumes the establishment of actions' admissibility criteria through purposes of proportionality declared in law [12, 114]. "Discretion has two interrelated facets – it reflects the limits of competence of subject and not only introduces its activity in the legal framework, but also provides the necessary independence and mobility. Otherwise, management will turn into a regime of mechanical actions" [9, 72-75].

Of course, it is difficult to fully cover all the issues of the freedom of discretion within the framework of a short report. There is a publication with more details

concerning this issue [6, 17-20], although, in our view, to the issue of the freedom of discretion could be devoted a monograph and not one. In the message to the Conference we limit ourselves to the conclusion that the approach to the freedom of discretion as to something subject to rigid limitation is getting out of date. The Russian theory and practice needs to rethink the issue of the freedom of discretion. The freedom of discretion in the modern legal realities should be considered exactly as an autonomy and power to take decision. To evaluate decisions in today's reality we need to find a flexible criterion for evaluation the actions of a governing entity, and it should be a timely evaluation, without waiting for the consequences of decisions taken. Recently the draft law "On the State Strategic Planning" [14] has passed the first reading in the State Duma of the Federal Assembly, accordingly, already in the near future, the theory and practice will face the issue of the freedom of discretion in strategic planning.

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Luparev E. B.

JUDICIAL REFORM AND DEVELOPMENT PROSPECTS OF ADMINISTRATIVE JUSTICE IN RUSSIA [1]

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The article highlights the novelties of the legislation on administrative justice in the light of judicial reform in Russia related to creation of a unified Supreme Court of the Russian Federation.

Keywords: administrative justice, administrative court procedure, judicial reform.

Reform of higher courts in Russia clearly shows that our country follows a kind of its own path that differs from Europe, the UK and the U.S. Let's try to figure out the originality of this path and novelties that are introduced by the legislator in the legal regulation of administrative justice.

First, we note the actual denial of the introduction in Russia of organizational segregated system of administrative courts. First, we note the actual refusal of the introduction in Russia of organizational segregated system of administrative courts. Of course, we can argue that the reform of arbitration courts could be held in another scenario – namely, to create on their basis administrative courts, transferring to the courts of general jurisdiction full judicial power concerning criminal and civil cases. But the country's top leaders decided that the widespread formation in the system of courts of general jurisdiction of the level of subjects of the Russian Federation of administrative boards is a sufficient measure to settle administrative-legal

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and some other public-law disputes (we note, that also until 2013 in some courts of general jurisdiction of the level of subjects of the Russian Federation, for example, in the Krasnodar regional court, administrative boards have already been created on a trial basis). The view of the representatives of the court arbitrage system has gained its very limited effect.

What, in fact, does the judicial reform represent in relation to administrative justice? It is encouraging that in the RF Constitution after the amendments made by the Law of the Russian Federation on Amendment to the Constitution of the Russian Federation No. 2-FKL from February 05, 2014 "About the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation" the provisions of part 2 article 118, which provides for administrative court procedure, remained immutable. The provisions of article 126, in accordance with which the powers of the Supreme Court of the Russian Federation are complemented by cases on the resolution of economic disputes along with administrative and other cases typical for the Supreme Court, have been changed. At that, the term of "economic dispute" is not explained. On the basis of the text of article 127 removed from the Constitution of the Russian Federation, it is assumed that economic disputes can be associated exclusively with civil legal relations.

Interestingly, that the FCL "On the Supreme Court of the Russian Federation" from February 05, 2014 [1] already in article 4 distinguishes categories of administrative cases under the jurisdiction of the RF Supreme Court in first instance, that, in our view, emphasizes the importance of this category of cases among other cases under the jurisdiction of the RF Supreme Court. It is important to note that the category of administrative cases, and not cases as indicated in the Code of Civil Procedure of the RF, arising from public legal relations, in addition to traditionally considered by the judicial panel on administrative cases of the Supreme Court of the Russian Federation, includes the following cases:

- contesting the acts of state corporations (with that, not all of state-owned corporations can implement state-managerial powers) [5];
- contesting the decisions of election commissions, which do not belong to any branch of government, and other disputes relating to the electoral legal relations, which essentially are not administrative;
- cases on disputes between federal bodies and public authorities of the subjects of the Russian Federation, as well as between public authorities of the subjects of the Russian Federation transferred by the RF President for consideration to the Supreme Court of the Russian Federation in accordance with article 85 of the Constitution of the Russian Federation.

Consideration of administrative-legal disputes under the jurisdiction of the Supreme Court of the Russian Federation is distributed between two boards: Judicial Board for Administrative Cases and Disciplinary Board of the Supreme Court of the Russian Federation. Comparative analysis of the provisions of paragraph 3 article 4 and article 11 of the analyzed FCL "On the Supreme Court of the Russian Federation" suggests that the powers of the Disciplinary Board also include consideration of administrative cases on contesting decisions of the Higher Qualification Board of the Judges of the Russian Federation and decisions of qualification boards of the judges of the Russian Federation on suspension or termination the powers of judges, either on suspension or termination of their resignation, as well as other decisions of qualification boards of judges, the contesting of which to the Supreme Court of the Russian Federation is provided for by federal law. Although, essentially, consideration of any disciplinary case of persons holding public positions is exactly an administrative case. However, in this connection, we may blame the perversity of the structure established in the legislation on civil service, which separates public servants from persons employed in public positions, but the nature of disciplinary legal relations [4] with the participation of persons employed in public positions remains administrative.

It appears that "overboard" of article 4 of the FCL "On the Supreme Court of the Russian Federation" remains such a category of administrative cases as cases on introduction of temporary financial administration, the provisions on which the legislator has found necessary to enshrine in article 168.2 of the Budget Code of the Russian Federation in edition of the Federal Law No. 25-FL from 12.03.2014 "On Amendments to the Budget Code of the Russian Federation" [2].

Organizationally all administrative cases against military personnel will be considered not by the Judicial Board on Administrative Cases of the Armed Forces of the RF, but by the Board of the Armed Forces of the RF on cases of military personnel.

Due to the fact that part 3 article 4 of the FCL "On the Judicial System" as amended on February 05, 2014 [7] leaves a mention about the system of arbitration courts of district level, appellate arbitration courts, arbitration courts of the subjects of the Russian Federation, then the question "hangs": What procedural legislation will these courts be guided by in consideration of cases, including administrative cases?

Yet the situation is at the level of draft laws. March 05, 2014 the President of the Russian Federation introduced another set of amendments mainly in arbitration procedural and administrative procedural legislation [6]. If you summarize

the content of the proposed amendments regarding the issues of administrative justice, they are reduced to the following:

1. Chapter 23 of the Code of Administrative Procedure of the RF (Consideration of Cases on Contesting Normative Acts) shall be abrogated.

2. It is proposed to make amendments to part 4.1 article 206 of the Code of Administrative Procedure of the RF on reconsideration of decisions on bringing to administrative responsibility taken by arbitration courts, Supreme Court of the Russian Federation;

3. It is proposed to supplement part 5.1 of article 211 of the Code of Administrative Procedure of the RF by provisions on reconsideration decisions on contesting decisions of an administrative body concerning bringing to administrative responsibility by the Supreme Court of the Russian Federation;

4. Article 30.13 CAO RF may be supplemented by the norm that the entered into force decisions of arbitration courts on cases of administrative offenses, decisions made by the results of consideration of complaints, protests, presentations shall be reviewed by the RF Supreme Court represented by the Chairman, its deputies or on behalf of the Chairman of the judges of the RF Supreme Court, if all the ways of their appeal in arbitration courts provided for by arbitration procedural legislation have been exhausted.

It is clear that this set of amendments is of transitional nature. In the prospect we will have a single Code of Civil Procedure and CAO that is essentially supplemented in procedural aspect. Perhaps, within the framework of this reform we will see also the Code of Administrative Court Procedure, thanks God, that the corresponding draft has been submitted to the State Duma of the Federal Assembly of the Russian Federation. The prospects for the adoption of the Code of Administrative Procedure remain murky, judging by the fact that the representatives of the Administration of the President of the Russian Federation negatively speak in this regard, despite the suggestions of a number of experts in the field of administrative and administrative-procedural law [3].

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Ponkin I. V.

TOWARDS THE QUESTION ABOUT THE CONCEPT AND TYPES OF RISKS IN PUBLIC MANAGEMENT[1]

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Risks in the public management are analyzed in the article. Classification of risks in public management under the author's grounds is given in the article.

The author notes emergence of new risks in public management that are contributed by international processes related to the worsening of wars of secret services against sovereign states.

Keywords: public management, risks in public management, public risks management, risks classification.

The fall of the Ukrainian State that happened in February 2014 and turning it into a failed (default) state [3] raise questions about the quality of public administration and, at the same time, risks in public administration. All this also actualizes the need to study the nature, sources of emergence and content of such risks, the development and validation of tools for the early detection, prevention, damping and reduction of such risks.

Obviously that we are talking not about the risks of a corrupt official to be caught on a bribe, as well as the risks of a dwarfish and marginal political party (of not putting its people in the State Duma, and even just not gathering any meaningful number of sympathizers), and we are talking not about other private risks that represent little interest in the context of considered range of problems. We will focus on the major risks in the field of public interest. And, of course, concerning the topic of risks in public management we should determine a minimum level of

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public management, below which to talk about such risks would be unnecessarily (there should be a talk about negligence, incompetence and official malpractice of individual officials, their corruption, ineffectiveness concerning their personal activity, etc.)

The existence of a wide range of different and very numerous risks is an integral part of public management in general, and of providing public services in particular.

Such risks significantly affect the quality and effectiveness of public management, the referentiality of public management (in terms of its content and goal-setting) to public interest, the completeness and adequacy of achievement of set goals of public management and implementation of public functions (functions of public authority). Many of these risks are unpredictable, they derive from nonlinear processes.

In the course of implementation of public management the State inevitably faces such risks like the risk of not meeting the needs of the population or their incomplete or inadequate meeting; risk of damage to the environment (in implementation of public management in certain areas). In other words, one of the major risks of public management is the inability to meet all the demands, concerns and expectations of all interested parties, in particular, of the State itself [8]. Risks in public management assume a significant potential impact on the whole society, and (in case of systemic risks) a significant potential impact on the entire system of public management.

The concept of "risk" is polysemantic, that is, with a multiplicity of meanings, each of which is realized under certain conditions.

In very general terms, *the risk in public management* can be defined as a phenomenon characterized by the uncertainty in outcome of application of managerial actions within the framework of public management and by the presence of certain real probability of significant negative consequences for the process and, above all, for the results of public management (intermediate-step, benchmark instrumental or final), as well as for the entire system of public management and the state as a whole, including the perception and evaluation of authorities' legitimacy by the population.

Given the complexity of the subject-object sphere of public management, totality of objects subjected to managerial impact within and due to public management, it is impossible to avoid the emergence of risks in public management.

However, it is generally accepted and confirmed that there are some possibilities to control such risks.

Risk management of public management is a combination of organizational systems, sets of tools of public management [5] (primarily, crisis-preventive and broader anti-crisis public management), processes and procedures that allow implementation of early, including prudential, detection, identification and assessment of risks and the search for solutions of tasks set in connection with this.

However, the growing complexity and interconnectedness of segments, levels and elements of the system of public management contribute to the development of new types of risks and more complex causal relations [9, 5]. Moreover, it is contributed by the trends of complication and expanding of nonlinear interaction of law with other complexes of social norms; increase in application the mechanisms of self-regulation and self-government in various areas of public relations; complication of the interaction of public order and a number of extra-legal normative orders; trends of strengthening of autonomous institutionalization in some areas of public relations [2; 4]. And, as has been shown by the experience of Ukraine, Syria, Libya and a number of other states, the emergence of new risks in public management is especially contributed by international processes related to the worsening the wars of secret services, particularly of the USA and UK, against sovereign states, especially in the conditions of the trend of forced reduction of significance and content of state sovereignty.

Risks in public management can be classified on the following grounds: 1) scale of possible consequences (in the sense of a threat to the statehood itself or to ruling regime), 2) territorial (geographical) affiliation, 3) specificity of the nature of risks.

Classification of the risks of negative outcomes in public management on the grounds of scales of possible consequences:

- catastrophic risks, in case of their objectification and implementation leading to complete external destruction or complete self-destruction (or a combination of such causes) of a state in the territorial boundaries, within which the state previously existed and acted;
- risks of total (national wide) scale, in case of their objectification and implementation leading to fall of a state, transforming it into a failed (defaulted) state, or its turning into a quasi-state (few quasi-states);
- risks of total (national wide) scale, in case of their objectification and implementation leading to systemic dysfunctionality [3] of a state, systemic dysfunctionality of the entire system of public management or its most important segments.

Classification of the risks of negative outcomes in public management on the grounds of territorial (geographical) affiliation:

- global risks (on a nationwide scale, throughout a country);
- regional risks (within a region or a group of regions not exceeding a third of the total number of regions, otherwise it will be a more serious category – nationwide);
- numerous local risks;
- single local risks.

Classification of the risks of negative outcomes in public management on the grounds of specificity of risks' nature:

- risks of managerial and organizational dysfunctionality of the system of public management;
- risks of loss of central public management of regions (up to the partial destruction of the territorial integrity of a state);
- risks threatening to public order of a state, including the risks of loss of state sovereignty (full or partial loss);
- risks of inefficiency of the state system of legislation and the risks associated with deficiencies of legislative activity;
- economic risks (such risks of public management include changes in interest rates, tax losses, breach of trust and inflation [6, 46]);
- geo-political and international-legal risks;
- risks of failure of a state to timely prevent devastating effects of natural (climatic, seismic, biological) and man-made disasters, to timely and effectively conduct rescue operations and work to eliminate the consequences of such events;
- demographic risks;
- risks arising from a breach of the stability of public morality (in particular, the risks threatening the key civilizational foundations of statehood and nation, risks of changes in social and moral values, and other social changes and cultural transformations [6, 46]);
- risks of loss of legitimacy in the perception of its citizens, its population;
- political risks (the risk of critical exceeding of allowable (tolerable) scope of constitutional and other political myths and illusions [1]; they are also the risks of negative effects of taking controversial or unfounded, erroneous political decisions, the risks of complete burnout of population's interest in elections and, as a consequence, the risk of mass absenteeism , and many others);

- risks of reduction of subordination of the entire system of public management to key constitutional imperatives (state sociality, democratic and legal nature of state, secular nature of state, etc.);

- risks associated with ethnic and religious conflicts in the territory of a state (including the risk of obvious or latent conquest of full authority in a multinational state only by one religious or ethnic clan);

- risks of loss of control over legal order and critical shortcomings in ensuring legality;

- risks associated with pervasive corruption within the system of public management;

- risks associated with external aggressive and negative impact on the system of management from abroad.

Also distinguish the risks associated directly with the implementation of public management.

Risks associated with the implementation of the process of public management include risks associated with the implementation of control over public management, quality and continuity of rendering state services, documentation, data privacy and security, as well as risks associated with the interaction with the media [7, 4].

Therefore, it is reasonably to separate a classification of risks in public management on the grounds of levels and segments of public management. These will be individual risks associated with the implementation of public management in certain areas, the nature of which depends on the nature of area, in which such management is implemented. As well as complexes of such risks. But that is already the topic of another material.

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Popov A. I.

THE PROBLEMS OF CONSIDERATION OF DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS WITHIN THE FRAMEWORK OF ADMINISTRATIVE COURT PROCEDURE[1]

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The author proves that cases on consideration of disputes arising from administrative contracts should be regarded as a separate kind of cases within the framework of administrative court procedure.

Attention is drawn to the fact that in consideration of disputes arising from administrative contracts, the court considers not the issues of the legality of actions or decisions of these or those bodies and their officials, but the issues related to a disagreement concerning the performance or non-performance of an administrative-contractual obligation.

Keywords: administrative contracts, administrative court procedure, disputes arising from administrative contracts.

The issue of administrative contract is currently very topical, because, firstly, the development of managerial relations requires their regulation through dispositive forms and methods, which should also include contract, secondly, the issues of administrative contract are ambiguous and unresolved in administrative-legal science and, finally, thirdly, there is no legal framework that would regulate the procedure for consideration disputes arising from administrative-contractual relations.

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Resolution of emerging conflicts in the course of exercising administrative contracts is a necessary condition to balance the interests of the parties to a concluded administrative contract.

One of the main signs of contract from general-theoretical point of view is the mutual responsibility of parties for failure to comply with or inadequate performance of commitments, as well as the presence of legislative establishment of main principal and obligatory requirements at the conclusion of contract [10, 15].

Controversies arising among parties to administrative contract at various stages of the contractual process acquire the status of administrative-legal disputes. However, the nature of these disputes and the procedure to resolve them are open questions that need to be addressed in the near future. Often the parties to already concluded administrative contracts in case of conflict situations, associated with the implementation of such contracts, refuse execution of commitments because of the absence of a real mechanism for resolving disputable situations. Because of this the goals of concluding administrative contracts are not always achieved.

K. V. Davydov rightly points out that this problem is peculiar not only to the Russian legal system, but also to a number of legal orders competing for a much more complete regulation the issues of administrative court procedure concerning administrative contracts [3, 521].

It appears that to ensure the safety and protection of the rights of the parties to administrative contract, we need to use the potential of administrative justice means, within of which administrative-contractual disputes will be considered. We should agree with the point of view of K. A. Pisenko that administrative-contractual disputes at the doctrinal, as well as legislative and practical levels, have not been adequately reflected in the domestic system of administrative justice [9, 111].

Yu. M. Kozlov notes that disputes between parties to contracts shall be resolved by negotiations and conciliation procedures. If necessary, conciliation commissions can be created. In case of failure to reach agreed solution the dispute may be brought before corresponding court [7, 380].

At the same time the need to develop effective mechanism to resolve disputes arising from administrative contracts is quite timely, because the discussion of the draft Code of Administrative Court Procedure is being actively conducted [1].

Civil-legal regulation of individual disputes has been developed in the absence of administrative-legal regulation of the order and procedure to resolve disputes arising from administrative contracts. Gradually the features and specifics of court proceedings concerning public-law disputes outgrow the borders of civil

court procedure. Today the circumstance, that in civil procedural legislation public-law disputes fall under the general concept of "civil case", cannot be recognized substantiated either from scientific or practical points of view, since it contradicts their substantive-legal nature" [11].

In this connection we should also agree with the point of view of M. R. Megrelidze that the combining of cases of public-law and private-law nature in adversary proceedings is not only inconsistent with the Constitution of the Russian Federation, but it may lead to the situation when the principles and rules of private-law nature, focused on the protection of civil rights and lawful interests of individuals, will be applied to the resolving and consideration of public-law disputes affecting the interests of the State and society as a whole [8].

Cases on consideration of disputes arising from administrative contracts should be considered, in our opinion, as an independent kind of cases through administrative court procedure. Here are the following arguments in favor of justifying this position.

Administrative contract should be considered as a form of managerial activity, as a variety of administrative act, as well as a legal relation. At that, the consensus in Russian and foreign administrative-legal doctrine concerning administrative contract as a form of managerial activity and kind of administrative act de lege ferenda gives rise to analogy of application the mechanisms of administrative justice in order to resolve cases arising from administrative contracts [9, 112-113].

In connection with the above, we note that in essence administrative court procedure is based on the contesting of different forms of managerial activity, which, as we previously indicated, include administrative contract.

As correctly noted by A. B. Zelentsov, public-law requirement for protection of a violated subjective right, submitted to the court in accordance with applicable legislation, should be formed in the form of application that is called administrative claim [4, 112].

It should be recognized that disputes arising from administrative contracts may be considered through adversary justice. And not of civil, but administrative court procedure, because dispute arising from administrative contract is a public-law claim of one of the parties on the protection of public law.

Right of action implies the existence of equality between the parties of corresponding legal relation. Though formally, but there is such equality between the parties to administrative contract. Therefore, cases on administrative-contractual disputes are possible because the parties have reciprocal rights and duties defined by one equally obligatory norm of law.

Private person in public-law sphere – it's not just a carrier of duties, but also a subject of public rights, which he can use, like in private-law sphere, without violating the rights of others and the law. This optionality allows it in administrative disputes not only to change the subject matter of claim, but also to put forward counterclaims [4, 117].

Administrative claim may be stated by one of the parties to administrative contract in order to protect and restore the infringed rights under the contract. Administrative-contractual claim arises out of the contentious administrative- contractual legal relations as a requirement of protection the rights and interests of one of the parties to administrative contract.

Modern problems of consideration of disputes arising from administrative contracts require a balance between private autonomy and public interests, what constitutes the core of discussion on the attributing this category of disputes to an independent kind within the framework of administrative court procedure.

Public-law relations are an expression of public interest. Powers of authority of a public authority, local self-government body and their official reveal inequality of parties to legal relation and possibility of enforced execution of public rights in pre-trial procedure. The duty of a subject of public administration to use it powers of authority only for the attainment of goals set by law, and only in the framework of law, reflects the principle of imperative nature – the basic principle of public law branches. In connection with this legal means of protection of legal relation are primarily tools of supervision and control over the legality of activities of public authorities [8].

It should be noted that also there may be some legal inequality of parties that is due to the legal nature of the administrative contract, as well as the public purpose of this contract. Parties to administrative-contractual relations in most cases have different administrative-legal status, namely, their rights and duties in the field of public administration are different. This fact suggests that, there is no possibility to negotiate specific terms of administrative contracts in some cases. That is, one of the parties determines the terms of administrative contract, and the other takes the decision on acceptance or rejection of these terms. Concerning this sign administrative contracts are similar to contracts of adhesion implemented within the framework of civil law. The above shows the possibility of consideration disputes arising from administrative contracts within the framework of civil court procedure. However, this is not quite justified.

In our view, disputes arising from administrative contract must be a model of administrative cases, the consideration of which must be based on specific priorities

of public interests. Disputes arising from administrative contracts emerge, as a rule, between the parties to the very contract, but, in general, they affect public interests, for the ensuring of which they have been concluded. Exactly this feature allows us to attribute cases arising from administrative contracts to cases considered within the framework of administrative court procedure.

It should be recognized that the disputes arising from administrative contracts must be attributed to disputes arising from public-law relations. Such disputes, in accordance with paragraph 1 article 2 of the draft Code of Administrative Court Procedure, shall be considered in administrative court procedure.

Thus, following the logic of the legislator, the main cause of attributing disputes arising from administrative contracts to consideration in administrative court procedure is that administrative-contractual relation in its nature refers to public-law relation.

In general, dispute arising from administrative contract should be recognized as an especial kind of administrative legal relation, which is characterized by the contradictions of the parties that are caused by non-performance or improper fulfillment of the relevant administrative contract.

There is no doubt that the cases arising from administrative contracts are public-law, administrative, and because of that there is a real opportunity to settle their jurisdiction at the stage of creation of administrative courts through allocating an entire chapter in the Code of Administrative Court Procedure regulating peculiarities of proceedings on such cases.

At that, the attribution of such disputes to the competence of administrative courts can become an additional argument for the early adoption of a corresponding substantive act on administrative contracts.

It appears that disputes on cases arising from administrative contracts, within the framework of administrative court procedure, may be resolved by conclusion of a settlement agreement.

However, the Supreme Court of the Russian Federation in the Decision No. 2 from February 10, 2009 [2] indicates, that in cases on contesting decisions, actions (inaction) of public authorities, local self-government bodies, officials, state and municipal employees the court does not have the right to approve a settlement agreement between the applicant and person concerned, since in this case the court examines the legality of the contested decisions, committed actions (inaction) of public authorities, local self-government bodies, officials, state and municipal employees and the resolving of this issue may not be affected by these or those agreements between the applicant and person concerned.

However, in contrast to the opinion of the Supreme Court of the Russian Federation in the legal literature suggest that although in many public cases (through an example of cases on administrative offences) the conclusion of agreements is not possible in principle, in individual cases such possibility exists (through an example of tax agreement) [6]. K. V. Davydov also confirms that, in principle, administrative contract is a more flexible legal form of management, rather than an administrative act, so under general rule a settlement agreement is acceptable (after all, it itself, in this case, by the way, is an example of a public agreement). However, it is necessary to establish a general rule: the conclusion of a settlement agreement is not allowed if it is contrary to legislation and/or violates the rights of third parties and legal order in general [3, 522].

Based on the above, a question arises: is it possible to attribute disputes arising from administrative contracts to cases on contesting decisions of relevant bodies within the framework of civil or arbitration court procedure?

In the context of development the theory of administrative process, the resolving of the issue of possibility to consider disputes arising from administrative contracts within the framework of administrative court procedure raises an undoubted interest. The need to identify the place of both administrative-contractual process in general and the procedure of consideration of disputes arising within its framework is due to the need for forming a conceptual approach to the essence and structure of administrative process. However, the positive solution of the question posed will generate two sets of norms: substantive and procedural. Accordingly, this fact will result in new prospect for the development of the institute of administrative contract.

Legal literature actively discusses the issue of formation the following institutes in the structure of administrative-procedural law: 1) institute of judicial administrative and punitive jurisdiction; 2) institute of administrative and disputed jurisdiction [5, 14]. The proposed structure should be recognized rational. At that, it should also be noted that also the issue of consideration disputes arising from administrative contracts should be developed exactly within the framework of the institute of administrative and disputed jurisdiction.

Fundamental resolving of the issue on the possibility of consideration disputes arising from administrative contracts within the framework of administrative court procedure is of methodological significance for subsequent deeper researches. Application of the principles of administrative, rather than civil court procedure, should be the basis of decisions on individual-specific administrative contracts.

Taking into account the current realities of the development of administrative court procedure the visions of the procedure for consideration disputes arising from administrative contracts need some adjustment. We need still to answer some fundamental questions about the limits of application the norms of administrative court procedure to such kind of category of cases. In this case, the emergence of special norms on the procedure for consideration of cases arising from administrative contracts, perhaps, will allow us to look at the analyzed problem from a different angle.

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Shurukhnova D. N.

ADMINISTRATIVE-LEGAL REGULATION OF BRINGING TO RESPONSIBILITY FOR VIOLATIONS IN THE SPHERE OF PRIVATE CARRIAGE[1]

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The problem points of application administrative responsibility under article 14.1 of the Code on Administrative Offences of the Russian Federation are considered in the article.

The author proposes normative enshrining of the possibility to detain a vehicle until the confirmation of payment of administrative fine imposed to offender.

Keywords: administrative responsibility, responsibility for violations in the sphere of private carriage, illegal transportation, private cabbing.

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In recent years, major Russian cities have faced a problem related to the monitoring of compliance with the rules in the field of private carriage. Services of illegal cabbies are contemporary reality on Russian roads. Police raids indicate that drivers providing these services do not have permission on exercising activity on the carriage of passengers and baggage. Often private carriage is exercised by foreign nationals (mainly immigrants from the CIS) with poor knowledge of Russian language, not having documents for driving vehicles or having invalid (expired) driving licenses. Some of them were denied licenses because of driving vehicle being drunk. There are cases when private cabbing is exercised by vehicles with registration numbers of foreign countries, in the absence of compulsory motor TPL insurance, on cars with an unpleasant outside appearance, the passenger compartments of which do not meet basic sanitary and epidemic requirements, and regarding technical condition they have long been subject to official recycling.

Illegal carriers organize spontaneous parking nearby railway stations, subway stations, major shopping malls, thereby creating additional problems in the organization of traffic on already difficult road sections of large cities. This shows that the services of illegal taxi drivers pose a real threat to the safety of passengers and other road users.

One of the means of impact on illegal taxi drivers is the application of measures of administrative responsibility under article 14.1 of the Code on Administrative Offences of the RF (hereinafter – CAO RF) [1]. However, their practical implementation involves a complex of various problems.

Under Article 9 of the Federal Law No. 69-FL from April 21, 2011 "On Amendments to Certain Legislative Acts of the Russian Federation", activities for the carriage of passengers and baggage by car taxi in the territory of a subject of the Russian Federation shall be subject to the permission of a legal entity or individual entrepreneur to exercise activities on the carriage of passengers and baggage by car taxi issued by an authorized body of the executive authority of the corresponding subject of the Russian Federation [2; 3; 4; 5].

When solving the question of presence in actions of a person the signs of an administrative offense under part 2 article 14.1 CAO RF, it must be assumed that, in accordance with the third subparagraph of paragraph 1 article 49 of the Civil Code of the RF, the right to carry out activity, the exercising of which requires a special permit (license), emerges from the moment of obtaining a permit (license) or within a period specified therein and is terminated upon its expiration (unless otherwise is specified), and also in cases of suspension or revocation of permit (license) [7].

Solving the question of whether person's actions constitute an administrative offense under article 14.1 CAO RF, it is necessary to check whether they contain signs of entrepreneurial activity listed in paragraph 1 article 2 of the Civil Code of the RF.

In view of the aforementioned norm, entrepreneurial activity is an activity designed to systematic profit from the use of property, sale of goods, providing works or services, which is carried out at own risk of a person registered in accordance with the law as an individual entrepreneur. With this in mind, individual cases of the sale of goods, performance of works and rendering services by a person not registered as an individual entrepreneur do not form composition of administrative offence provided that the quantity of goods, the range of products, the volume of work performed, services rendered and other circumstances do not indicate that this activity has been aimed at systematical deriving a profit [7]. In this regard, in case of taking decision to bring a person to responsibility, an authority has to have knowledge of that passenger carriage is aimed at systematical deriving a profit.

In order to detect illegal taxi drivers in all districts of Moscow the government organizes mobile groups to combat illegal cabbing, which consist of the representatives of the Moscow Department of Transport, employees of internal affairs bodies, migration service officers [8].

A question rises concerning collecting evidence on the case. In practice, only an explanation is taken from a passenger; this is a violation of article 28.1 CAO RF, since it is necessary to demand an application containing data indicating the presence of an administrative offense. Members of the initiative, mobile groups, who act as passengers, have to carry out the control purchase and register it according to a corresponding procedure, but in practice this is not done, that leads to a lack of evidence. The absence of a control purchase registered according to a corresponding procedure leads to the fact that the materials of case are based solely on confessions of the driver; it is not enough for a comprehensive, full and objective clarification of the circumstances of the case. The absence of driver's confession can lead to the termination of proceedings.

Certain issues arise within the framework of law-enforcement practice in sentencing under part 2 of article 14.1 CAO RF.

The sanction entails administrative fine on citizens in the amount from two thousand to two thousand five hundred rubles with confiscation of manufactured products, tools and raw materials or without such. Employees of internal affairs bodies during drawing up a protocol on administrative offense detain car, sent it to auto impound or to safekeeping. However, in the case of transferring case files to

court, the additional penalty of confiscation of the vehicle is not imposed. Because, according to the sense of the sanctions, it is about the confiscation of a tool of production, but car is not such.

In this regard, it seems necessary to amend the sanction of part 2 article 14.1 CAO RF, through providing for the possibility of punishment in the form of confiscation of a vehicle that is used for passengers' carriage. However, in establishing this kind of punishment it is necessary to take into account that, according to the legal position of the Constitutional Court of the RF expressed in its decision No. 6-P from April 25, 2011 [6], the confiscation of the instrument or target of administrative offense owned by a person, who is not brought to administrative responsibility for this administrative offense and not recognized in court guilty of its committing, is not applied, except for administrative violations in the field of customs, provided for in chapter 16 CAO RF. This legal position was enshrined in CAO RF.

This legal position of the Constitutional Court of the Russian Federation is of particular importance for a decision on bringing to administrative responsibility for the carriage of passengers and luggage without permission on exercising this type of activity. In most cases, drivers are not the owners of the vehicles used to carriage. Therefore, in case of bringing a person to administrative responsibility, the penalty of confiscation of vehicle cannot be imposed.

In this situation, an offender may be sentenced to an administrative penalty in the form of a fine from two thousand to two thousand five hundred rubles, which cannot have a significant impact on combating these violations.

Denoting the problem of engagement of foreign nationals in illegal private cabbing, we note that in case of imposition to them an administrative penalty they may freely leave the territory of the Russian Federation. And if the fine is not paid within the statutory period, the decision of court in the part of recovery of penalty is unenforceable. The lack of international cooperation on this issue makes it impossible to execute the judgment taken against an offender. It is also problematic for bailiffs to determine the location of a foreign national in the territory of Russia.

Thus, in the case of administrative offence, officials have to rely on the honesty of the person that has been called to account.

An effective measure of impact on a person, who has been brought to administrative responsibility, is the possibility to seizure the vehicle within the framework of proceedings on case of administrative offence. CAO RF should provide for the possibility to detain a vehicle until the confirmation of payment of administrative fine imposed by judge, authorized body or official.

The lack of opportunity to apply confiscation of the vehicle when making a decision , as well as a small size of fine, make administrative-legal measures of enforcement ineffective in combating illicit private cabbing.

In order to improve the effectiveness of administrative-legal measures to combat violations in the sphere of transportations it is expedient to amend the current legislation through increasing the size of fine under part 2 article 14.1 CAO RF, as well as through providing a mechanism of returning the seized vehicle after the confirmation of payment of fine imposed by court.

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Stepanenko Yu. V.

LAW ENFORCEMENT ACTIVITY: THEORY ISSUES[1]

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The article carries out a review of the legal literature regarding law enforcement activity, the author notes that there are certain disagreements regarding the goals, objectives, scope, objects, subjects, means, methods and forms of law enforcement activity provided for by the current legislation. It is suggested that the goal of law enforcement activity should not be limited only to prevention tasks. The author notes a multifunctional nature of law enforcement activity of internal affairs bodies.

Keywords: law enforcement activity, regulation and protection of public relations, protective function of law, law enforcement, law enforcement authorities.

The problem of research of the concept and content of law enforcement activity is rooted in the days when emerged a need for law as a regulator, when, thanks to the division of labor, protection of colliding with each other interests of individuals was transferred into the hands of the few, that is, the state, and thus the barbaric way of implementation of law disappeared [35, 336-337]. Speaking of the primitive communal system, F. Engels emphasized that "from the very beginning in community exist common interests, protection of which is entrusted to separate persons, albeit under the supervision of the whole society", that "such posts are found in primitive communities at all times", and that "they are entrusted with known

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powers and represent the rudiments of public authority" [36, 183-184]. Hence the issue of research of law enforcement activity goes back to the issues of the functions of law, functions of the State and its bodies, as well as the form of their implementation, law enforcement system, legal activity, exercising of law.

If to leave aside the known differences in views on the *function of law* in its narrow normative sense (as a rule, functions of law are understood as the most significant directions and aspects of its impact on social relations [2, 12]), then this issue in the legal literature, in principle, appears solved. Law is designed to regulate and *protect* public relations (individual scientists, along with regulatory and protective functions of law, distinguish economic, educational, political functions [46, 60]). Along with laws positively regulating social relations, there are whole branches and sub-branches of law and legislation, legal institutes, which are mostly of protective significance.

Protective function of law – is a direction of legal impact conditioned by social purpose, aimed at protection of generally significant, the most important public relations and their inviolability [49, 277]. The content of protective function of law includes: 1) establishment of sanctions for encroachment on protected public relations; 2) establishment of prohibitions to commit acts contrary to the interests of society, the State and an individual; 3) formulation of legal facts, the emergence of which (if they are the result of illegal actions), according to the law, is connected with the emergence of grounds for bringing offenders to juridical responsibility; 4) establishment of a particular legal connection between the subjects of law, the objective of which is the exercising of juridical responsibility (protective legal relation) [47, 11].

This, however, does not mean complete unity of views on the protective function of law. As V. V. Borisov believes, there is no adequate clarity in the material. "What is protected: public relations, rights and freedoms of a citizen, interests of the subjects of law, political and economic system, laws, State power? All these phenomena are different in nature. Absolute precision is required in initial positions" [9, 308-309]. Indeed, for example, according to N. A. Bobrova, law protects against violations not public relations, but someone's interests that are realized in legal relations. In other words, the law regulates public relations so as to promote the emergence and development of the first, restrain the dynamic of the second, eliminate the cause of the third relations that are harmful to the state interest, and if they do arise, to resolve the conflict of interest solely on a legal basis, on the basis of the legal regulation of state coercion application, the making of state-negative assessment as a reaction to an offence [7, 144-145]. In our view, in the architecture

of all (or most) of the classifications in the general theory of law, public relations are all-encompassing fundamental substance similar to moving, eternally developing matter. All the rest is an add-on, derivative, secondary. The protective function of law is in the passive impact on these relations. The latter have already emerged and are developing according to their own laws. The law is assigned the role of a caretaker of current relations from encroachments on their integrity and inviolability [51, 15].

Strictly speaking, there is no contradiction in the fact that some scientists cite different objects protected by law. However, such an approach impoverishes the understanding of protective function of law. Law actually protects the rights and freedoms of a citizen, the interests of the subjects of law, political and economic system, laws, State power, etc. But, first, all of these interests, institutes and values are concluded and implemented only in public relations. Second, the path of enumeration of legally protected objects is a very useless path, because this list is quite variable, dynamic, in a certain sense it is inexhaustible and at the highest level of abstraction is covered by a single concept – "public relations". Third, law itself is an impartial. It is just a tool in the hands of the State. Law, in general, is nothing without state coercion able to compel to abide legal norms, and to refrain from the violating of legal order. The State has priority over the law in the sense that it establishes and maintains legal order, changes and repeals laws, promotes or inhibits their implementation. But, on the other hand, laws are adopted by people's representatives, and law in a constitutional state should be not only a regulator of social relations, but also a means of subordination of the State to law, means of protecting the rights and freedoms of an individual. The main thing in determination of the State is linked to the law. The state of the economy brings to life the law, and in order to enable it to be a regulator of public relations we need the State. In other words, the State also exists due to and for the sake of law [44, 24, 27]. In addition, the protective function of law should not to be understood only as a reaction to offence. Its main purpose is the prevention of violations of legal norms. Therefore, we emphasize once again: law protects public relations and thus creates a legal basis for law enforcement activity [33, 27]. The essence of this basis is that it is strictly of normative, overall and binding nature [59, 203].

Protective function of law is implemented by *protective (law enforcement)* activity of the State. If protective function of law is associated with the protection of existing public relations, then the protective activity of the State is aimed at the protection of law itself, without which the latter cannot function effectively. The issue on referring protective (law enforcement) function to the functions of the State has

also not yet received a clear resolving in science (under the state functions understand directions (and aspects) of its activity, which express its essence, service role, objectives and goals, patterns of development [4, 190-191]). For some scientists, it is an obvious, not causing doubts fact (Yu. E. Avrutin, A. G. Bratko, G. A. Tumanov, I. N. Zubov, I. I. Mushket, E. B. Khokhlov, N. V. Chernogolovkin). Other researchers do not separate protective function as an independent function of the State, and "split" it into stand-alone functions or "distribute" protective tasks among other functions. So, I. K. Yusupova attributes ensuring of protection of the current form of government and public order protection to the internal functions of the State [68, 41]. V. S. Afanas'ev, highlighting economic, political, social and ideological functions of the state, provides for protective tasks in the first three: protection of the existing forms of property, maintenance of state and public security, protection of the rights and freedoms of the population or part of it [57, 285]. The third group of scientists, highlighting one function of protective orientation, avoids calling it protective, preferring to denote in it specific protected objects. For example, L. A. Nikolaeva calls among the functions of the State the function of protection of citizens' rights and freedoms, all forms of property, legal order [40, 3]. M. I. Baitin, I. A. Kuznetsov distinguish the function of protection of legal order, property, rights and freedoms of citizens [4, 199; 29], V. B. Kozhenevskii – the function of protection of property, rights, freedoms and lawful interests of citizens, the whole legal order [27, 8]. N. T. Shestaev calls the protective function as the function of state protection from internal disorganizational processes [66, 18]. The next group of researchers further specifies objects of law enforcement activity of the State in the composition of the function. As a result, attempts to find more specific characteristics of protective function lead to confusion of the functions of the state with the functions or private tasks of its bodies.

Dominant in the literature and, in our view, correct, seems to be the first point of view that considers protective activity of the State as its single and indivisible basic function. In the theory of State and law long ago has been proved that, along with the other functions, the State also exercises *protection of legal order* [11, 41; 48; 55, 26; 39, 31]. This term, in our view, may be used as a synonym of the concept of "law-enforcement function of the State". Legal order is homogeneous in all spheres of social life, and the State equally protects the rights and legitimate interests of all subjects, as well as all objects of law, including property, form of government, etc. Of course, it is possible to give a more detailed description of protective function of the State, enumerating the elements of its content. However, as in the analysis of the functions of law, it will not cover many important aspects and objects of

protective activity of the State. This function can be briefly designated, and it will not be a mistake to call it a function of legal order protection that includes protection of property, rights and freedoms of citizens, etc. [61, 114]. We also associate ourselves with the position of T. N. Rad'ko. According to him, if the concept of "legal order" is given a wide meaning, why there are specified such activities as protection of property, rights, freedoms and legitimate interests of citizens, because in this case the first concept covers the rest. And if legal order is interpreted in its narrow sense, then why there are not mentioned such important directions of state-legal protection as state and social system, natural resources and the natural environment, cultural and spiritual heritage of the people, etc. [48, 8].

From time to time there are calls in legal science for renewal and replacement of the leading paradigms. For example, I. I. Sydoruk rightly, in our view, suggests that the typical for administrative law reduction of ensuring legal order just to its protection in public places through highly specialized oversight of state administration and police over the conduct of participants to public relations and application of administrative-legal coercion measures significantly impoverishes administrative-legal science and narrows its potential in part of developing constructive recommendations for organization of legal order in the country, an effective counteraction to crime and offence [56, 12]. S. M. Zabelov, in order to avoid confusion between the concepts of public order in the wide and the narrow sense, proposes introducing of the concept of State order instead of the concept of public order in the wide sense [18, 8].

It is believed that legal order protection can be considered as an independent state function neither in whole nor even more in part. The argument is the fact that the legal order, on the one hand, is a result of legislative activity of the State, and on the other, is the most important tool for exercising all (though to varying degrees) the functions of the State [26, 45].

The argumentation itself raises no objection. At the same time, it cannot be used to deny the law enforcement function of the State. Among scholars, who criticize the expressed point of view, the argumentation of I. N. Zubov seems to be the most persuasive, "This is not about *what* is created by legal order and what is its *social purpose*, but about *the protection* of the current legal order. It is clear, when we talk about the *source* of legal order and the *purpose* of its existence, thus we do not put forward arguments *for* or *against* the recognition of the protection of that legal order as one of the most important activities of the State, i.e., its *function*" [19, 43]. Legal order, in fact, is a condition for the existence of social institute of the State, so it (legal order) is the aim of the State as such, that is why its activity on legal order

protection should also be considered exactly as a State function attributively inherent to any type of State acting in any historical era [19, 42].

The State and its bodies exercise their functions in certain *forms*. Most researchers combine the understanding of the latter as a specific activity (its kinds) of state mechanism. Forms of exercising the functions of the State are divided into legal and non-legal (institutional, for example). The legal forms of exercising the functions of the State are understood as a homogenous in its external features (nature and legal consequences) activity of states bodies on the organization of public relations through committing of legal acts [52, 86]. The main functions of the State, including law enforcement, are exercised through legal forms (any state activity associated with the implementation of its core functions, – whether we'll call it actual or organizational, – is not free and cannot be free from legal regulation. However, public authorities may exercise their functions both through legal and organizational forms. Legal forms are unthinkable without purely factual, substantive organizational work. Legal forms are always organizational, while not all organizational forms are legal [3, 46]).

In the typology of juridical activity law enforcement activity is often distinguished either as a standalone legal form of implementation protective function of the State [52, 85-86; 41, 41-42; 61, 114; 4, 229; 12, 26; 29, 44; 27, 47], or as an integral part, a form of enforcement (law ensuring, law implementing, law exercising) activity [15, 36; 1, 58; 32, 17; 28, 26; 6, 58]. In some literary sources law enforcement activity at the same time is called jurisdictional activity, is identified with it [25, 87; 67, 29-36; 38, 10-11]. This seems not justified, because the jurisdiction is just a part of law enforcement activity. Identification of jurisdiction with law enforcement activity leads to a confusion of different kinds of the last and is not conducive to a clear delimitation of the competences of the participating in it bodies [63, 16].

The term of "*law enforcement activity*", whose appearance in the legal literature is associated with the name of I. S. Samoshchenko [54], now has firmly entrenched in the thesaurus of Russian legislation and legal science. At present, in the theory of state and law and sectorial legal sciences can be noted two equally acting trends. The first of them is connected with the fact that for almost 60 years, the term of "law enforcement activity" has been adapted by different branches of domestic law. Many scholars and practitioners believe that the concept of law enforcement activity is deeply researched and find it possible to use it without repeating words spoken. Often the mentioned concept is used without any reasoning, including in works on the theory and practice of public administration, in which this term is the key one [31; 43]. There is no precision in the use of the researched concept in

official sources, especially in departmental normative legal acts. Often the terms of "protection", "ensuring", etc. are used ambiguously, without indicating the specific value in a particular context.

The second, opposite, trend is related to the expansion of the researched issue and reflects a growing interest in the issues of law enforcement activity, active search for its new features. Today the theory of State and law, sectorial legal sciences possess a considerable knowledge about this form of State practice, its carriers, which include internal affairs bodies. However, the results of our analysis of literary sources lead to the conclusion that knowledge about law enforcement activity of the State still does not meet the increased needs of law enforcement practice. Here we support the view expressed by A. G. Bratko, that "law enforcement activity issues have practically not been studied yet, and this negatively impacts on resolving of sectorial, specific problems of the legal protection of public relations. Study of this problem is directly related to the strengthening of protection the rights and legitimate interests of citizens, to the strengthening of the rule of law and legal order" [11, 29].

In short, it is still too early "to discard into archive" this issue. This also touches upon the terminology, which is the basis of any professional information [23, 3]. Only the certainty of semantic meaning of the terms used allows us to avoid ambiguity of thesis that is being proved and its replacement during discussion [5, 257]. The main sources of disagreements in approaches to the concept of law enforcement activity lay, in our view, firstly, in different understanding of its content. Attempts to give definition of the concept of law enforcement activity by enumeration of its structural elements do not receive general acceptance and lead to lively discussions. Second, scientific disputes are caused by different interpretations of one and the same terms. Third, studies, in which the concept of law enforcement activity is considered without reference to its meaning and sense (wide, narrow or otherwise), do not add clarity. Fourth, there are some disagreements concerning the goals, objectives, subject matter, subjects, objects, means, techniques and required by law forms of law enforcement activity.

Of course, within the framework of this article it is impossible "to reach an agreement" with opponents concerning unambiguous understanding of law enforcement activity, the corresponding definitions and their place in the conceptual apparatus of the theory of law and practice of public administration. We only try to understand the critical issues. Not being able to go deep into the controversy, we have to fix some of the findings as if they are in shot form, in "solid residue" reflecting the author's position.

Law enforcement activity should be considered as: 1) a specific type of social activity; 2) special state-legal type of social management. This approach allows us to analyze law enforcement activity in the broad and narrow sense, to explore its main structural elements and on this basis to find out the value of each of them in law enforcement activity.

Calling law enforcement activity "by the method of ensuring inviolability of legality regime", "method (form) of ensuring the functions of the State", "specific form of special subjects' activity", "special form of state-imperious activity", "specific type of professional activity", "extremely important function of society", "totality of interrelated measures", the researchers thus emphasize its social, objective, active, operative, imperious, creative, sublegislative, comprehensive, specific, professional, polysubjective, strictly regulated by law nature. Analysis of the literature sources leads us to conclusion that the concepts of "law enforcement form of state functions exercising", "law enforcement activity", "law enforcement", "legal order protection", "protection of law against violations" in the functional (and not objective) sense are identical (it should be noted that a number of authors, speaking of law enforcement, have in mind a protective function of law, and not the activity of the state for the protection of legal norms from violations). They mean nothing else than *activity on protection of legal norms against violations*. Perhaps this conclusion limits the matching of views in the studied issue, although different views exist even here [29, 47].

In our opinion, the *direct object* of law enforcement activity is legal norms, the *mediated object* – public relations (economic, political, ideological, etc.), in which implement subjective rights and freedoms of man and citizen, perform legal duties. Ultimately, the object of law enforcement activity is always a man, its conduct in society. Protection of rights in the objective sense cannot be an end in itself, since the human personality with its interests always acts as a center of "gravitation" of legal regulations [13, 135]. According to V. P. Fedorov, man in general is subject to human rights activity (law enforcement activity in the broad sense of the term), and a citizen of State, whose rights and freedoms are defined not by the nature and essence of man, but by specific national legislation, is an object of law enforcement activity (in the narrow sense) [60, 16-18].

The aim (purpose) of law enforcement activity is considered by many authors as *control* (not in the sense of a function, but in the sense of object of desire) over the compliance of activity of the subjects of law with the legal regulations, over its legality, and, in the case of detection of offences – *taking of appropriate measures* to restore the disturbed legal order, apply measures of state coercion to offenders,

ensure the enforcement of penalties [12, 31]. In some cases, this aim is complemented by an indication of the *creation of conditions* for the exact implementation of legal regulations [63, 7]; conditions that prevent offenses [16, 30] and facilitate the unhampered implementation of rights and freedoms by citizens [69, 23]; conditions, under which public and state values are reliably guaranteed, practically realizable and are a real wealth of each person [30, 130]. Some authors limit the purpose of law enforcement activity to elimination of violations of legality, application of legal sanctions against persons responsible for violation of the requirements of law [27, 50]. According to A. H. Mindagulov, meaning and purpose of law enforcement activity lay in searching, detection and developing measures to eliminate (or neutralize) the factors leading to crime and other offenses [37, 6]. In our view, this position is not well founded. First, the aim of law enforcement activity should not be limited only to prevention tasks. Second, the mentioned statement talks not about legal norms that make up the object of law enforcement activity, but about the factors that give rise to offences, which also can be not legal. These factors may relate to the closest to the law not legal, material base. We do not deny the need for knowledge of the nature of social relations in the area of legal order ensuring, but cannot recognize their exceptional role in law enforcement activity.

The conclusion of S. S. Samykin is based on outmoded traditional theoretical views that the purpose of law enforcement activity is prevention of possible violations of law [51, 30]. It used to be that the crime rate, its fluctuations largely or even mainly depend on how effectively criminal justice agencies cope with their tasks. The fight against crime was seen as the purpose of law enforcement activity. It inevitable reduced law enforcement activity of state bodies authorities to combat [11, 47].

The defects of the paradigm of "combat against crime" have been long noted by legal scholars. So, S. S. Boskholov writes: "Calls to war against crime, strengthening the combat against it, in fact, pose purposeless goals before criminal justice authorities, the State and society. They not only mislead, but also disorganize their efforts to ensure security and legal order, as a rule, entail mass violations of law, the rights and freedoms of citizens. The sooner such goal set is found unfit, the sooner the country will begin to move towards the constitutional state [10, 39]. L. O. Ivanov and G. M. Reznik make a fair conclusion that law enforcement bodies cannot be required elimination and reduction of crime. Their work is only one of the factors, neutralizing many aspects of crime and offences in general. The role of criminal justice in the life of society best corresponds to the term of "protection"

[21, 57]. The fight against crime is a task of the whole society, all its institutes. Law enforcement activity can reduce the crime threshold, to a certain extent reining or even reducing it, but it cannot itself eliminate this phenomenon. Moreover, it is not able to eliminate the huge array of administrative offences. Law enforcement bodies should be directed not to fight, but to protect. Fight is a method of protection. The fight should be implemented against specific offences, but not against crime in general [11, 49, 206].

Protection of law from violations is exercised by *all bodies of the State*. But not in the same level. If for some bodies this function is optional, supplementary, then in the activity of other law enforcement bodies it dominates or is the only. Constitution of the Russian Federation (articles 2, 8, 10, 45, paragraph "c" article 71, paragraph "b" article 72, etc.), defines the general conceptual approaches to law enforcement, establishes basic protected values (rights and freedoms of man and citizen, the separation of power into branches, recognition and protection of all forms of property, etc.). In most general form it designates *tasks* and *subjects* of law enforcement activity. In accordance with paragraph "f" article 114, the Government of the Russian Federation is obliged to implement measures to ensure the legality, rights and freedoms of citizens, protect property and public order, to combat crime. Important role in the implementation of these measures is given, first of all, to internal affairs bodies (the specific tasks of internal affairs bodies in the field of law enforcement activity are contained in the federal laws, decrees of the President of the Russian Federation and other normative legal acts). Many authors consider the law enforcement function in the activities of internal affairs bodies as the defining, main, leading, dominant [64, 8; 24]. These bodies carry out law enforcement in a professional manner, as if by a "contract" with the State and society. The literature emphasizes the dual nature of their activity to ensure legal order: managerial and law enforcement one [32, 13; 6, 58]. On the one hand, the internal affairs bodies are included in the system of public administration and as the holders of powers of authority and organizing foundations exercise managerial impact on public relations in the sphere of internal affairs of the State, as well as manage their own forces and means. On the other hand, internal affairs bodies are an active link of law enforcement system, law enforcement bodies, and implement in this role the protection of legal norms from violations. Some authors even believe that the system of the Russian Ministry of Internal Affairs is a central link of the state system of legal order ensuring [20, 3], argue that such a variety of tasks and functions is not presented at another law enforcement body [11, 92].

There is a widespread approach in jurisprudence, according to which the *content* of law enforcement activity is disclosed in broad and narrow sense. According to A. G. Bratko, the content of law enforcement activity in the broad sense is the protection of law norms from violations. In this sense, every body of the State in one way or another is engaged in law enforcement activity within the limits of its competence. We are talking about the protection of legal norms in the management system itself. Such law enforcement activity has a kind of internal nature [11, 31-32]. In addition, law enforcement activity goes beyond the realization of law, since it also covers the creation of legal (protective) norms aimed at protecting of public relations [11, 29]. Law enforcement activity in the narrow sense of the word is nothing but a specialized work on the legal protection of public relations. Specifically established for this law enforcement bodies of the State are engaged in this activity. Thus, as A. G. Bratko believes, we can talk about general and specialized law enforcement activity, which are inextricably interrelated [11, 32].

I. A. Rebane understands law enforcement in the broad sense as various guarantees of legality: institutional, educational and other activities, supervision, control, and so on. As law enforcement in the narrower sense – the prevention and suppression of infringements of the legal order, as well as direct combat against already committed offences [50, 13-14].

T. M. Shamba understands law enforcement activity in a broad sense as a branched functional system of socio-legal means of ensuring the protection of legal order; in the narrow sense – as a direct protection of established by law order of social relations, that is, combating against offenses through bringing the perpetrators to justice, consideration of criminal and civil cases, application of sanctions [62, 124-126]. He also suggests considering law enforcement activity in the broad sense as one consisting of legal-educational, preventive and law enforcement (in the narrow sense) activity [62, 124-125]. This provision T. M. Shamba has put forward concerning law enforcement activity carried out by all state bodies and public organizations. Here we agree with N. T. Shestaev, who believes that such a delimitation of law enforcement activity in the types may well be extrapolated to the law enforcement activity of internal affairs bodies. After all, the tasks of the last are not limited to the fight against offences through their detection, suppression and bringing guilty persons to responsibility [66, 118].

S. S. Samykin believes that law enforcement activity in the broad sense encompasses the legislative activity of the State. In his view, the legislative process and the laws themselves are directed at protecting of law by all means of the State. Law enforcement gets narrower sense when it is associated with the activity

of the State to provide justice and order, enshrined by law. This will include all the sub-legislative activity of state bodies. Law enforcement gets an even more narrow sense if it's understood as activity of special (law enforcement) bodies of the State [51, 28-29].

From the point of view of S. M. Kuznetsov, law enforcement activity in the broadest sense is a specific activity, which is characteristic for a democratic and constitutional state and its bodies (legislative, executive, judicial), consisting of the protection of rights and freedoms of man and citizen, as well as the legitimate rights and interests of legal persons. Law enforcement activity in the broad sense is a purposeful activity, which has as its aim, task and function the creation of conditions, in which public and state values are reliably guaranteed, practically realizable and are a real wealth for everyone [30, 21, 130].

As we can see, there is no impassable brink between these points of view. But they do not resolve all the contentious issues in the approaches to the understanding of law enforcement activity content. In some of them the essence of law enforcement activity seems to be too integrated and included in more general concepts, the other on the contrary provide for its four members gradation (narrower, narrow, wide, the widest). Therefore, further, it is appropriate to focus on the content of law enforcement activity in the narrow sense, specialized law enforcement activity (through the example of internal affairs bodies), which lays in prevention and suppression of encroachments on legal order, as well as the direct combat with already committed offences (this, however, does not mean that law enforcement activity issues in intrabranch management do not have a value. Just in this case they are of secondary importance). At that, the focus will be on the functional characteristic of law enforcement activity, since its objective content and specific tasks of law enforcement bodies are laid down in the relevant normative legal acts.

I. S. Samoshchenko, one of the pioneers of the studied issue, includes in the content of law enforcement activity: a) supervision over the compliance with the requirements of law; b) studying of the circumstances of deeds, which contain the signs of wrongfulness; c) resolution on the merits of cases on violations of legality, implementation of decisions taken and adoption of special measures to prevent violations in the future [53, 94-94]. Often the components of law enforcement activity content are named in the legal literature as its kinds, varieties, organizational-legal forms, subsystems or directions. With some refinements, not generally touching the foundation of the concept proposed by I. S. Samoshchenko, the mentioned provisions are repeated L. S. Yavich [69, 30], V. M. Gorshenev [15, 182], M. I. Baitin [4, 230], N. N. Voplenko [13, 144], I. L. Petrukhin [42, 36]

and other scientists. It is noteworthy that this concept remains valid even today, being enriched by the constructive additions and refinements of modern legal scholars. Thus, disclosing the content of law enforcement activity, some authors distinguish in it the main, central link. According to A. P. Shergin, law enforcement activity performs corrective function in the system of legal regulation, and its core link is jurisdiction, the essence of which consists of the consideration of case on violation, on legal dispute and taking decision thereon. Other types of law enforcement activity basically "cater" jurisdiction [63, 9-16]. While supporting this point of view, we note that with respect to the activity of internal affairs bodies as this central link it is advisable to consider active monitoring over the compliance with legal norms of the real conduct of participants of protected public relations with subsequent correction where necessary. Surveillance covers all forms of monitoring over compliance with normative legal acts, including supervision, inspection, audits, checks, control in the strict sense of the word, etc. It is inherent to both external and corporate activity of internal affairs bodies. Monitoring over the performance of requirements of law by participants of social relations compels to refrain from violations of legality. This is its social function and its significant preventive potential. There is a number of authors, who support the given statement. For example, S. M. Kuznetsov writes that "the main thing in law enforcement activity is not the registration of offences and imposition of penalties for them, but an active preventative, preventive impact, prevention of offences" [30, 130-131]. To a similar conclusion comes E. V. Bolotina, who considers implementation of private and public prevention as the basic direction of activity of internal affairs bodies [8, 18]. After all, the more effective the internal affairs bodies will carry out monitoring and oversight functions, the smaller will be the volume of jurisdiction. Repressive, punitive component in the content of the law enforcement activity of the State that has declared itself constitutional should, in our view, decrease. Pretty symptomatic that among the researchers involved in this issue the number of scientists considering enforcement of laws only as punishment for failure to comply with normative requirements is getting fewer. According to A. P. Shergin, "Constitutional state is inconceivable without humane administrative policy. The transition from the repressive-prohibitive nature of administrative policy to democratic relations with the population includes audit and reduction of administrative-legal prohibitions restricting the exercising of legitimate human rights" [65, 58]. I. I. Sydoruk is also right, saying that while maintaining a natural for administrative law mandatory nature of norms, the itself "prohibitive-punitive" element of the branch loses its importance, the role of

competency and discretionary rules and as a consequence – the role of state regulation, legalization, control and surveillance increase [56, 29]. You also cannot but agree with the view of S. V. Kalashnikov that "serious threat to the formation of constitutional state and civil society is represented by the current lack of efficient supervision over legality, respect for the rights and freedoms of individuals in different spheres of public life" [22, 23, 24]. On the other hand, the systematic introducing of monitoring, representing a vigorous activity, along with preventive function ensures the maximum possible detection of offences and inevitability of punishment for them.

Law enforcement activity of internal affairs bodies is poly-functional and consists of the following types: 1) operational-investigative activity; 2) criminal-procedural activity (preliminary investigation and inquiry); 3) administrative activity (in their activity internal affairs bodies deal with other institutes of law (civil, labor, etc.), but because of the small volume of these contacts, there is no need to give them a value of separate directions). Each of these types of law enforcement activity has its own functions, specificity defined by specific purpose; normative regulation and system of units constituting internal affairs bodies. The legislator attributes a considerable part of cases on offences to the jurisdiction of internal affairs bodies. Detection, prevention, exposure and investigation of the last is exercised in the form of operational-investigative and criminal-procedural activity. But the law enforcement activity of internal affairs bodies is not limited to their participation in the fight against crimes. Special attention should be paid to the combating administrative offences, the number of which greatly exceeds the number of criminal deeds.

The main field of activities of internal affairs bodies is public relations. Exactly this circumstance determines the special role of administrative law in the functioning of internal affairs bodies [64, 8]. According to apt expression of Yu. A. Tikhomirov, administrative law is the backbone of the entire family of public law and in the role of basic primary regulators interacts with nearly all branches of law. Institutes and norms of administrative law, existing by themselves, as if penetrate in other branches, at that, more fully in other branches of public law or mixed branches of legislation [58, 7]. How exactly is the role of administrative law manifested in the activity of internal affairs bodies?

1. Internal affairs bodies are part of the executive branch, the regulator of which is administrative-legal norms. Legal status and competence of internal affairs bodies, including in external activity and in management of subordinate units, are defined by the norms of administrative law contained in federal laws,

presidential, governmental and departmental normative legal acts, provisions (statutes), administrative and service regulations.

2. Administrative-legal norms govern relations that arise in the field of protection of public order, ensuring of public safety and in organization of law enforcement itself, define the basic forms of the legal activity of internal affairs bodies (monitoring, supervision, administrative jurisdiction, etc.).

3. The mentioned norms form the compositions of administrative offences and establish responsibility for their commission, define the powers of bodies (officials) concerning consideration of cases on administrative offences, the procedure for the proceedings and execution of decisions on these cases [34, 14; 33, 26-27].

4. Administrative-legal activity – one of the most voluminous, multifaceted, polysubjective directions of internal affairs bodies' work. The latter have a significant arsenal of administrative-legal means of protecting public order and public safety, the impact of which is addressed to virtually the entire population. Amplifying in this sense the role of administrative law, I. I. Sydoruk writes, that it has a powerful arsenal of protective methods, not only to maintain order in the streets, stadiums, etc., but also to ensure the legal order of implementation public relations, for example, in economic sphere, directly or indirectly participating in the implementation of protective mechanisms of budgetary, tax, customs, civil legislation [56, 23-24].

5. Administrative law norm not only regulate the activity of internal affairs bodies in the sphere of public relations. In the process of their implementation, they pass their social approbation, effectiveness testing. Then, taking into account the administrative practice of the internal affairs bodies, the mechanism of administrative-legal regulation is improved, that is, there is a feedback of norms and law-enforcement practice [64, 8].

6. Norms of administrative law help to establish administrative-legal regimes (licensing and permitting, Passports and Visas systems, etc.), in maintaining of which the important role belongs to internal affairs bodies.

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LEGAL RISKS: THE CONCEPT AND KINDS[1]

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The essence of legal risks in the context of banking activity and property losses of the subjects of entrepreneurial activity is analyzed in the article.

The author considers objective and subjective factors that contribute to emergence of legal risks.

Keywords: risk, legal risk, kinds of legal risks, consequences of non-compliance with legislation.

Risk in a broad sense is a possibility of occurrence of circumstances leading to:

- uncertainty or impossibility of obtaining the expected results from the fulfilment of a set goal;
- infliction of material damage;
- risk of currency losses and etc.

Risk from a legal point of view – an inherent to human activity, objectively existing and within certain limits capable of evaluating and volitional regulation probability of suffering negative consequences by legal entities due to adverse events logically associated with diverse backgrounds (risk factors). Risk is of double subject-object nature, respectively, elements of risk are divided into objective (factors and situation of risk) and subjective (subject and volitional regulation).

Legal risk is a current or future risk of loss of income, capital or damages due to violations or non-compliance with internal and external legal norms such as laws,

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by-laws of regulators, rules, regulations, prescriptions, constituent documents. In Russia, legal risks are getting particularly important, because due to the relatively short history of existing market economy the legislation still lacks of a clear regulatory framework and often basic definitions.

All companies are required to carry out activity in accordance with the legislation, the compliance with which is particularly important from a practical point of view and serves to the interests of both a company and consumers.

Although the risks are applicable to any business organizations, particular importance they gain in banking sphere, where regulatory authorities are obliged to provide protective measures against systematic failures in the banking structure and in economy. Historically, operational risks were recognized as inevitable costs of doing business.

The hallmark of legal risk in contrast to other banking risks is a possibility to avoid dangerous levels of risk if parties to a banking process fully comply with applicable laws and regulations, internal documents and bank procedures.

The Basle Committee has identified seven basic categories of events that lead to losses

Intra-company fraud – losses associated with deception, illegal property or non-compliance with laws or regulations in a company, where at least one of the parties is involved.

External fraud – losses associated with deception or illegal property or failure to comply with law by a third party. These include theft, robbery, hacker attacks and other similar factors.

Work-related practice and work safety – losses associated with actions that are contrary to laws or agreements concerning labor, health and safety that entail compensation for claims concerning compensation for personal injury or discrimination.

Customers, products and business practice – losses associated with unintentional or negligent mistake when performing professional duties in respect of particular customers or in connection with nature or design of products.

Damage to physical assets – losses associated with the loss or damage of resources due to natural disasters or other events.

Disruptions in business and systems failures – losses associated with failures in business or failure of systems. This category includes losses due to failure of computer equipment, software, networks or disruptions in the work of municipal services.

Performance, delivery and processes' management – losses associated with failures in transaction processing or processes' management, as well as losses caused by unsuccessful relations with suppliers and manufacturers.

So, legal risk refers to a group of operational risks, but its management within the framework of financial organization lets us to refer it to financial risks.

If we talk about categories of risks, there is an optimal *risks classification concerning the sphere* in the descending order of importance:

1) risks in the field of hostile takeover;

2) risks in the field of tax relations;

3) risks in the field of ownership and management of real estate, as well as other assets of company;

4) risks in the field of corporate relations;

5) risks associated with the implementation of judicial-claim activity;

6) risks associated with contracting with counterparties.

By *the source of origin* legal risks are:

a) external (amending of legislation, its violation by bank's clients);

b) internal (legal mistakes of a bank itself).

By t*he place of origin*:

a) bank - client (breach of agreement by bank, entailing its invalidity or penalties);

b) bank – regulator (failure to provide information to a regulator);

c) bank – economic entity, a person (under the control of regulator) (failure to perform control functions delegated by a regulator).

By *the stages of legal regulation mechanism*:

a) legislative – norm-making;

b) enforcement ones (law-enforcement, interpretational, other risks to the realization of law).

Where legal risk is a risk of losses due to the inability to meet the requirements of the legislation, including:

- violation of existing capital requirements;

- failure to anticipate future legislative requirements.

So, the emergence of risks associated with amending, termination or adoption of new normative legal acts in no way depends on the actions of corporate executives and cannot be prevented.

Normative legal risk is internal in part of orders, decisions, standards and orders issued inside of an organization and external in part of amendments in legislation.

The signs of *interpretational* risk are: organic connection with interpretation, with uncertainty in law and in regulated by it public relations; the variability of interpretation; divergence; its subjective-objective nature.

This is the risk of different approaches to the interpretation of these or those law norms by various state bodies. This is a sin, for example, of the Russian Ministry of Finance and the Federal Tax Service of Russia. This legal risk may result in payment of penalties, monetary compensation for damages, and deterioration of a company's reputation.

Emergence of risk in interpretational activity is caused by a complex of factors of objective-subjective nature.

The *objective* factors shall include: positive uncertainty of legal norms and the regulated by them diversity of particular life circumstances; the objective backlog of law from development of public relations; existence of areas of public relations falling under legislative reticence; the specificity of the language of law; existence of logical-structural defects of law (gaps, conflict of norms and conflict of interpretations, overregulation, imperfection of legal and terminological structures, etc.).

The *subjective* factors shall include: individual characteristics of the subjects of interpretation expressed by the level of their legal conscience (legal knowledge, deformations of legal conscience, legal pillars and readiness of a person), by the legal (professional) experience and other personal qualities, as well as by the actual dependence when formal independence from economic, political, departmental, personal and other interests.

Interpretation of norms and legal prescriptions contained in individually-legal acts (law-enforcement acts, individually-legal contracts), which are the carriers of information about proper and possible conduct of the subjects of law, is the process of extracting of meanings embedded in them by their creators, development of contained in them legal information that is clothed in a certain sign-symbolic form.

Interpretation of legal prescriptions that is expressed in the distortion of their meaning and inadequate reproduction of content volume (volitional, social, actually legal) generates their incorrect use in specific circumstances.

To the consequences of non-compliance with legislation, which are potentially very serious, include:

- carrying out of investigation by regulating (control-supervision) authorities;
- recognition by a court decision of contracts concluded with a violation as null and void and not having legal force;
- adverse media coverage (reputational risk);

- risk of legal action by third parties for damages caused by the unlawful actions of company;
- administrative responsibility (fines, etc.);
- criminal responsibility of officials.

Significance of legal risk is characterized by the amount of losses incurred by the company as a result of implementation of a risk event and which include payment of claims, judicial costs, attorney fees, costs of harmonization with law of company's internal documents, lost profits and the costs of elimination legal errors.