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CONCEPTUAL FOUNDATIONS FOR THE LEGAL REGIME OF ENSURING PUBLIC SAFETY OF THE RUSSIAN FEDERATION

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The author suggests a system of views on security issues and ways to ensure it, including the main components of conceptual foundations of ensuring public safety of the Russian Federation. Administrative and legal regimes regulating relations between public authorities and population are considered as the most important elements of the organizational and legal mechanism of conceptual foundations of ensuring public safety of the Russian Federation.

The need for development of a number of federal laws designed to ensure public safety, which will form the administrative and legal regime of ensuring public safety, is substantiated in the article.

Here is noted that the content of general administrative and legal regimes to ensure public safety consists of regimes of state administration activity, namely the regimes of organization and implementation of state administrative control and supervision in order to ensure the protection of identity, society and the state as a whole.

Keywords: public safety, safety, national security, legal regime of ensuring public safety.

The task of developing an adequate scientific of security perceptions is particularly important for modern Russia, since in the post-Soviet period not only ideological and political views had been changed, but Russia as a whole was obliged to find a new identity, including the development of new ideas on the ways and objectives of further development of the country.

Despite the deep study of a number of methodological issues relating to the regularities, principles and methods of activity to ensure national security, in scientific researches the reflection of modern processes to ensure public safety is paid little attention. Moreover, down to recent times the study of this issue was not of a systematic and comprehensive nature, and was carried out mainly within the framework of departmental research and training educational institutions.

The current normative-legal regulation in the sphere of public safety does not have at its core an overall strategy. In this field there is still sufficient legal scope for further improvement. Acknowledging the fact of abundance of normative acts and separate norms relating to the regulation of various minor provisions of substantive law, operative search and other procedural means to counter encroachments on public safety, it must be recognized that the current situation is such that there is no holistic system of legislation in the field of ensuring public safety in the Russian Federation.

Noting multidimensionality of the content of public safety, volume and complexity of the issue, it should be noted that a promising and feasible way to solve it is to develop conceptual foundations of ensuring public safety and to improve on that basis a comprehensive legal regime of its ensuring.

It should be noted that the system of views on security issues is varied and sometimes contradictory. The lack of common theoretical approaches to the concept of public safety leads to different assessments, and, of course, to different ways of ensuring. The result of the lack of a unified understanding of the content of public safety, its types, threats and methods of their elimination is an inconsistency in assessments and actions, the lack of necessary coordination of security subjects, the excessive number of elements in the system of predicting and decision-making on the issues of public safety, insufficient regulation by universally binding and coordinating norms.

It seems that the main way to resolve problems encountered in the field of security of society, an individual and the state is to develop conceptual frameworks to ensure public safety of the Russian Federation, the main components of which should be:

- *aim*, defined as the formation and maintenance of protection of qualitative status of public relations that ensure progressive development of a man and society in the specific historical and natural conditions;

- *principles*, on the basis of which public safety is implemented, and the list of priorities, methods and ways of such activities.

- *system* of ensuring public safety, which is presented in the totality of security subjects, firmly interconnected by functional responsibilities and rights in the field of protection of society and personality, responsible for the development and implementation of measures of political, legal, institutional, economic, scientific and other nature, aimed at maintaining socially acceptable level of public safety.

Public safety in conjunction with state and personal security forms the content of national security, being simultaneously its types, differentiable on the basis of security object.

In structural and contensive plan the conceptual foundations of ensuring public security of the Russian Federation enshrine a system of views on the theoretical and practical aspects of the issue of ensuring public safety, as well as form the conceptual apparatus of the theory of public safety and such basic notions as aims, objectives, principles, priorities and main directions of its ensuring.

It seems, that the most important structural and contensive element of conceptual foundations of ensuring public security of the Russian Federation is its terminological apparatus, i.e. the system of definitions that disclose the essence and meaning of such concepts as "public safety", "ensuring public safety", "organization of public safety" "vital (national) interests", "threats to public safety", "objects of public security", "subjects of public safety", "system of ensuring public safety", etc.

It should be distinctly emphasized that as the most important element of organizational and legal mechanism of the conceptual foundations of ensuring public security of the Russian Federation we should recognize administrative and legal regimes governing the relations developing between public authorities and population, as well as relations, in the framework of which implement state legal coercion on the basis of the federal legislation, orders of the President of the Russian Federation, decisions of the Government of the Russian Federation, normative legal acts of federal and local executive authorities.

Based on the study of the theory of law and the determination of the essence and content of the concept of legal regime, it should be noted that its essence lies in the absolute priority of the legal means of achieving objectives, what distinguishes

it from the regime as a whole. It should also be noted that the legal regime is not similar to the term of "legal status", because its content goes beyond the definition of the legal status of a subject.

Has been revealed that the category of a sectorial legal method reflects the features of "technology" for regulation of public relations sphere, which constitute the subject of a separate branch of law, at the same time as the concept of "legal regime" is actual to denote specific techniques, ways of regulation certain types of social relations within a branch. This specificity is enshrined in the law norms governing a particular type of public relations and forming the legal institute of ensuring public safety.

The content of this institute defines, above all, the method of legal regulation and legal regime that are applied for emphasizing of appropriate branches and institutes of law.

Thus, the legal regime of public safety can be defined as a normatively established special procedure of legal regulation, which reflects a totality of legal and institutional means that regulate a particular area of public relations in various spheres of public administration, is used to consolidate the socio-legal status of both the subject and object of management, and is aimed at maintaining sustainable operation and ensuring of their protection.

Accordingly, the structure of the legal regime of public security includes items such as: regime carrier, regime legal means; regime rules, legal status of the subjects of regime regulation, the system of organizational and legal guarantees.

In this connection, the peculiarities of legal regulation of the regime of public safety lay, first of all, in the multifaceted nature of the structural elements disclosing its content and should be considered together and in their indissoluble connection with each other.

Also characteristic of the legal regulation of the regime to ensure public safety is the fact that its subject is a complex legal-institutional institute based on the norms of administrative law, which forms administrative and legal regime to ensure public safety.

The purpose of this institute is the formation of a complex administrative and legal regime of ensuring public safety, which brings together many common administrative and legal regimes that organize and consolidate the legal status of the subject of ensuring public safety, the object of managerial impact, the required degree of their subordination, information interaction, as well as special and particular administrative and legal regimes established by the norms of sub-institutes of administrative law.

The conducted study suggests that the system of views on security issues is rather varied and sometimes contradictory. The lack of unified theoretical approaches to the concept of public safety leads to different estimations and, consequently, to different ways of its ensuring. The result of the lack of a unified understanding of the content of public safety, its types, threats and methods of their elimination is an inconsistency in assessments and actions, the lack of necessary coordination of security subjects, the excessive number of elements in the system of predicting and decision-making on the issues of public safety.

The main way to resolve the problems encountered in the area of public safety, security of a personality and the state, seems to be development a strategy and defining the state policy of Russia in the field of formation of the system of public safety. In order to implement this idea, it seems appropriate to develop Federal Law "Strategy of State Policy in the Sphere of Ensuring Public Safety of the Russian Federation for the Period up to 2020".

At that, the following methodological grounds should be considered, namely: public safety is an independent type of the national security of the Russian Federation, its organic element, endowed with its own content, which consists of the complex of following main elements – the sphere of public safety, its objects, the nature and types of threats, the system of public safety, the powers of subjects of ensuring public safety, etc. It appears that these elements can form the structure of the document under development.

The strategy of the state policy in the field of ensuring public safety should become the fundamental document defining the aims, objectives, as well as the ways and means of achieving them, expressed in the main directions of the state activities. In addition, the mechanism of implementation of the Strategy also implies the development of relevant normative legal acts, federal and regional targeted programs in certain areas of ensuring public safety.

The main thing, in our view, is that public policy in the field of public safety must be considered as part of the strategic plan, designated by the President and the Government of the Russian Federation for the period up to 2020.

The National Security Strategy is formed on the principles of continuity of state policy in the sphere of security and is based on the system of national priorities of Russia. Thus, the analysis of these documents, which are fundamental in the theory of security, shows that the aims of ensuring security lay in maintaining the protection of the vital, in fact, national interests of an individual, society and the state from real and potential threats and challenges that encroach on these interests.

With this approach, it seems that exactly threats and their consequences should be primarily taken into account in the forming of the security architecture, i.e., the security system as a whole. Exactly by the nature of threats, in our opinion, should be classified and delimited different types of security defined by the Law.

In this connection, the content of the general administrative and legal regimes to ensure public safety consists of the regimes of activity of public administration, namely the regimes of organization of implementation the state administrative control and supervision in order to ensure the protection of an individual, society and the state as a whole.

The content of the most characteristic special administrative and legal regimes to ensure public safety consists of the regimes of state administration activity in certain territories of strategic importance for realization the interests of an individual, society and the state.

The content of the special administrative and legal regimes to ensure public safety consists of the complex regimes of state administration activity governing the extreme (extraordinary) regime of implementation of public authority in a variety of situations where the normal functioning of society and the state is impossible.

Thus, the complex administrative and legal regime to ensure public safety is a totality of legal norms and organizational means, integrated into a special regime formation, the purpose of which is to ensure the security of the organically interconnected triad: security of an individual, society and the state.

The content of the complex administrative and legal regime to ensure public safety consists of the regimes of state administration activity, which can be roughly divided into three blocks:

- regimes of regular functioning of state administration – general regimes;
- regimes of state administration activity in certain territories of strategic importance for implementation the interests of a individuality, society and the state – special regimes.
- regimes of state administration activity in emergence of extreme (extraordinary) situation – particular regimes

Each of these administrative and legal regimes is endowed with its own content and the complex of organizational-managerial and normative-legal means aimed at implementing the aims and objectives of regime, which by their nature are complex administrative and legal regimes designed to ensure public safety.

It should be noted that at the present day, the lack of provisions that directly provide for special situation regime, procedure and conditions of its introduction,

is an obvious gap of a modern legislative framework of particular administrative and legal regimes.

In our view, it would be feasible to adopt FCL (federal constitutional law) "On the Special Situation Regime" to be introduced in the event of an emergency of natural and man-made nature, which is quite different from a State of emergency.

First, the right to establish this regime has to belong both to public authorities of the subjects of the Russian Federation and bodies of local self-government.

Second, this regime does not provide for the restriction of constitutional rights of an individual, and social and political activities. Restriction of freedom of movement, freedom of enterprise, and some of other rights acts as the inevitable consequence of rescue, rehabilitation, preventive and organizational, and evacuation measures.

Third, such regime does not involve changing of the competence of public administration bodies, reallocation of powers.

Special situation regime is a special legal regime that includes the need for application of special measures, the hardness and volume of rights restriction of which significantly inferior to measures used in the regime of emergency and martial law. Thus, about special situation should be spoken when there are certain restrictions and prohibitions, but a state of emergency or martial law is not declared, i.e. this mode is at the junction of special and particular administrative-legal regimes of ensuring public safety.

In our view, it is also seems appropriate to develop and adopt FCL "On the Particular Regime" that includes the need for application of particular measures, the hardness and volume of rights restriction of which significantly exceed measures used in the regimes of special situation and state of emergency, because the threats arising in the emergencies that have become a consequence of social causes, as a result of which some territories of the Russian Federation became temporarily uncontrolled by the constitutional public authorities, and measures to eliminate them have remained outside the legal framework of the law "On the State of Emergency". The mentioned threats are aimed at undermining the constitutional system of the Russian Federation.

This Federal Law establishes the grounds, aims, procedures of introducing and implementation of additional measures – special administrative and legal regime to protect constitutional system, territorial integrity, rights and legitimate interests of citizens upon the occurrence of extraordinary circumstances that have become a consequence of social causes, as a result of which some territories of the Russian Federation became temporarily uncontrolled by the constitutional public

authorities. This federal law also defines the powers of public authorities involved in the provision of additional measures – particular administrative and legal regime.

It appears that the attempted study of the theory and improving of the practice of the legal regime to ensure public security of the Russian Federation can serve as a basis for the further development of legal material and practice of state administration activity in the studied area.

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ENSURING PUBLIC SAFETY AS A SOCIO-LEGAL CATEGORY

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Peculiarities of public security, considered by the author as a socio-legal category, which covers a specific sphere of social relations that determine the content of their law enforcement functions and powers, are given in the article.

The author states that the aims and objectives of ensuring public safety are determined by the nature of potential and existing threats, i.e., conditions and factors that create a real or potential threat to life, health, civil and political rights and freedoms of citizens, property, state and public institutions whose functioning provides normal conditions for life of individuals, society and the state.

Keywords: public safety, ensuring public safety, protection of public order.

The problem of ensuring security has been existing at all stages of the development of social relations and institutions of society. The simplest explanation of the meaning of the word "*security*" is a state of "*no danger*", that is, the absence of any risk to a certain subject. The need for security is one of the basic motivational values of society and, according to A. Maslow, by importance is in second place among the basic human needs [3].

There are many different aspects (semantic meanings) of the concept of security, which can be considered both in the broad sense of the word, and in relation to specific conditions. From the point of view of social phenomena security can be seen as a need and interest, as feeling, as a social function, as a social relation, as purpose and result of activity, as process, as value, of system, as science and an art, etc.

One of the components of security is public safety, in the broadest sense of the word, defined as a totality of ensuring security of the established legal regime of society, citizens, safety of their property, the normal operation of sources of increased danger that threat to man and society.

In particular, one of the juridical encyclopedic dictionaries interprets the concept of "*public safety*" as a system of social relations and the legal norms governing these relations in order to ensure public peace, inviolability of life and health of population, normal labor and rest of citizens, normal activities of state and public organizations, institutions and enterprises [4, 204].

At that, there are different opinions of authors regarding inclusion of public safety to the components of the concept of public order. If to consider public order as public relations regulated by law norms and morality, which in their entirety ensure public peace, generally accepted norms of behavior, normal operation of enterprises, institutions and organizations, transport, safety of all types of property, as well as respect for public morals, honor and dignity of citizens, it is possible to conclude that these concepts are complementary. In this case, the concept of "*public safety*" is objectively slightly wider than the concept of "*public order*".

Public safety as a social and legal category, which covers a specific sphere of public relations, is characterized by a number of features that define the content of activities of the law enforcement agencies for the protection (ensuring) of these relations.

Firstly, public safety concerns all citizens without exception, from the birth to the end of life.

Secondly, public safety, as a rule, concerns elementary actions, deeds and rules of behavior of people that are taking place openly, publicly, and generally understood by others.

Thirdly, public safety is regulated by both law norms and other social and technical norms (morality, customs, traditions and even fashion).

Fourthly, in the field of public safety a huge number of offences are committed every year. And all offenders, and it is a significant part of the population, one way or another, are subjected to forced impact of law enforcement agencies.

Fifthly, there is a significant circulation of objects and subjects of high risk in the field of public safety: acquisition, storage, use, transportation of civil and service firearms, explosive and highly toxic substances, radioactive isotopes, etc. Therefore, licensing and permitting activities of the internal affairs bodies that exercise state supervision and control in this area allow prevention and suppression of violation of established rules, and thereby minimization of the occurrence of serious implications, as a rule associated with the violation of relevant norms, standards and requirements.

Sixthly, the area under consideration is in close contact with such dangerous anti-social phenomena as drug addiction, alcoholism, prostitution, vagrancy and begging. That's why in a number of cities in the country established special units, so called the morality police.

Seventhly, in the area of public safety various mass public events are regularly held with a large concentration of people in various premises or in a limited territory, what often poses a threat to the life and health of citizens, the normal functioning of organizations. These include political (rallies, marches, demonstrations), economic (picketing, hunger strikes), cultural and entertainment (festivals, concerts, days of cities), sports (Olympics, football, hockey and other competitions), religious and other public events. Their implementation requires a great deal of organizational work of law enforcement agencies, as well as bringing of significant manpower and means of the police and internal troops to ensure order and safety [1].

Eighthly, there are various group violations of the order, riots, armed and unarmed conflicts, acts of terrorism in the field of public safety. Often they are accompanied by killings, loss of lives, demolitions and arsons of state and public buildings, residential houses of citizens, destruction of railways, bridges, power lines and communications.

Ninthly, the considered area is inextricably linked with emergencies coming in the event of natural disasters, fires, major industrial accidents, disasters, epidemics and epizootic that violate the conditions of life, threaten to the lives and health of citizens, and require rescue and recovery operations.

The above aspects of public safety clearly demonstrate the importance and relevance of this field in activity of law enforcement agencies, and the most important – define the content of their law enforcement duties and powers.

It should be noted that in the post-Soviet period the differentiation of scientific knowledge on the basics of ensuring safety of individuals, society and the state is taking place across the full range of state policy of the Russian Federation.

This trend also has affected the theory of ensuring public safety in the Russian Federation. As part of this trend, the issues of ensuring public safety in the Russian Federation stand out in a relatively independent part.

In due time, the Concept of the Development of Public Security Service of the Russian Ministry of Internal Affairs [2] defined public safety in the Russian Federation as a state of protection of the vital interests of an individual, society and the state from socially dangerous deeds and the negative impact of emergencies caused by the crime situation in the Russian Federation, as well as emergency situations caused by natural disasters, catastrophes, accidents, fires, epidemics, and other emergency events.

This definition is linguistically based on the indicators that display the performance of the Ministry of Internal Affairs of Russia in the field of ensuring public safety, and with taking into account today's realities does not quite truly interprets the definition of public safety.

Meanwhile, the goals and objectives of ensuring public safety are defined by the nature of potential and existing threats, that is, the conditions and factors that constitute a real or potential danger to life, health, civil and political rights and freedoms of citizens, property, state and public institutes, the functioning of which ensures the normal conditions of life of citizens, society and the state.

In this case, public safety is ensured by a set of measures of economic, political, legal, organizational and scientific, and other nature implemented by the federal bodies of legislative, executive and judicial powers, bodies of state power of subjects of the Russian Federation and local self-government bodies, citizens and public associations.

In this regard, it is proposed to extend basic content of ensuring public safety, which within the framework of new approaches to understanding the national security that are defined by the Strategy lies in maintenance of legal and institutional mechanisms, as well as resource capabilities of the state at the level that ensures protection of society from potential and existing threats that could harm the foundations of the constitutional system of the Russian Federation, preservation of civil peace, political and social stability in the society.

It should also be noted that ensuring public safety is aimed at preserving civil peace, political and social stability in the society, and that it is not just an integral part of the scope of the national security of the Russian Federation.

This concept has its own content, which, in turn, defines the independent direction of state law-enforcement policy, needs theoretical development like methodological framework to address many of legal, institutional, law enforcement

and other issues at various directions of protection of an individual, society and the state.

In general, the justification of requirements to the content of public safety allows a comprehensive approach to its definition and defining the concept of public safety as a state of protection of society from potential and existing threats, which ensures the protection of the constitutional system of the Russian Federation, the preservation of civil peace, political and social stability in the society.

However, the theoretical study of problems in the functioning of the regional systems to ensure public safety in the Russian Federation is in need of experimental and legal verification, since it is necessary to recognize that the scientific development of a system of theoretical views on the strategy and tactics to ensure public safety in the subjects of the Russian Federation as a separate direction of law enforcement activity should take its proper place both at research and at legislative level.

In general, it is correct to assert that the legislative enshrining of the principle of balancing between the vital interests of an individual, society and the state is a reflection of democratic changes in our country.

References:

1. Federal law from July 19, 2004 "On Meetings, Rallies, Demonstrations, Processions and Picketing" [Federal'nyi zakon ot 19 iyunya 2004 g. «O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh»]. *System GARANT* [Electronic resource], Moscow: 2013.

2. Order of the Russian Ministry of Internal Affairs No. 240 from March 15, 2002 "On Approval the Concept of Developing Public Security Service of the Russian MIA" [Prikaz MVD Rossii «Ob utverzhdenii Kontseptsii razvitiya Sluzhby obshchestvennoi bezopasnosti MVD Rossii» ot 15 marta 2002 g. № 240]. *System GARANT* [Electronic resource], Moscow: 2013.

3. *Motivation and Identity. 3rd edition* [Motivatsiya i lichnost'. 3-e izdanie]. A. Maslou – translation from English, St Petersburg: Piter, 2007.

4. *Juridical Encyclopedia* [Yuridicheskii entsiklopedicheskii slovar']. Moscow: 1984.

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UNLAWFUL ACTIONS OF THE SUPERVISION INSTANCE OF ARBITRATION COURT OF THE RUSSIAN FEDERATION: RULING ON REFUSAL TO TRANSFER A CASE TO THE PRESIDIUM OF THE HIGHER ARBITRATION COURT OF THE RF WITH A VICE OF MOTIVE

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Here is considered a situation when a taken judicial act of the supervisory instance of arbitration court – ruling to refuse to transfer a case to the Presidium of the HAC RF contains the motive, which is not lawful from the standpoint of the main provisions of the Arbitration Procedural Code of the RF, and the ruling, in fact, illicitly finishes the process of arbitration court acts' appeal. The author draws a line between tort and lawful conduct of judicial panel of the HAC RF in making a ruling on refusal to transfer a case to the Presidium of the HAC RF in determining or changing the practice of application a legal norm.

Keywords: tort in legal proceedings, ruling of the HAC RF, refusal to transfer a case to the Presidium of the HAC RF, supervisory instance of arbitration court, revision of judicial acts that have entered into legal force, defining or modifying the practice of law, determining or changing the practice of application a legal norm.

Having analyzed the norms of Arbitration Procedural Code of the Russian Federation (hereinafter APC RF) [1], which govern proceedings on the revision of judicial acts by way of supervision (chapter 36 of the APC RF) and proceedings on the revision of judicial acts entered into legal force due to new or newly revealed

circumstances (chapter 37 of the APC RF), you involuntarily ask yourself about correspondence of these norms to the common principles and objectives of proceedings in arbitration courts that are set out in chapter 1 of Arbitration Procedural Code of the Russian Federation. Even more questions arise after getting acquainted with the judicial acts of supervisory instance of arbitration court taken on similar cases that are in its proceedings.

It is no secret that the decisions taken by judicial panels of the Higher Arbitration Court of the Russian Federation (hereinafter HAC RF) that settle the issue of the transfer of a case to the Presidium of the HAC RF on similar cases may be diametrically opposed. However, the reason for this should be different factual circumstances of particular cases, but not different approaches to the application of law norms.

Considering the supervisory instance as ultimate one in the row of appeals against court decisions, people involved in a case, logically believe that outcome will be a legitimate and fair resolution of dispute. However, the possibility of filing an application to the Higher Arbitration Court of the Russian Federation (in the context of part 2 article 292 APC RF – exercising of the right to contest court decisions by way of supervision) by persons participating in a case is linked to the conditions, which do not correspond to the grounds for revision judicial acts by way of supervision (see article 304 of the APC RF).

We believe, and this is confirmed by the practice, the judicial Board of the HAC RF, setting in motion a person's application on revision of judicial acts by way of supervision, in fact is guided by the provisions of article 304 APC RF, while formally noting the existence in the application of circumstances provided for in article 292 of APC RF (which actually are the cause of applying to the supervisory instance). In our opinion, the judicial panel of the HAC RF does not care about violation or incorrect application of norms of material or procedural law by the arbitration court, if:

- a judicial act disputed by way of supervision does not violate the uniformity in the interpretation and application of law norms by the arbitration courts, including due to the lack of the formed legal position of the Presidium of the HAC RF on the application of these norms;

-an applicant has failed to bind into a single chain a significant violation of its own rights and legitimate interests in the sphere of entrepreneurial and other economic activity with violation of rights and freedoms of man and citizen in accordance with universally recognized principles and norms of international law, international treaties of the Russian Federation;

- an applicant has failed to prove that in addition to a significant violation of its own rights and legitimate interests in the sphere of entrepreneurial and other economic activity the challenged act of arbitration court violates the rights and legitimate interests of indefinite range of persons or other public interests.

Actually, analysis of the norms contained in articles 292 and 304 of the APC RF does not reveal their collision (see Table 1). Their inconsistency is quite understandable. Thus, we believe that the legislator has shielded the Presidium of the HAC RF (but not the judicial board of supervisory instance) from the flow of applications on supervisory revision of arbitration court judgments. As a result, the Presidium of the Russian Federation considers only those cases that are much more serious than the violation of the rights and legitimate interests of individuals in the sphere of entrepreneurial and other economic activity. Therefore, it seems to us that those, who rely on the possibility of appeal judicial acts of arbitration court by way of supervision, should learn how to derive generalizations from particular, know their constitutional rights and universally recognized principles and norms of international law accepted by the Russian Federation.

Table 1

The sufficient and necessary conditions for revision of judicial acts by way of supervision

Sufficient conditions for the exercising of the right to appeal against court judgments by way of supervision (article 292 of the APC RF)	Conditions necessary for the review of judicial acts by way of supervision (article 304 of the APC RF), which should be set out in claim (paragraph 3) part 2 article 294 of the APC RF)
- *the rights and legitimate interests* in the field of entrepreneurial and other economic activities *of the person that files an application* to the supervisory instance have been substantially *violated*;	- there is a *violation of the rights and freedoms of man and citizen* according to the universally recognized principles and norms of international law, international treaties of the Russian Federation; - there is a *violation of the rights and legitimate interests of indefinite range of persons* or other public interests;
- there is a *violation or misuse of the norms* of substantive or procedural law *by the arbitration court, which adopted the contested judicial act.*	- *a judicial act* that is contested by way of supervision *violates the uniformity in the interpretation and application of law norms by the arbitration courts*.

However, as we see it, the legislator made a mistake in the heading of article 304 of the APC RF – "Grounds for the Supervisory Review of Effective Judicial Acts and for Awarding a Compensation for the Violation of Right to a Fair Trial within

a Reasonable Time". According to the content of the article it should be regarded as "Grounds for Cancellation or Modification by Way of Supervision of Judicial Acts that have entered into Legal Force, and Awarding a Compensation for the Violation of the Right to Trial within a Reasonable Time".

Unfortunately, there is no such ground like a "violation or misuse of the norms of substantive or procedural law by the arbitration court, which has taken the contested judicial act" among the grounds listed in this article (the check of judicial acts of arbitration court on this ground ends in cassation instance).

Proceeding from the analysis of the provisions of article 304 of the APC RF and judicial acts taken by judicial panel and the Presidium of the HAC RF (compiled by legal reference system "GARANT" with reference to article 304 of the APC RF), we can conclude that the main purpose of supervisory instance is avoidance of the going beyond the limits of arbitration and, in general, national court proceedings of persons having evidence of violation by arbitration court of the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law, international treaties of the Russian Federation and persons seeking a just resolution of their case in other instances, for example, the Constitutional Court of the Russian Federation, the European court of Human Rights, etc. This conclusion is also supported by the content of the decision of the Plenum of HAC RF No. 52 from June 30, 2011 "On the Application the Provisions of the Arbitration Procedural Code of the Russian Federation in the Revision of Judicial Acts on New or Newly Discovered Circumstances [3]. As a condition of judicial review on new circumstances, paragraph 9 of the decree stipulates the recognition by a decision of the Constitutional Court of the Russian Federation of not correspondence to the Constitution of the Russian Federation of the law applied by the court in a particular case, in connection with a judicial act, regarding which an applicant has appealed to the Constitutional Court of the Russian Federation. Paragraph 10 of the same decree of the Plenum of the HAC RF provides for judicial review on new circumstances due to the established by the European Court of Human Rights violations of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in the consideration of a particular case by the court of arbitration in connection with a judicial act regarding which an applicant has appealed to the European Court of Human Rights.

Practice shows that the Presidium of the HAC RF rarely carries out the adjustment of law enforcement, basically if there is a change in the legislation of the Russian Federation. In all other cases, the Presidium of the HAC RF applies fairly wide discretion.

It's no secret that the "filter" of entered into legal force court decisions, consisting of courts of cassation, does not notice due to subjective reasons judicial acts of previous instances of arbitration courts with errors of justice. However, a judicial error is also possible during the administration of justice in the courts of arbitration as a result of judges' compliance with the current legal position of the HAC RF regarding the application of the law norm that is laid down in the rulings of the Plenum or the Presidium of the HAC RF. The fact that the HAC RF may be mistaken in the interpretation of the law norms derives from such concept as a change in judicial practice, when the HAC RF, in fact, recognizing the mistakes of the previous interpretation of a law norm, issues an act to change the practice of application of the law norm. Mistake of the HAC RF can also be associated with unconstitutionality of certain norms of laws, with unconstitutional interpretation (application) of law norms in a particular case. However, the very fact of recognizing of past mistakes does not entail the resolving of a case in the HAC RF in favor of the applicant. In this case, at the discretion of the judicial panel of the HAC RF, can be taken three acts that are different in legal consequences:

- ruling on refusal to transfer a case to the Presidium of the HAC RF without reference to the possibility of revising of entered into legal effect court's judgments on new circumstances (under part 8 article 299 of the APC RF in the absence of grounds under article 304 of the APC RF, the court makes a ruling on the refusal to transfer a case to revise judicial act by way of supervision to the Presidium of the HAC RF);

- ruling on refusal to transfer a case to the Presidium of the HAC RF with reference to the possibility of revising of entered into legal effect court's judgments on new circumstances (according to part 8.1 of article 299 of the APC RF, if circumstance provided for by paragraph 5 part 3 article 311 of the APC RF is found in considering an application or presentation for revision of a judicial act by way of supervision, the collegial panel of judges of the HAC RF make a ruling to refuse to transfer the case to the Presidium of the HAC RF, in which it points to the possibility of judicial review of the contested judicial act on new circumstances in time under part 1 article 312 of the APC RF);

- ruling on transfer a case to the Presidium of the HAC RF for making decision (in accordance with Part 4 article 299 of the APC RF if there are grounds under article 304 of the APC RF, the court makes the decision to transfer the case for judicial review of the contested act by way of supervision).

Paragraph 11 of the Decision of the Plenum of the HAC RF No. 52 from June 30, 2011 just describes the variants and cases of formation of specified by us

rulings of the HAC RF on refusal to transfer a case to the Presidium of the HAC RF in case of defining or change in the practice of application legal norms by the HAC RF. For example, in the Decision of the Plenum of the HAC RF there are cases of retroactive application of legal position on cases, in which the appeal procedure, provided for by the HAC RF, ended on terms at the time of making decisions of the Plenum or the Presidium of the HAC RF with a new legal position formulated in them.

However, as we see from the practice, there is possible a double understanding of outspread of retroactive effect on entered into legal force judicial acts of arbitration courts, taken on the basis of the rule of law in the interpretation differing from an interpretation newly defined or modified by an appropriate judicial authority of the HAC RF. We may well assume non-proliferation of retroactive effect of new legal position, formulated in the decree of the Presidium or Plenum of the HAC RF, on the judicial acts, the time terms of appeal of which have expired (a kind of amnesty for arbitration courts that have done improper application of law norms, because in the absence of this kind of "amnesty" it would be not possible, in principle, to correct miscarriages of justice). And in no way we can agree with the non-proliferation of retroactive effect on the taken with the use of "old" legal position judicial acts that are still under appeal in the various instances of arbitration courts, especially at the stage of supervision proceedings.

Legal position of the HAC RF formulated in the decision, which does not contain a special clause, for example, "entered into legal force court decisions of arbitration courts on cases with similar factual circumstances, adopted on the basis of the rule of law in the interpretation at variance with the interpretation contained in this decision, may be revised on the basis of paragraph 5 part 3 article 311 of the APC RF, if there are no other obstacles" [3], in our opinion means that this legal position should be taken into account by all courts (all instances of arbitration courts) in consideration of similar cases only from the date of the publication of such decision (by virtue of the provision laid down in the seventh paragraph of part 4 article 170 of the APC RF).

For decisions that do not contain clauses about retroactive effect, the Plenum or Presidium of the HAC RF "can define the limits of application of the formulated by it legal position, in particular by reference to the date of occurrence or change of legal relations, to which it is applied" [3].

We believe that paragraph 12 of the decision of the Plenum of the HAC RF No. 52 from June 30, 2011 confirms the presence of discretionary powers of judicial board that takes the decision not to transfer a case to the Presidium of the HAC RF,

because of which an individual approach to each case should be carried out, with taking into account all the factual circumstances (the board may indicate or not indicate the possibility of judicial review of a contested act on new circumstances). It is at this stage of the proceedings of arbitration court's supervisory instance the tortious conduct of judges (judicial board) and taking an illegal judicial act are possible. For example, there are possible different outcomes for different categories of applicants of supervisory complaints and participants of cases in the same circumstances and in the application of the same law norms.

Potential of tort, in our opinion, contains both subjective and inadequate understanding by judges of the concept of "defining the practice of application of a law norm" (article 311 of the APC RF). The matter is that the decision of the Plenum of the HAC RF, which we have discussed before, does not contain an explanation of how the practice of application of a law norm should be formulated, but only contains the model wordings of legal position in the decisions of the Presidium or Plenum of the HAC RF, what is not the same. Legal positions of the specified judicial bodies expressed by the sentences:

- "Entered into legal force court decisions of arbitration courts, adopted on the basis of a norm of law in the interpretation at variance with the interpretation contained in this decision, may be revised on the basis of paragraph 5 part 3 article 311 of the APC RF, if there are no other obstacles",

- "Entered into legal force court decisions of arbitration courts on cases with similar factual circumstances, adopted on the basis of a norm of law in the interpretation at variance with the interpretation contained in this decision, may be revised on the basis of paragraph 5 part 3 article 311 of the APC RF, if there are no other obstacles",

in our opinion, constitute only resolutive part of defining the practice of application of a law norm. The very same defining of practice should include the reasoned conclusion on the norm of law and its proper practical applying in arbitration courts. Otherwise, the defining the practice of application of a law norm will be identical with the law-enforcement interpretation of a law norm, given by the highest judicial authority in any decision of the Presidium of the HAC RF handed down in consideration of any case by way of supervision. The defining the practice of application of a law norm, in our opinion, should answer the question of how and when in resolution of cases should be applied this or that legal norm, including, possibly with an indication of the errors of arbitration courts.

As we see it, a judicial act of supervisory instance that contains in the reasoning part the following wording – "In these circumstances, contested court decisions are

subject to cancellation by virtue of paragraph 1 part 1 article 304 of the Arbitration Procedural Code of the Russian Federation as violating uniformity in the interpretation and application of law norms by arbitration courts" – does not define the practice of application of legal norms. With this formulation the judicial act, in our view, states the taking place error of arbitration courts, which have issued contested in supervisory instance judicial acts, with the establishment of provided for by article 304 of the APC RF reason for their cancelation (because there are other legal acts, in respect of which the contested acts violate uniformity and interpretation of legal norms). In another interpretation any ruling of the Presidium of the HAC RF will be the defining the practice of application of law norm, this will unreasonably provide supervisory instances (especially judicial board that defines the procedural fate of the application of a person contesting judicial acts in supervisory instance) broad discretion in administration of justice and lead to the threat of abuse of the right in administration of justice.

The desire to reduce the burden on the Presidium of the Russian Federation, as well as possibly for other purposes, the panel of judges, which considers applications from persons of the review of criminal acts in the exercise of supervision, under various pretexts, can with impunity refuse to transfer the case to the Presidium of the Russian Federation, taking into account that in itself refusal does not violate the rights of a person in the administration of justice [8, 25-36], and the possibility to appeal against the ruling on refusal to refer the case to the Presidium of the Russian Federation is missing (not a party to the arbitration process will be able to appeal to the Constitutional Court a violation of their rights and legitimate interests, also to appeal to international courts).

Trying to reduce the workload of the Presidium of the HAC RF, as well as possibly for other purposes, the panel of judges, which considers applications from persons on the review of judicial acts by way of supervision, under various pretexts, with impunity can refuse to transfer a case to the Presidium of the HAC RF, taking into account that refusal itself does not violate the right of a person to administration of justice [8, 25-36], and there is no possibility to appeal against the ruling on refusal to transfer a case to the Presidium of the HAC RF (not every party of arbitration process will be able to appeal violation of its rights and legitimate interests in the Constitutional Court of the RF, as well as to apply to international courts).

All this leads judicial board of the HAC RF to the temptation of tort actions. A practical example of such a tort, in our opinion, is the action of the judicial board on the application of LLC "Trade house "Elton" in the case No. A57-3530/2008 [10]. The appeal of LLC "Trade House "Elton" to the supervisory instance of

arbitration court was connected with the violations committed by the appeal instance of arbitration court, which after cancelation the decision of the Arbitration Court of Saratov Region terminated the proceedings on the case by refusing procedural succession of a party in the case. Judicial act of appellate instance was supported by the cassation instance of arbitration court. The company applied to the supervisory instance on February 10, 2012 (as supplemented). The Chronology of the case in supervisory instance was as follows:

- 10.02.2012 was handed down the ruling on accepting application (presentation) for proceedings,
- 7.03.2012 was issued a ruling of certiorari,
- 12.05.2012 was issued a ruling on the suspension of the proceedings [9],
- 3.08.2012 was issued a ruling on the resumption of the proceedings,
- 3.08.2012 was issued a ruling on refusal to transfer the case to the Presidium of the HAC RF for the revision of the judicial act by way of supervision [7].

The peculiarity of proceedings on the case in the supervisory instance lies in the fact that the process was suspended in connection with the consideration of the similar case No. A27-17017/2009 (the motivation of the ruling on suspension of proceedings on the case is following – "Because the above case cannot be considered until resolution by the Higher Arbitration Court of the Russian Federation of the case No. A27-17017/2009 of Kemerovo Region Arbitration Court, which has been transferred by panel of judges to the Presidium of the Higher Arbitration Court of the Russian Federation for the review of judicial acts by way of supervision by ruling dated 20.01.2012, the proceedings on the case have to be suspended in accordance with paragraph 1 part 1 article 143 Arbitration Procedural Code of the Russian Federation"), and after the resumption of proceedings was made a decision to refuse the transfer to the Presidium of the HAC RF on the following grounds:

"*Having checked the validity of the arguments set out in the application, and having studied the materials of the case, the panel of judges considers that there are no grounds provided for in article 304 of the Arbitration Procedural Code of the Russian Federation to transfer the case to the Presidium of the Higher Arbitration Court of the Russian Federation in virtue of the following.*

The courts found that the company "Elton" (assignee) and society (the assignor) 20.09.2010 entered into a contract of assignment of claim of the last from inspectorate in the amount of 406,524 rubles 81 kopecks in respect of compensation judicial costs associated with consideration of the case No. A57-3530/2008 at the Arbitration Court of Saratov region.

The Court of First Instance during satisfying the application of the society on procedural succession has come to the conclusion that the right to claim judicial costs transferred to the company "Elton" under the assignment agreement has arisen by virtue of law (chapter 9 of the Code) and an entered into legal force court decision.

The fact that the assigned on a controversial contract right to claim judicial costs from the inspectorate has not occurred and has not been confirmed by the judicial act of arbitration court at the time of conclusion of the contract, that is ***the subject of the contract is a future right****, does not contrary to paragraph 4 of the Information Letter of the Presidium of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007 "Review of the practice of applying by arbitration courts of provisions of chapter 24 of the Civil Code of the Russian Federation".*

The Court of First Instance rightly has not taken into account the argument of inspectorate about the impossibility of replacing the company by its successor in view of liquidation of the company (05.05.2011), because at the time of conclusion and execution of the contract on the assignment of claim from 20.09.2010 the society existed as a legal entity.

However, since ***the legal position on this matter has been formed*** *by the Presidium of the Higher Arbitration Court of the Russian Federation* ***in its resolution No. VAS-14140/11 from 17.04.2012****, that is, after the adoption of the contested judicial acts, there are no grounds for satisfaction of the application of the company "Elton" on the transfer the case to the Presidium"* [7].

This ruling of the HAC RF, in our opinion, is illegal and violates the rights of the applicant. First, the ruling of the Constitutional Court of the RF No. 22-O of February 20, 2002 "On the claim of JSC "Bol'shevik" on violation of constitutional rights and freedoms by the provisions of articles 15, 16 and 1069 of the Civil Code of the RF" defines the legal nature of judicial costs in a tax dispute. Judicial costs – a specific type of loss, the procedure of compensation of which is defined by procedural legislation (APC RF).

The Constitutional Court of the Russian Federation stated that "article 1069 of the Civil Code of the Russian Federation provides that the harm inflicted on an individual or a legal entity as a result of unlawful actions (inaction) of state and local self-government bodies or of their officials, including as a result of the issuance of an act inconsistent with the law or any other legal act of a state or self-government body, shall be subject to redress at the expense of the state treasury of the Russian Federation, the respective subject of the Russian Federation or the respective municipal body. Satisfying a claim for damages pursuant to article 1082 of the Civil Code of the Russian Federation, the court depending on the circumstances of the case requires the person responsible for the damage to compensate the damage in

kind or to compensate the losses caused. The concept of damages appears in paragraph 2 article 15 of the Civil Code of the Russian Federation: under losses shall be understood the expenses, which the person, whose right has been violated, has made or will have to make to restore the violated right, as well as loss or harm inflicted to its property (actual damage), and also the non-derived income, which this person would have derived under the ordinary conditions of the civil turnover, if its right have not been violated (loss of profit).

The legislator does not set any limits on compensation of property costs of representation in court the interests of a person whose right has been violated. Otherwise would be inconsistent with the duty of the State to guarantee the constitutional rights and freedoms.

Direct enshrining in article 91 of the RSFSR Code of Civil Procedure the provision on imposing on the losing party of a dispute the payment of expenses on a representative of the one who wins the dispute does not mean that because of the lack of similar norm in the Arbitration Procedural Code of the Russian Federation similar costs cannot be exacted in the protection by parties of their rights in the procedure of arbitration proceedings. Otherwise would be contrary to the principle embodied in article 19 (1) of the RF Constitution, the principle of equality before law and court.

The disputed articles along with adjusting the terms, conditions and procedure for compensation for damages, including by providing reimbursement of expenses incurred for the restoration of a violated right, also implement the enshrined in the RF Constitution principle of the protection of private property rights by law (article 35, part 1) and provide constitutional guarantee of the right to qualified legal assistance (article 48, part 1)" [2].

It should be noted that the Constitutional Court of the Russian Federation has issued this ruling with the negative assessment of the arbitration court activity in the dispute of OJSC "Bolshevik" with the tax authority – "the exclusion of costs for representation in court and for providing legal services from the losses, which are to be compensated in accordance with articles 15, 16 and 1069 CC RF in system connection with its article 1082, indicates that the interpretation of the mentioned norms aimed at ensuring the restoration of the violated rights of citizens and legal entities, including by way of compensation for damage caused by unlawful actions (or inaction) of State power authorities (article 53 of the Constitution of the Russian Federation), when considering a particular case was made against their constitutional and legal sense, which the courts were not entitled to do" [2].

Thus, in the event of a decision on a dispute in favor of a taxpayer (tax agent), legal qualification of judicial costs in the dispute with a tax authority provides the taxpayer the right to compensation while imposing on the responsible party an obligation for compensation for this type of loss (harm in the context of article 1069 of the Civil Code of the RF). The subject of the transaction on the assignment of rights (claims) in the case No. A57-3530/2008, on the basis of which was carried out the procedural succession (intervention of LLC "Trade House "Elton") of the party, was not the future right (as the judicial panel of supervisory instance of the arbitration court qualified), but real losses of the taxpayer to restore its violated rights (court costs).

Secondly, part 1 article 382 of the Civil Code of the RF, which stipulates that the transfer of creditor rights to another person occurs on the basis of commitments, in conjunction with the norm of part 2 article 307 of the Civil Code of the RF on the grounds of commitments emergence (in this case, infliction of loss (harm)), does not requires from the arbitration court neither ascertainment of the fact of emergence of the tax authority's commitment to the taxpayer in part of court costs compensation, nor ascertainment of a non-existent earlier commitment of the tax authority. The role of a judicial body is reduced only to compliance with the statutory procedures to meet the requirements of a taxpayer in that part of the loss (harm inflicted by illicit decision (action) of a tax authority), which is defined in the procedural legislation as court costs, taking into account the ensuring a balance of the interests of parties (the questions of incurred court costs reasonableness are resolved).

According to article 110 of the APC RF, court costs incurred by individuals involved in case, in whose favor a judicial act is taken, shall be exacted by arbitration court from the party that has lost a dispute.

The disposition of the article does not assume and does not denotes the actions of a party, in whose favor a judicial act was taken, on the proof of emergence the right to compensation for judicial costs, as well as does not require evidence of the occurrence of the other party duties on their payment.

Content of the norms of chapter 9 of the APC RF enshrines the right of a party, in favor of which a judicial act is taken, to choose to recover court costs from the losing party or refuse to claim for their recovering. In this case, a party to the proceedings obtains the right to apply to court for the recovery of court costs as soon as the last non-disputed judicial act, which satisfies the claims, has been adopted.

Thus, from the moment of the ruling of the Court of Cassation from 30.04.2010 on the case No. A57-3530/2008, which declared the decision of the tax authority

unlawful, LLC "Teploenergopribor", in accordance with article 110 of the APC RF, obtained the right to appeal to the Arbitration Court of the Saratov region with an application on the allocation of court costs, because in the taken judicial acts on the case in the resolution of the dispute on the merits the issue on court costs had not been resolved. The very same right to claim against the debtor (the amount of claim, which was the subject of consideration in the arbitration court) was being formed outside the relationship "applicant – tax authority", the amount of claim of the applicant was determined by the contract with JSC "SANAR" and its actual performance (formed costs).

From the legal position reflected in the newsletter of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007, it follows that the assignment of right (claim) is admissible provided that the assigned right is indisputable, appeared before its cession. Claim to the Interested person had been formed by the Applicant before filing an application for compensation of court costs, at the time of conclusion of the contract of cession with LLC "Trade House "Elton".

As we see it, if one does not make an extraction from the decision of the Presidium of the HAC RF No. VAS-14140/11 from 17.04.2012, there will not be visible delinquency in actions of the Judicial Board of the HAC RF, which in the case No. A57-3530/2008, in our opinion, just evaded the administration of justice itself and deprived the applicant an opportunity to correct a miscarriage of justice by reviewing the court decision in appeal instance on new circumstances.

"The courts, having applied the provisions of paragraph 1 article 61 of the Civil Code of the RF on the impossibility of succession in the event of liquidation of a legal entity and the provisions of article 384 of the Code on the transition the right of an original creditor to a new creditor only to the extent that was at the time of transfer of the right, have come to a conclusion about the impossibility of replacing society that is a claimant by another person in the presence of a court ruling on partial satisfaction of a claim for compensation of judicial costs.

There is agreement on the assignment of rights (cession) from 21.02.2011 in the records of the case, according to which the company "KemerovoAgroStroyProekt" has yielded, and the citizen Belousov A. V. has taken the rights to the reimbursement of judicial costs incurred in connection with consideration of this case, as the evidence of succession in the material legal relation.

In accordance with paragraph 1 article 382 of the Civil Code the right (claim) that belongs to the creditor on the basis of an obligation may be transferred by it to another person in a transaction (assignment of a claim), or pass to another person on the basis of the law.

The contract of cession from 21.02.2011 was concluded in respect of the right to claim compensation in the amount, which the company was claiming after applying to the arbitration court with an application for reimbursement of judicial costs.

Conclusion of this cession contract during assignor liquidation procedure leads to transition to the assignee in the performance of only that part of stipulated in the contract rights that the assignor had as a creditor at the time of conclusion of the contract on the designated in it subject (singular succession). The fact that the assignee has not acquired all the rights that the assignor had as a legal entity at the time of liquidation (universal succession) does not mean the assignee's lack of procedural succession in the case considered by the arbitration court on the subject of the contract with the participation of the assignor prior to the termination of its activities.

Satisfaction by the court the claims of the assignor for the reimbursement of judicial costs in the amount less than has been stated in the application for compensation of judicial costs is not a legal obstacle to the inclusion in the contract of cession the right of the claim that is yielded to the assignee in the amount calculated by the assignor. This also is not an obstacle for entering the assignee in the appeal process that has already been instituted on the appeal of the assignor, for maintaining by the assignee the right of claim transferred to it in an amount determined in the contract.

The mere fact of termination of a legal person prior to consideration by the court of this legal entity application on leaving the process and its replacement by another person does not result in the termination of the proceedings when there is data on the conclusion of the agreement on assignment of claim of the leaving trial participant before its elimination.

In accordance with article 48 of the Arbitration Procedural Code of the Russian Federation in the event of leaving of one of the parties from a disputable legal relation or from a legal relation established by a judicial act of the arbitration court (reorganization of a legal entity, cession, assignment of debt, death of an individual and in other cases of changing of persons in obligations), the arbitration court replaces this party with its legal successor and indicates this in a judicial act. Succession is possible at any stage of the arbitration process.

All actions committed in the course of arbitration proceedings prior to the entry of a legal successor into the case are mandatory to the successor to the same extent, to which they have been mandatory for the person whom the legal successor replaces (part 3 article 48 of the Arbitration Procedural Code of the Russian Federation).

Despite the fact that the citizen Belousov A. V. became the successor of the company "KemerovoAgroStroyProekt" in the legal relations with the company "Azot" regarding compensation of judicial costs and stated this in the court of appeal, and the case materials contained the evidence to support the succession, the court of appeal instance terminated proceedings on the lawfully filed appeal, thereby depriving the purchaser of rights under

the contract of change of persons in an obligation the right to replacement in the process and to judicial protection of the transferred to it rights.

In these circumstances the contested judicial acts should be cancelled by virtue of paragraph 1 part 1 article 304 of the Arbitration Procedural Code of the Russian Federation as violating the uniformity in the interpretation and application of the rules of law by arbitration courts.

The case should be transferred to the Seventh arbitration court of appeals for consideration of the appeal" [4].

The difference of the case No. A57-3530/2008 from the resolved in the Presidium of the HAC RF previous similar case is that the successor entered into the process in first instance of arbitration court, where procedural succession was accepted and the case was considered on the merits (judicial costs were allocated), as well as the fact that party to the case was a public person – a structural unit of the Federal Tax Service of Russia.

The context analysis of the decision of the Presidium of the HAC RF No. VAS-14140/11 from 17.04.2012, as well as of the earlier defined practice of application of chapter 24 of the Civil Code of the RF [4; 6] and article 48 of the APC RF, suggests that the panel of judges of supervisory instance expressed an interest in the case in favor of a public person – a structural unit of the FTS of Russia, and also violated the basic provisions of the APC RF.

Coming back to the issue of determining legal position in a judicial act of the HAC RF, it should be noted that in the above cases the courts considered the transactions on assignment of rights as transactions, in which the subject of contract was the future right, and in respect of these transactions there had not been changes in the practice of application of legal norm from the moment of publication of the newsletter of the Presidium of the Higher Arbitration Court of the Russian Federation No. 120 from October 30, 2007 [5] (see paragraph 4 of the newsletter).

Legal position, as set out in this newsletter, is based on the fact that the current legislation does not prohibit the circulation of future rights, but on the contrary, in some cases, directly regulates transactions, the subject of which is future right.

It should be noted that paragraph 17 of the same newsletter provides that the assignment of the right (claim) to recover damages does not contradict legislation.

Thus, the panel of judges uniquely determined on the materials of the case No. A57-3530/2008, as we believe, the violation of uniformity in the interpretation and application of law norms by the arbitration courts, but due to the interest in favor of a public person – party in the case, issued a ruling on refusal to transfer the case to the Presidium of the HAC RF.

In order to avoid such cases, we consider it necessary to give more detailed regulation in the APC RF to the right of judicial panel of the HAC RF, which considers applications from persons on the review of judicial acts by way of supervision, to make rulings on the refusal to transfer a case to the Presidium of the HAC RF in the cases of defining or change the practice of application of law norms.

For clarity of the suggested by us provision on the need to limit judicial discretion in the supervisory instance let's consider, what legal consequences follow from the court judgments of supervisory instance of arbitration court and are applied to cases at various stages of the arbitration process and similar to the case, in which has been defined or changed the practice of law norms application by the Plenum or Presidium of the Higher Arbitration Court without reservation in the judicial act on retroactive application of legal position.

In our understanding, the issue of retroactive application of legal position generated by the Presidium or Plenum of the HAC RF in the decision, which has defined or modified the practice of law norms application, can only arise in respect of judicial acts regarding of which the appeal process in accordance with the APC RF in the whole chain of arbitration court instances has been completed or statute of limitations on filing an application for review of a judicial act by way of supervision has expired (see Table. 2).

Table 2

The legal consequences of cases similar to the case, in which the practice of law norms application has been defined or changed without reservation in the judicial act on retroactive application of legal position.

Stage of the arbitration process, in which is a similar case		Legal consequences applied in practice
1. Proceedings in the arbitration court of first instance		legal position on the practice of law norms application is taken into account when considering similar cases from the date of publication of the decision of the Plenum or Presidium of the HAC RF (by virtue of the provision set out in the seventh paragraph of part 4 article 170 of the APC RF, etc.).
2. Proceedings on the revision of the judicial acts of arbitration courts	2.1. Proceedings in the arbitration court of appeal instance	legal position on the practice of law norms application is taken into account when considering similar cases from the date of publication of the decision of the Plenum or Presidium of the HAC RF (by virtue of the provision set out in the seventh paragraph of part 4 article 170 of the APC RF).
	2.2. Proceedings in the arbitration court of cassation instance	legal position on the practice of law norms application is taken into account when considering similar cases from the date of publication of the decision of the Plenum or Presidium of the HAC RF (by virtue of the provision set out in the seventh paragraph of part 4 article 170 of the APC RF).
	2.3. Proceedings on the revision of judicial acts by way of supervision	similar cases are reviewed at the Presidium of the HAC RF with taking a judicial act with taking into account a particular (amended) practice of law norms application
		in a similar case, there is issued a ruling on the refuse to transfer a case to the Presidium of the HAC RF with reservation on the possibility to review the case on new circumstances in previous instances of arbitration court
		legal position is not taken into account when considering similar cases, the proceedings in supervisory instance are ended by the ruling on the refuse to transfer a case to the Presidium of the HAC RF without the possibility of revision on new circumstances
3. Proceedings on the revision of entered into legal force judicial acts on newly discovered and new circumstances		similar cases are not revised in arbitration court

However, supervisory instance has a different perspective on this issue. Judicial boards of the HAC RF that consider persons' applications on reviewing court decisions by way of supervision broadly interpret the provision on retroactive application of legal position in order to reduce cases, for which the revision of judicial acts in supervisory instance is possible.

It seems to us that HAC RF makes a mistake by applying the law norm from the grounds for the revision of judicial acts on new circumstances – paragraph 5 part 3 article 311 of the APC RF to the grounds for the revision of judicial acts by way of supervision.

In our opinion, the law norm that is set out in part 8.1 article 299 of the APC RF – "If during the consideration of an application or an representation on the revision of a judicial act by way of supervision has been established, that there exists a **circumstance, provided by paragraph 5 part 3 article 311** of this Code, the panel of judges of the Higher Arbitration Court of the Russian Federation issues a ruling on the refusal to transfer a case to the Presidium of the Higher Arbitration Court of the Russian Federation, in which it cites on the possibility of revision of the disputed judicial act on new circumstances within the term, provided by part 1 article 312 of this Code" – does not provide to judicial board of supervisory instance the right to make a ruling on the refuse to transfer a case to the Presidium of the HAC RF for the revision by way of supervision, if there are grounds under article 304 of the APC RF.

Analysis of the notion of **circumstances** set out in paragraph 5 part 3 article 311 of APC RF leads, as we see it, to its unambiguous understanding. It's not just the presence of the decision of the Plenum or Presidium of the HAC RF, which defines or changes the practice of law norm application, but also the presence in it of reference to the possibility of revising of judicial acts that have entered into legal force by virtue of this circumstance. Thus, the decisions of the Plenum or Presidium of the HAC RF that define or change the practice of law norm application, but which do not indicate the possibility of revising of judicial acts that have entered into legal force on new circumstances (due to defining or change of the practice of law norm application), do not create circumstances in the context of part 8.1. article 299 of the APC RF.

In our opinion, judicial board of the HAC RF must make a ruling on the transfer of a case that is in supervisory instance to the Presidium of HAC RF for revision by way of supervision, if there are grounds under article 304 of the APC RF, including, if in consideration of a similar case in the supervisory instance the practice of law norm application has been defined or changed, but the possibility of revision of judicial acts that have entered into legal force by way of supervision has not been indicated. That is, the supervisory instance is to review all cases in this instance of arbitration proceedings, which are similar to a case previously considered in supervision proceedings. In another legal consciousness and application of the norms of article 299, 304, 311 of the APC RF, Higher Arbitration Court of the Russian

Federation will be a generator of judicial torts – leaving in force judicial acts that have been appealed to the supervisory instance, which violate the uniformity in the interpretation and application of law norms by arbitration courts, the practice of application of which the HAC RF has already formed in the previous similar case.

In conclusion of the examined by us problem we believe that it is necessary to note that the defining of the practice of law norm application is a defining in several judicial acts, because one case is an isolated event. First of all, practice consists of multiple activities accompanied by development of certain skills. Court practice must express a certain tendency in resolving by courts (especially superior courts) of certain categories of cases, taking into account judicial acts that have entered into legal force. We have not seen the defining of practice in case No. VAS-14140/11 in this context.

References:

1. Arbitration Procedural Code of the Russian Federation from July 24, 2002, No. 95-FL [Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii ot 24 iyulya 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

2. Ruling of the Constitutional Court of the RF No. 22-O of February 20, 2002 under the claim of JSC "Bol'shevik" on violation of constitutional rights and freedoms by the provisions of articles 15, 16 and 1069 of the Civil Code of the RF [Opredelenie Konstitutsionnogo Suda RF ot 20 fevralya 2002 g. № 22-O «Po zhalobe otkrytogo aktsionernogo obshchestva «Bol'shevik» na narushenie konstitutsionnykh prav i svobod polozheniyami statei 15, 16 i 1069 Grazhdanskogo kodeksa Rossiiskoi Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

3. Resolution of the Plenum of the HAC RF No. 52 from June 30, 2011 "On application the provisions of the Arbitration Procedural Code of the Russian Federation in the revision of judicial decisions under new or newly discovered circumstances" [Postanovlenie Plenuma VAS RF ot 30 iyunya 2011 g. № 52 «O primenenii polozhenii Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii pri peresmotre sudebnykh aktov po novym ili vnov' otkryvshimsya obstoyatel'stvam»]. *System GARANT* [Electronic resource], Moscow: 2013.

4. *Resolution of the Presidium of the HAC RF No. VAS-14140/11 from 17.04.2012* [Postanovlenie Prezidiuma VAS RF ot 17.04.2012 № VAS-14140/11]. Available at: http://kad.arbitr.ru/PdfDocument/1316685d-3531-4b9a-90eb-b8bf80b5eba7/A27-17017-2009_20120417_Reshenija%20i%20postanovlenija.pdf (accessed: 10.03.2013).

5. Information Letter of the Presidium of the Higher Arbitration Court of the RF No. 120 from October 30, 2007 [Informatsionnoe pis'mo Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 30 oktyabrya 2007 g. № 120]. *System GARANT* [Electronic resource], Moscow: 2013.

6. Ruling of the Higher Arbitration Court of the RF No. 4627/09 from April 17, 2009 [Opredelenie Vysshego Arbitrazhnogo Suda RF ot 17 aprelya 2009 g. № 4627/09]. *System GARANT* [Electronic resource], Moscow: 2013.

7. *Ruling on refusal to transfer a case to the Presidium of the Higher Arbitration Court of the RF No. VAS-11732/10 from August 03, 2012* [Opredelenie ob otkaze v peredache dela v Prezidium Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 3 avgusta 2012 g. № VAS-11732/10]. Available at: http://kad.arbitr.ru/PdfDocument/faf01446-4039-4bd1-a20b-0d4abb4b45f0/A57-3530-2008_20120803_Opredelenie.pdf (accessed: 10.03.2013).

8. Kizilov V. V. Ruling of the Higher Arbitration Court of the RF on Refusal to Transfer a Case to the Presidium of the Higher Arbitration Court of the RF: Is it a Procedural Judicial Act or an Act of Justice? [Opredelenie VAS RF ob otkaze v peredache dela v Prezidium VAS F: protsessual'nyi sudebnyi akt ili akt pravosudiya?]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2013, no. 1.

9. Available at: *http://kad.arbitr.ru/PdfDocument/45e0e2d0-af05-44ef-953e-34663f335158/A57-3530-2008_20120512_Opredelenie.pdf* (accessed: 10.03.2013).

10. Available at: *http://kad.arbitr.ru/Card?number=A57-3530/2008* (accessed: 10.03.2013).

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Kositsin I. A.

WHAT SUITABILITY OF PRIVATE GUARDS IS PERIODICALLY CHECKED?

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The article analyzes the divergence of orders and letters of the Russian Interior Ministry, establishing procedures for periodic checks of private security guards in respect to suitability to act in conditions involving the use of firearms and special equipment, from legislation on private security activity.

Keywords: private security activity, periodic checks, use of weapons.

Private security activity is related with the possible restriction of the constitutional rights of citizens and use of high risk items (weapons and special means). For the purpose of increasing the quality of provision security services to the population and economic units without negative consequences in this sphere of activity the existing Russian legislation provides for the passage by employees of private security organizations of periodical checks for suitability to act in situations involving the use of firearms and special means.

The obligation is laid upon private security guards, article 16 of the law of the Russian Federation No. 2487-1 from March 11, 1992 "On Private Detective and Security Activities in the Russian Federation" [1]. The content of periodic inspections, procedures and time-frames are defined by the Ministry of Internal Affairs of the Russian Federation in accordance with the prescription of law.

First, let's determine the subject of check. In accordance with the law employees of private security organizations pass periodical checks for suitability to act in situations involving the use of firearms and special means. Therefore, the theoretical part of examination allows finding out the knowledge of an employee of a private security organization:

- about the prescribed by law cases of use of firearms,
- about the prohibitions on the use of firearms,
- about the instructions of the applying of firearms.

However, the reference rule of the article provides that "the content, procedures and time-frames of periodic inspections are defined by a federal executive authority, the competence of which includes internal affairs issues", which means that the questions for the check of knowledge of a private security organization's employee, contained in subordinate law, must not go beyond the requirements stipulated by law.

Second, let's define what is meant under applying by a private security guard firearm and special means. For example, the authors of the commentary to the Law "On the Police", who took direct participation in drafting laws on the militia and on the police, define the use of firearms by police officers, as follows: "this is firing for the purposes stipulated by article 23 of the Law "On the Police". Another legislatively permitted handling of firearms – extracting from its holster, preparation to combat readiness, threats of weapon (verbal or by demonstration, but without firing), beating by weapon, shooting at a shooting range, as well as firing in situations where there is no reasons stipulated by the Law "On the Police", but a police officer is in a position of self-defense, absolute necessity, during detention a criminal, and so on, are not the use of firearms within the meaning of articles 23 and 24 of the Law "On the Police" [2].

Necessary to note the position of the Plenum of the Supreme Court of the Russian Federation: "In classification of person's actions under clause "b" part 3 article 286 of the Criminal Code of the RF, under the use of a weapon or special means the courts should understand deliberate actions of a person related to the use of killability of the mentioned objects, or the use them by purpose" [3].

Consequently, actions in situations involving the use of firearms and special means include:

1) actions immediately preceding the use of weapons and special means, including determination of the legality of the upcoming use of firearms and (or) special means;

2) adherence to the rules of the use of weapons and special means;

3) actions taken immediately after the use of weapons and special means.

In accordance with the prescription of the Law, the Russian Ministry of Internal Affairs issued the order No. 647 dated June 29, 2012 "On approval the Provision on conducting by the internal affairs agencies of the Russian Federation of periodic inspections of private security guards and employees of legal entities engaged in

special assignments on suitability to act in situations involving the use of firearms and special means" [4]. The named order in clause 21 of Annex No. 1 requires during polling employees to determine their knowledge of provisions of:

- articles 1-6, 9, 12, 13, 21, 22, 24-27 of the Federal Law No. 150 from December 13, 1996 "On Weapons",

- articles 37-39, 203, 222, 224 and 225 of the Criminal Code of the Russian Federation,

- articles 14.2, 17.12, 19.1, 19.4 (part 1), 19.5 (part 1), 19.20, 19.23, 20.08 (parts 1 and 2), 20.9, 20.12, 20.13, 20.16, 20.17, 20.19 and 20.24 of the Code On Administrative Offences of the Russian federation,

- articles 16-18 of the law of the Russian Federation No. 2487-1 from March 11, 1992 "On Private Detective and Security Activities in the Russian Federation",

- as well as the Instructions for the use of special means by private security guards approved by the Decree of the Government of the Russian Federation No. 587 from August 14, 1992.

Analysis of the content of the mentioned order questions the increase in quality of providing security services to the population and economic units from conducting of implemented on the basis of this normative act periodic inspections of private guards for suitability to act in situations involving the use of firearms and special means. Not every of its articles, the knowledge of which has to be determined, contains provisions governing action in situations associated with the use of firearms and special means. Most of these articles regulate actions in the situations relating to the acquisition, possession, storage, sale of weapons and special means. Some norms do not relate to weapons and special means, for example, articles of the Code on Administrative Offences of the Russian Federation: 19.1. Arbitrariness; 19.4. Failure to Follow the Lawful Order of an Official of a Body Exercising State Supervision (Control); 19.5. Failure to Follow in Due Time a Lawful Direction (Order, Proposal, Decision) of a Body (Official), Exercising State Supervision (Control); 19.20. Conducting Activities, Which Are Not Connected with Deriving Profits, Without a Special Permit (License); 19.23. Making Forged Documents, Stamps, Seals or Forms, and their Use, Transfer or Sale.

Even more doubts are raised by the letter of the Head Department to Ensure the Protection of Public Order of the Russian Ministry of Internal Affairs (GUOOOP MVD in Russian) No. 12/8977 dated December 27, 2011, by which to the centers of licensing and permitting work of Internal Affairs Bodies of constituent entities of the Russian Federation were sent model questions for periodic inspection. These questions are posted on the websites of many Internal Affairs

Bodies and organizations, such as the sites of the Center of licensing and permitting work of the Head Department of the Ministry of Internal Affairs for the city of Saint-Petersburg and the Leningrad region [5] and the Coordinating Council of the Head Department of the Ministry of Internal Affairs for Novosibirsk region for interaction with security and detective structures [6]. These questions are used to conduct periodic checks of employees of private security organizations in subdivisions of licensing and permitting work all over the country.

A close reading of a letter from the GUOOOP MVD No. 12/8977 dated December 27, 2011 allows us to draw a conclusion that the letter contradicts not only to the order of the Ministry of Internal Affairs of Russia No. 647 from June 29, 2012, but also the Law of the Russian Federation No. 2487-1 from March 11, 1992 "On Private Detective and Security Activities in the Russian Federation". On the one hand, it does not contain questions on the knowledge of the CAO RF articles specified in the order, but on the other hand, sets out the issues on topics not related to situations related to the use of firearms and special means, thus goes beyond of the framework defined by law.

In the list of questions stipulated by the letter only 27 out of 120 questions on legal training are consistent with the objective of periodic inspection. The remaining questions are designed to determine the knowledge of a private security guard in the area of labor and civil legislation, as well as the organizational aspects of qualification examination, for example, question No. 102 determines the private security guard's knowledge of the list of persons signing the examination sheet, which contains the results of qualifying examination.

It seems to us that the order is required to be adjusted in part of defining the list of provisions of laws, knowledge of which should be determined in the course of periodic inspections.

References:

1. Law of the Russian Federation No. 2487-1 from March 11, 1992 "On Private Detective and Protection Activity in the Russian Federation [Zakon Rossiiskoi Federatsii ot 11 marta 1992 g. № 2487-1 «O chastnoi detektivnoi i okhrannoi deyatel'nosti v Rossiiskoi Federatsii»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

2. *Comment to the Federal Law "On Police"* (article-by-article) [Kommentarii k Federal'nomu zakonu «O politsii» (postateinyi)]. Avrutin Yu. E., Bulavin S. P., Solovei Yu. P., Chernikov V. V., Prospekt, 2012.

3. Resolution of the Plenum of the Supreme Court of the Russian Federation No. 19 from October 16, 2009 "On judicial practice in cases of abuse of power and abuse of office" [Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 16 oktyabrya 2009 g. № 19 «O sudebnoi praktike po delam o zloupotreblenii dolzhnostnymi polnomochiyami i o prevyshenii dolzhnostnykh polnomochii»]. *Byulleten' Verkhovnogo Suda RF – Bulletin of the Supreme Court of the RF*, 2009, no. 12.

4. Order of the Russian Interior Ministry No. 647 from June 29, 2012 "On approval the provision on carrying out by internal affairs bodies periodic checks of private security guards and legal entities with special statutory tasks regarding suitability to act in conditions involving the use of firearms and special equipment" [Prikaz MVD Rossii ot 29 iyunya 2012 g № 647 «Ob utverzhdenii Polozheniya o provedenii organami vnutrennikh del Rossiiskoi Federatsii periodicheskikh proverok chastnykh okhrannikov i rabotnikov yuridicheskikh lits s osobymi ustavnymi zadachami na prigodnost' k deistviyam v usloviyakh, svyazannykh s primeneniem ognestrel'nogo oruzhiya i spetsial'nykh sredstv»]. *Rossiiskaya gazeta – Russian Gazette* from August 15, 2012.

5. Available at: *http://clrr.info/index.php?option=com_content&view=article&id=74&Itemid=101* (accessed: 20.03.2013).

6. Available at: *http://www.ks-nso.ru/catnews/kategoriya-2/20120123/informacionniy-byulleten-koordinacionnogo-soveta-gu-mvd-rossii-po-novosibirskoiy-oblasti-10-01.12.2011-31.12.2011g* (accessed: 20.03.2013).

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Kudryashova E. V.

THE TOPICAL SCIENTIFICALLY-THEORETICAL ISSUES OF SECTORAL AFFILIATION OF STATE STRATEGIC PLANNING LEGAL REGULATION

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Considering the evolution of planning, the author shows the difference between long-term and strategic planning. The timeliness of the draft law "On the state strategic planning" in the context of similar acts existing in other countries is estimated in the article. Here is noted that scientific and theoretical foundations of legal regulation of strategic management lag behind from the management development. The author gives his position regarding sectorial affiliation of legal regulation of state strategic planning.

Keywords: strategic planning, legal regulation of strategic planning, state strategic planning, strategic management.

The issue of strategic management in recent times has become very popular in the press and in scientific publications. At the same time, the legal aspects of strategic management have not yet become a subject of scientific debate among legal scholars, although the time for such a discussion came long ago.

Despite the popularity of the term "strategic", its scientific content is often overlooked or being touted fairly contradictory. We are going to break this tradition and to define what we mean under "strategic", in our case, strategic planning.

"The term of "strategy" (from the Greek *stratos* - army + *ago* - to lead) literally means the orientation of generals to win – a decisive change in situation through military actions. Strategy is a science, art, and experience of implementing large scale operations, transformations, reforms and other actions intended to qualitatively change the current situation, state of public affairs, situation in important sectors, the balance of power in the conflict of interests. The main feature of strategy is the orientation to new quality, new level, and new condition" [3, 171].

Strategic management is a management "from the future in the present", a qualitatively new type of administration. Similarly, strategic planning is a qualitatively new stage in the evolution of planning. Incorrectly to believe that strategic planning is one of the types of planning alongside with financial, socio-economic one, and so on. All types of planning have become strategic: socio-economic, territorial, financial and other kinds of planning.

The evolution of planning has been going from the planning of ongoing internal processes in an organization, where the planning is directed inside of administration, to the planning aimed outwards, i.e. taking into account external factors: economic, socio-political, scientific, technical, etc. Managerial practice has shifted from the planning of ongoing activity to long-term planning, and from long-term planning to strategic one.

Long-term planning was conducted by moving past regularities and structural characteristics to the future. To orient in the heightened uncertainty of the future it was needed to change the original planning principle – occurred the necessity to go from the future to the present and not from the past to the future [2]. "The main difference between long-term and strategic planning is in the interpretation of the future. The system of long-term planning assumes that the future can be predicted by extrapolation of the historical growth trends.... Strategic planning denies assumption that the future must necessarily be better than the past, and does not consider that the future can be explored by the method of extrapolation" [2, 49-51]. Strategic planning "does not assumes that the future is the improved past and therefore it can be extrapolated on that basis" [5, 59].

In general we can say that the paradigm of planning has changed – planning as a management method has become strategic, that has required implementation in legislation. The problem of implementation of state planning management in legislative acts was raised back in the Soviet period, because scholars and practitioners complained that "the process of national economic planning (in the broadest sense – from the development and approval of plans till their implementation) remained one of the least regulated in the legal aspect of the spheres of socialist economy" [7, 167].

Currently, attempts are being made to legitimize the legal regulation of state strategic planning. October 01, 2012 draft law "On State Strategic Planning" was introduced in the State Duma of the Federal Assembly of the Russian Federation [1]. The Bill defines the concept of state strategic planning as activities of federal public authorities, public authorities of the constituent entities of the Russian Federation and local self-government bodies with the participation of

labor unions and employers' associations, public, scientific and other organizations regulated by the legislation of the Russian Federation and aimed at state prediction, results-based and territorial planning, as well as monitoring of execution strategic planning documents designed to address the tasks of sustainable socio-economic development of the Russian Federation and strengthening of national security.

In foreign practice exist similar legislative acts. In the 60's of XX century in the Federal Republic of Germany was adopted the Federal law "On the Requirement of the Stability and Development of Economy" [9]. In 1993, the United States adopted the law on the effectiveness and results of the United States Government activity ("Government performance and results act") [11], which required federal agencies to develop strategic plans for a few years (now for the coming financial year and the subsequent four-year) in accordance with the budgetary programs. Improved law on efficiency and results of the United States Government activity was issued in 2011(GPRA modernization act) [12].

It appears that the emergence in Russian legislation of the special law on the state strategic planning marks the beginning of the implementation of strategic management in legislative acts. However, scientific-theoretical basis of the legal regulation of strategic management is lagging behind the development of the management.

Because of the traditional division of Russian legislation and legal science into branches (sectors), in the scientific-theoretical field a question rises about sectorial affiliation of the issues of state planning.

Soviet legal science referred state planning to the area of constitutional law because the planning was considered as one of the foundations of social system. In the era of "perestroika" planning as the basis of social system was opposed to market economy, what, however, was more emotional than science-based opposition. For example, in the German legal literature, we find an opinion that after Germany's most important structures of a legal state had been built, together with the development of the practice of Constitutional Court and administrative courts, the phase of planning started in 1967. There was found the western idea of planning, which so far has been hampered by ideological shade of connection of planning with totalitarianism. Planning is a great engine of our time. Planning is an understanding in the present of the looming shape of the future" [10, 114].

Even today there are supporters of interpretation of planning as a constitutional institute in the Russian legal science, which advocate the restoration of norms on state planning in the Constitution of Russia. For example, such suggestion is made

by the authors of the textbook "Constitutional Law of European States": "Constitutional and legislative determination of the content of state planning institute is needed". In this context, it would be advisable to develop a set of constitutional provisions that govern the planned activities of the State (relations on planning), form a constitutional-legal institute of planning and assessment "of existence of economy and society as a whole. This would allow linking of planning with changes in modern Russian economy. The economy cannot be separated from the social, cultural and institutional environment", and further "Restoration of constitutional institute of planning is a necessary base for the revival of a balanced economy that is able to provide for the needs of Russian society" [4, 28-29]. Restoration of planning as the basis of constitutional order has recently been proposed by some Russian politicians as a panacea against crisis phenomena [6].

It seems to us that after passing the time of idea of planning as the basis of social system, state planning has preserved great importance in the managerial science. Therefore, it seems fair to include state planning mainly in the field of administrative law. The above-mentioned draft law "On State Strategic Planning", in our view, refers to administrative law with few exceptions. In the Bill is said about the integration of budget planning in the general system of state strategic planning (e.g., paragraph 6 article 10 of the Bill), which is quite reasonable. However, strategic planning in financial sphere as part of financial management should be attributed to financial law.

After financial law had become an independent sector, scientists for a long time were waging a controversy about the affiliation of the issues of public finance management to the sector of administrative or financial law, but the discussions was summed up by the article of Professor A. I. Khudiakov "About the correlation of the concepts of "financial activity" and "finance management" [8, 63-66]. In this article A. I. Khudyakov said that finance management, which traditionally belonged to the subject of administrative law, should be referred to the subject of financial law. This position is justified and serves to a holistic perception of the financial activity of the State.

So, one of the urgent scientifically-theoretical problems of modern legal science is the issue of the development of scientific approaches to a legal regulation of strategic management, including strategic planning. In today's reality the issue of sectorial affiliation of state strategic planning's legal regulation should be resolved in favor of administrative and partially in favor of financial law. It is within these sectors should be considered the provisions of the Bill and, possibly, after some time the Law "On State Strategic Planning".

References:

1. *Draft law No. 143912-6 "On State Strategic Planning"* [Zakonoproekt № 143912-6 «O gosudarstvennom strategicheskom planirovanii»]. Available at: http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=143912-6&02 (accessed: 22.03.2013).

2. Asnoff I. *Strategic Management* [Strategicheskoe upravlenie]. Moscow: Ekonomika, 1989

3. Atamanchuk G. V. *Theory of the State Management: Lectures. 3rd enlarged edition* [Teoriya gosudarstvennogo upravleniya: Kurs lektsii. 3-k izd., dop.]. Moscow: publishing house OMEGA-L, 2005.

4. *Constitutional Law of European States: A manual for students of law higher schools and faculties* [Konstitutsionnoe pravo gosudarstv Evropy: Uchebnoe posobie dlya studentov yuridicheskikh vuzov i fakul'tetov]. Editor-in-chief D. A. Kovachev, Moscow: Volters Kluver, 2005.

5. Kuznetsova E. I. Strategic Analysis in the System of State Management of National Economy: monograph [Strategicheskii analiz v sisteme gosudarstvennogo upravleniya natsional'noi ekonomikoi: monografiya]. *Zakon i pravo – Law and Justice*, Moscow: YuNITI-DANA, 2006.

6. Luzhkov Yu. M. Russian Features of the Global Crisis [Rossiiskie osobennosti mirovogo krizisa]. *Rossiiskaya gazeta – Russian Gazette*, federal edition from 11.02.2009, no. 4846.

7. *Theoretical Problems of Economic Law* [Teoreticheskie problemy khozyaistvennogo prava]. Moscow: 1975.

8. Khudyakov A. I. About the Comparison of the Concepts of "Financial Activity" and "Financial Management" [K sootnosheniyu ponyatii «finansovaya deyatel'nost'» i «upravlenie finansami]. *Pravovedenie – Legal Studies*, 1985, no. 1.

9. *Act to Promote the Stability and Growth of Economy from June 08, 1967* [Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft vom 8. Juni 1967 (BGBl. I S. 582), das zuletzt durch Artikel 135 der Verordnung vom 31. Oktober 2006 (BGBl. I S. 2407) geändert worden ist]. Available at: http://bundesrecht.juris.de/stabg/index.html (accessed: 21.03.2013).

10. Joseph H. Keiser. Cited from Stolleis M. *Stages of Administrative Law Development* [Entwiklungsstufen der Verwaltungsrechtwissenschaft]. Edited by Wolfgang Hoffmann-Riem, Eberhard Schmidt-Assmann, Andreas Vosskule, Bnd.1, Munich: Verlag C.H., Beck, 2006.

11. Available at: *http://www.whitehouse.gov/omb/mgmt-gpra/gplaw2m* (accessed: 21.03.2013).

12. Available at: *http://www.gpo.gov/fdsys/pkg/PLAW-111publ352/pdf/PLAW-111publ352.pdf* (accessed: 21.03.2013).

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Maile A. D.

EXPERIENCE OF ORGANIZATION JUDICIAL SYSTEM IN GERMANY OR HOW CAN BE USEFUL FOREIGN EXPERIENCE?

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In considering the improvement of Russian judicial system the author sets out objectives, organization principles of the judicial system of Germany. The article notes that, despite the fact that executive power under the Constitution in the exercising of its activity is linked to the law and that is why its actions are subject to judicial control.

Keywords: administrative courts, judicial system of Germany, extrajudicial administrative procedures, improving of a judicial system, judicial oversight in the sphere of public administration.

Controversy and scientific discussions on the establishment of specialized administrative courts in Russia have being conducted for a long time [6, 18-20; 2; 3; 5]. Problem is still not solved. A new round on the need of their creation flared after VIII all-Russian Congress of judges, which took place in Moscow from 17th to 19th of December, 2012.

As the President of the Supreme Court of the Russian Federation Vyacheslav Lebedev noted in his speech, consideration of cases by courts contrary to the rules of jurisdiction does not meet the requirements of fair trial, because a court that is not authorized to hear a case, within the meaning of articles 46 and 47 of the Constitution of the Russian Federation, is not a legitimate court. Judicial acts taken as a result of such consideration cannot be recognized really ensuring rights and freedoms. Pointing to the fact that to date there is no separate administrative proceeding

provided for in part 2 article 118 of the Constitution of the Russian Federation, although the need for a Code of Administrative Court Procedure has been noted in 2000 in the Resolution of V all-Russian Congress of judges, it called for introducing to the Resolution of the Congress an address to the legislative branch of the Russian Federation to adopt the Code of Administrative Court Procedure [10].

Chairman of the Supreme Arbitration Court of the Russian Federation, A. A. Ivanov in his report underlined that it is necessary to persistently and firmly enter the mechanisms of binding pre-trial appeal of decisions taken by administrative authorities. At that, should be developed and legislatively enshrined the common to all departments principles of extrajudicial administrative procedures. In his opinion, this is the most direct and efficient way to achieve simultaneously both reducing the burden on courts and reducing the time and cost of considering such cases [11].

In his speech, the Chairman of the Constitutional Court of the Russian Federation V. D. Zorkin noted that the uniqueness of the Russian judicial system is that, unlike many other countries, where there are specialized courts, there are two branches of the judiciary in Russia – courts of general jurisdiction and arbitration courts, which apply the same rules of substantive law (in our opinion, the lack of specialized courts, it is not the uniqueness, rather, the disadvantage of the Russian legal system). Interpretation of these rules often varies, causing many problems for persons seeking judicial protection. Meanwhile, the rule of law and arising from it principle of constitutional legality presuppose uniform understanding and application of the law by a court not only in every mentioned judicial subsystem, but also in the judicial system of the Russian Federation as a whole. Notably, such uniformity implies not only a purely formal aspect – the same interpretation and application, but also, what is more important, a substantive aspect, that is, the interpretation and application complying with the principles and rules of the Constitution. First of all – compliance with the principle of legal equality in the exercise of rights and freedoms and the consequent inadmissibility of their illegal restriction in law enforcement activity [12].

On the need to establish administrative courts was also said by the President of the Russian Federation, V. V. Putin, who has noted in his speech that "first of all, we should complete the establishment of administrative proceedings, promptly adopt the appropriate code, and form judicial structures that will settle disputes of citizens with public authorities and bodies of local self-government" [13].

At the conclusion of its work VIII all-Russia Congress of judges has decided to request the State Duma of the Federal Assembly of the Russian Federation to

ensure priority consideration of the draft of federal constitutional law "On Federal Administrative Courts in the Russian Federation" and the draft of federal law on "Code of Administrative Court Procedure of the Russian Federation" [1].

The need for reliable protection of the rights, freedoms and legitimate interests of citizens requires the building of a qualitatively new level of Justice in the Russian Federation.

Appreciating the establishment of administrative courts in Russia, it should be noted that even if administrative proceedings are created in the system of courts of general jurisdiction, this will lead to a more effective administration of justice. Administrative and legal disputes should be considered by the specialized administrative courts according to the rules of administrative proceedings.

As correctly argued by Professor Yu. N. Starilov, "improvement of the judicial system should take place, mainly through the establishment of administrative courts in the country. It is about feasibility of establishing administrative courts in Russia, which could more effectively (as compared to the current level and quality of judicial protection, the work of state bodies and officials) ensure the legality of the activities of executive bodies, as well as firmly protect the rights, freedoms and lawful interests of individuals and legal entities. Development of administrative justice as a form of exercising of the judiciary, and the codification of administrative-procedural norms will allow strengthening of administrative and legal protection" [4, 427].

The main content of judicial oversight in the public administration of Germany is to verify the legality of the activities of public authorities through rechecking of issued by them normative legal acts, which is generally carried out on the basis of claims (complaints) of natural and legal persons contesting these legal acts.

The ninth section of the Basic Law of Germany is dedicated to the organization of the judicial system of the German State and contains a number of provisions, which are the constitutional framework for the organization of court proceedings as a whole.

Article 92 of the Constitution stipulates that the judicial power is exercised by the Federal Constitutional Court, the federal courts provided for by the Basic Law, and the courts of the provinces. The independence of judges, as well as related with it legal status is guaranteed in all instances and for all branches of Justice (articles 97, 98 of the Basic Law of Germany). At that, in the field of general, administrative, financial, labor and social jurisdiction the Federation in the role of supreme judicial chambers establishes the Federal Trial Chamber, Federal Administrative Court, Federal Financial House, Federal Labor Court and the Federal Social Court (article 95).

Thus, three of the five supreme courts listed in this article refer to the field of administrative proceedings. In accordance with article 96 of the Basic Law of Germany, if necessary, in Germany also may be established other federal courts. So, there have been established military courts for those who are in public-law, official relations with the Federation (in German *Truppendienstgerichte*).

The judicial authorities directly involved in verification of legality of administrative acts in the field of public-law relations issued by the government of Germany, in a broad sense, include:

1) Federal Constitutional Court;
2) Federal Administrative Court;
3) Federal Social Court;
4) Federal Financial Court;
5) Federal Court of Patent Appeals;
6) constitutional courts of the federal provinces;
7) The European Court of Justice (it also has supervisory powers and on the basis of relevant complaints checks compliance of the German legislation with applicable legal norms of EU. If a legislative act is not in conformity with the norms of European law, Germany must in due time bring their normative legal acts into line with applicable European legislation).

Federal Constitutional Court on the basis of claims (complaints) of the federal and province executive authorities, and other bodies listed in the Constitution of the Federal Republic of Germany, as well as natural and juridical persons hears cases of conformity of federal or province normative legal acts' form and content to the Basic Law, or concerning the correspondence of province law to the rest federal law, whether the norm of international law forms an integral part of federal law and whether it directly generates rights and obligations for an individual, when the Court seeks such a decision. In addition, the Constitutional Court decides on constitutional complaints, which may be filed by any person alleging that a public authority has violated one of the basic rights or one of the rights stipulated in part 4 article 20, article 33, 38, 101, and 104 of the German Constitution (parliamentary minority also has the right of a query about the constitutionality of any law that has entered into force).

Under the so-called incidential control any court of Germany is entitled to submit a request to the Federal Constitutional Court, if it considers that law is contrary to the Constitution, and on the contrary, every decision of any court may be appealed to the Federal Constitutional Court by means of submitting a constitutional complaint if the applicant considers that the decision violates it basic rights.

Federal Administrative Court and subordinate administrative courts (the system of general administrative proceedings includes following courts: 1) administrative courts as first instance; 2) supreme administrative courts of Germany provinces as appellate instance; 3) Federal Administrative Court as cassation instance), on the base of the relevant statements of individuals and legal entities, deal with cases of conformity regarding the form and contents of decisions made by bodies of public administration in the form of individual administrative acts to the current administrative legislation. The competences of the Federal Administrative Court include all cases in the field of public-law relations, except those that are referred to the other federal courts. The competences of the Federal Administrative Court include all cases in the field of public-law relations, except those that are referred to the other federal courts.

According to the provision on administrative courts, the Federal Administrative Court is the only highest judicial instance in the field of general administrative jurisdiction.

All the administrative jurisdiction courts are collegial courts. In accordance with paragraph 5 of the Provisions on Administrative Courts, there are formed Chamber of judges consisting of three professional judges, including the presiding judge and two lay (public) judges. Lay judges do not participate only in making a ruling and a court decision if an oral hearing is not conducted.

Paragraph 9 of the Provisions on Administrative Courts provides for creation of senates in the Supreme Administrative Court of a province. Senates make decisions by a group consisting of three professional judges. Province legislation may provide for that the senates shall take a decision with help of five judges, two of whom may be lay judges.

According to article 10 of the Provisions on Administrative Courts, in the Federal Administrative Court are formed senates comprising of five professional judges, including the presiding judge, that make decisions in oral proceedings, and comprising of three professional judges – without oral proceedings.

Lay judges participate in oral proceedings and in making decision on the case on an equality with a professional judge (paragraph 19 PAC). Thus, their legal status coincides with the rights of lay members of court in other areas of jurisdiction.

Federal Social Court and subordinate social courts consider cases on conformity of the decisions of managerial bodies, the competence of which includes decision-making in the field of public-law relations in the form of individual administrative acts concerning pension scheme, health insurance, nursing care insurance, accident

insurance, calculation of pension, social money, and some other, to the current social legislation in respect to their form and content.

The cases on contestation of the above-mentioned decisions of administrative bodies on social issues affecting the rights and legitimate interests of interested persons are considered by social courts under the rules of court proceedings established by the Federal Law "On Social Courts" [9].

Federal Financial Court and subordinate financial courts based on complaints of interested parties consider cases on conformity to the current legislation of the decisions taken by financial authorities in the field of public-law relations in the form of individual administrative acts related to taxation and recovery of customs duties. Additionally, these courts deal with cases of contestation of decisions made by administrative authorities (individual administrative acts) on the calculation of child allowances. Activity of financial courts is governed by the Provision "On the procedure for determining jurisdiction of financial courts" dated October 06, 1965.

Federal Court of Patent Appeal, on the base of an appropriate claim (complaint) of a natural person or organization, examines cases of conformity to law of decisions taken by the offices of registration of inventions and granting of patents, trademark office and the Federal Office for Quality Testing.

Complaints and claims received by the Federal Court of Patent Appeal shall be allocated among individual Senates on the base of the so-called plan of allocation of cases, which is defined in advance for each year by the Presidency of the Court. Allocation of cases also regulates affiliation of individual judges to different senates. Thus, ensures compliance with an essential constitutional and legal principle that no one may be withdrawn from jurisdiction of its legitimate judge.

The activity of courts of patent appeal is governed by various legislative acts, including by special provisions of laws on patents, utility pattern, protection of integrated microchips, industrial designs, trademarks and protection of new varieties of plants. In addition, here are applied the provisions of the law on the judicial system and the Code of Civil Procedure, but only insofar as this is not excluded by the peculiarities of patent proceedings.

As part of the patent proceedings acts the principle of objective clarification of all the circumstances of a case (the principle of officiality). This means that court is not limited to taking into account the facts presented by parties (the so-called adversarial principle acting in a civil process). On the contrary, the court must, on its own initiative, to investigate the circumstances of the case in the framework of the submitted applications; it is not bound by the evidence presented by parties.

However, the participants of the process are required to assist in clarifying the circumstances of the case by giving reliable statements about the actual circumstances.

Constitutional courts of the federal provinces, based on requests from the subjects listed in the Constitution of a province, deal with cases of conformity of form and contents of province's law to the Constitution of the province. These courts also hear disputes concerning competence of the bodies of representative and executive power of provinces and some others.

Applications of citizens on violation fundamental rights by province's public authorities are not considered by these courts. Such complaints are in the exclusive competence of the Federal Constitutional Court of Germany.

In accordance with paragraph 3 article 95 of the Constitution of Germany, to ensure the unity of Justice in Germany was created a Joint Senate of the federal courts of the State, which was governed by the Federal Law "On Ensuring the Uniformity of Administration of Justice by Supreme Courts" from June 19, 1968 [7].

This Senate is not an independent court, but an administrative body entrusted with administrative oversight over the activities of federal courts. So, if one of federal courts wants to take a decision that is different from the decision of another federal court, then the matter becomes the subject of consideration in the Joint Senate. The decision on this matter taken by the Senate is binding on the exercising them by the courts.

The Basic Law of the Germany guarantees not only formal right of applying to court, but also real claims to effective judicial control. Despite the fact that the executive power, in accordance with the Constitution, while carrying out its activities is bound by the law, that is exactly why its actions are subject to judicial review. In the administrative and legal literature of Germany is noted that establishment of responsibility of managerial bodies and the State for their actions (actions of officials of public institutions) is associated with the exercise of exactly public, authoritative functions (hoheitliche Verwaltung). Distinguishing feature of a managerial body performing "public functions" is the fact that it performs them "as its primary duty" [8].

References:

1. *Resolution of VIII All-Russian Congress of Judges "On the Condition of the Judicial System of the Russian Federation and the main Directions of its Development" of December 19, 2012* [Postanovlenie VIII Vserossiiskogo s"ezda sudei «O sostoyanii sudebnoi sistemy Rossiiskoi Federatsii i osnovnykh napravleniyakh ee razvitiya»

ot 19 dekabrya 2012 g]. Available at: http://www.ssrf.ru/page/9085/detail/ (accessed: 25.03.2012).

2. Starilov Yu. N. *Administrative Justice: Theory, History, and Prospects* [Administrativnaya yustitsiya: teoriya, istoriya, perspektivy]. Moscow: 2001.

3. Starilov Yu. N. "Excessive" Administrative Regulation: Can it Ensure Law and Order in the System of Public Administration? [«Izbytochnoe» administrativnoe regulirovanie: sposobno li ono obespechit' zakonnost' i poryadok v sisteme publichnogo upravleniya?]. *Pravovaya nauka i reforma yuridicheskogo obrazovaniya – Legal Science and Legal Education Reform: collection of scientific works* under edition of Yu. N. Starilov, no. 22: Svoboda i gosudarstvennoe regulirovanie: sootnoshenie, pravovye garantii, praktika osushchestvleniya – Freedom and State Regulation: Ratio, Legal Safeguards, Practice of Implementation, Voronezh: 2009.

4. Starilov Yu. N. *From Recent Publications: Memories, Ideas, Opinions, Doubts...: collection of selected scientific papers* [Iz publikatsii poslednikh let: vospominaniya, idei, mneniya, somneniya...: Sbornik izbr. nauch. Trudov]. Voronezh State University, Voronezh: publishing house of VSU, 2010.

5. Starilov Yu. N. *From Administrative Justice to Administrative Court Proceedings* [Ot administrativnoi yustitsii k administrativnomu sudoproizvodstvu]. Series: Anniversary, Conferences, Forums, Voronezh: 2003, no. 1.

6. Starilov Yu. N., Kryazhkov V. A. Administrative Courts: What should they be? [Administrativnye sudy: kakimi im byt'?] . *Ros. Yustitsiya – Russian Justice*, 2001, no. 1.

7. *Law "On Conservation the Unity of Decision of the Federal Supreme Court" from June 19, 1968* – Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes vom 19. Juni 1968 (BGBl. I S. 661), das zuletzt durch Artikel 5 des Gesetzes vom 5. Dezember 2012 (BGBl. I S. 2418) geändert worden ist.

8. J. Jung. *Dualism of Public Service* [Die Zweispurigkeit des öffentlichen Dienstes]. Berlin: 1971.

9. *Law "On Social Courts" in the version published on 23rd of September 1975* [Sozialgerichtsgesetz in der Fassung der Bekanntmachung vom 23. September 1975]. (BGBl. I S. 2535), das zuletzt durch Artikel 4 des Gesetzes vom 20. Dezember 2012 (BGBl. I S. 2789) geändert worden ist.

10. Available at: *http://www.ssrf.ru/page/9096/detail/* (accessed: 25.03.2012).

11. Available at: *http://www.ssrf.ru/page/9099/detail/* (accessed: 25.03.2012).

12. Available at: *http://www.ssrf.ru/page/9098/detail/* (accessed: 25.03.2012).

13. Available at: *http://www.ssrf.ru/page/9097/detail/* (accessed: 25.03.2012).

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FIRE SAFETY AS PART OF NATIONAL SECURITY

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Defining national security as a social phenomenon, which includes a variety of nuances enshrined by law as an aggregate condition that accumulates infinitely many types of damage and possible visions of threats and their consequences, as a strategic priority of national security has been stated the security of individuals, society and States in areas such as defense, public life, international life, ecology, economics, information.

In connection with this, ensuring the required level of fire safety and minimization losses due to fires is considered as an important factor for sustainable socio-economic development of the Russian Federation.

Keywords: national security, state security, national security strategy, concept of national security, fire safety.

About the National Security Strategy of the Russian Federation.

The main task of public authorities in the field of fire safety is to ensure the necessary conditions for the dynamic development of the economy, sustainable increasing of well-being of Russian citizens and saving their lives.

In the Russian Federation in 2011 fixed 168.2 thousand of fires, in which died 11963 people, traumatized 12425 people, and total losses amounted to over 100 billion RUR (direct material damage amounted to 16.9 billion RUR). Fire destroyed more than 1.8 million m^2 of housing. Still a large share of fires occurs in the residential sector (71 %). Fire Departments rescued more than 86.5 thousand people and property worth over 43.6 billion RUR [1].

One of the most important documents for the development of our country is the National security strategy of the Russian Federation up to 2020 (hereinafter – the Strategy) [2]. The document could be conventionally called Constitution of Security. The current Strategy has replaced the National security concept that was adopted in the year 2000 [3]. I hardly need to say that today's Russia is more different from the country of those years. It has overcome transition period and has reached a qualitatively new level of steady and sustainable development.

The document is fully tied with the Concept of long-term socio-economic development of the Russian Federation for the period up to 2020 [4]. The main idea of the Strategy can be defined as "security through development" [5]. It aims at improving the quality of public administration and is intended to coordinate the activities of public authorities, state and public organizations to ensure security.

System analysis of the defined by the Strategy strategic priorities of National Security (pp. 23-24) lets talk about the recognition as key priorities: national defense, public and state security. As other priorities have been named sustainable development priorities: improving the quality of life of Russian citizens through guaranteeing personal security, economic growth, environmental management, and etc.

As sources of threats to national security in the sphere of state and public security (p. 37 of the Strategy) have been mentioned: intelligence activities of foreign states; various forms of terrorist activities; extremism; activities of transnational crime related to illegal trafficking in narcotic drugs and psychotropic substances, as well as weapons, ammunition and explosives; the continuing growth of criminal encroachments against a person, property, state power, social and economic security, as well as crimes of corruption.

The principal directions of public policy in this area perfectly justified in-clude (paragraph 38, 39 of the Strategy): strengthening the role of the state as a guarantor of human security; improving of the normative-legal regulation of preventing and combating crime; increasing the effectiveness of law enforcement agencies and secret services; the creation of a unified state system of prevention of crime and other offences, and some others.

About the notion of National Security.

In his study, I. N. Glebov concludes that at present the legal notion of "security" is losing the meaning of generic definition joining all the totality of kinds of security. The author believes that legal regulation needs in a new universal notion not depending on crushing it on sectoral signs. From this point of view is theoretically justified the de jure entered into legal turnover notion of "national security"", as counterpart to the earlier notion of "state security", on the base of the current understanding of the priority of an individual and society vis-à-vis the state. He sees the advantage of the notion of "national security", first of all, in the fact that it is not ideology-driven and is multidisciplinary, cross-sectorial in nature, brings together all the known types of security protected by a specific State [6, 12].

The multiplicity of definitions of security does not eliminate the problem of comprehension of the essence of this phenomenon and its designing into a concept. In our view, the conceptual definition of security is possible through its reflection in a generalized form of general properties and specific signs of this public phenomenon. As a result, V. N. Konin gives the following definition of notion of "security". Security is a system of social relations (state, legal, political, economic, cultural, spiritual, religious, etc.) that form a specific state of vital activity of society, its structures and institutions, which ensure preserving of their qualitative certainty, harmonious functioning and progressive advance [7, 72-74].

The main components of national security are security of individuals, society and the state in such areas as defense, public life, international life, ecology, economics, and information. In addition to the mentioned, the concept of "national security", according to the Russian legislation, covers such aspects of life as: "protection of life, health, rights and freedoms of individuals, property, public and state security against criminal encroachments" [8], "radiating safety of the population as the state of security of present and future generations from the harmful health effects of ionizing radiation" [9], "fire prevention as the state of protection of persons, the property, society and the state against fires" [10], "industrial safety of hazardous production facilities as the state of protection of the vital interests of an individual and society against accidents at hazardous production facilities and the consequences of these accidents" [11], "road safety" as the state of the given process reflecting the degree of protection of its participants from traffic accidents and their consequences", etc. Analysis of these definitions shows that they all are based on the underlying definition of security. At the same time, some kinds of security, including public, environmental, internal has not yet been legislatively defined.

If the National security used to be traditionally understood as the state protection against external military threats, then in the modern sense National security, as follows from the National Security Strategy of the Russian Federation, means "the state of protection of an individual, society and the State against internal and external threats that allows ensuring constitutional rights, freedoms, decent quality and the living standards of citizens, sovereignty, territorial integrity and sustainable development of the Russian Federation, the defense and security of the State".

Thus, National security as a social phenomenon has many forms enshrined by law as cumulative condition that accumulates an infinite variety of forms of damage, as well as possible perceptions about threats and their implications.

The problem of National security of the Russian Federation, since the early 90's, has being actively discussed not only among politicians, state and public figures, but also among legal scholars. Inducement of these discussions is the need to clarify the directions, methods and techniques, including legal ones, of implementation the conceptual framework of the socio-economic and spiritual development of our society, strengthen the geopolitical and geostrategic positions of the Russian Federation. And if in this search is often achieved a definite mutual understanding of all sectors of society, public authorities, scientists and specialists, then the content of the concept of "national security" is interpreted quite differently, and there are a variety of opinions. It is believed that this concept is either unacceptable to the Russian Federation or requires its specification in terms of Linguistics and political vocabulary, as well as constitutional and legal norms of it ensuring.

Administrative and legal institutes of the National security of the Russian Federation.

Open list of National security fields creates legal preconditions for the formation of independent, separate administrative and legal institutes of the Russian national security [13]. Federal Law No. 390-FL from December 28, 2010 "On Security" indicate only some types of security (security of the State, public security, environmental security, security of a person). Defines the powers and functions of federal public authorities, public authorities of the constituent entities of the Russian Federation, and bodies of local self-government. Some speak out on ensuring National security at different levels: Some speak out about ensuring National security at different levels: federal; of a subject of the Russian Federation (regional one); of personal security (citizens – in the territory of the Russian Federation); as well as about certain types of security: technical, information, industrial, etc.

National security is a generic term in relation to the types of security. In General, the legal regulation applicable to individual types of security is carried

out on the basis of more than 70 federal laws and 200 decrees of the President of the Russian Federation, around 500 decisions of the Government of the Russian Federation, as well as other subordinate acts. Most of them are fragmented, concern private threats, and generate local disparate array of legal norms related to various branches of law. The latter is due to the fact that state security issues permeate almost every field of social relations and objectively may be subjected to regulation in any of the existing branches of law.

I. B. Kardashov considers necessary to develop a qualitatively new constitutional federal law "On National Security" as the system of universal education on security in Russia, which would encompass all age groups and provide citizens' understanding of security issues [14, 4; 15, 12].

A. S. Dugenec offers to describe the main types of security in the Federal law "On Security", thereby elevating the status of the Federal Constitutional law "On Security". According to the scientist, in such case the law on security will be predominant, on the basis of which would be developed relevant normative legal acts. Moreover, under such an approach the proposed law specifies the main actors that ensure safety, i.e., federal bodies of executive power that ensure the safety of Russia on the following criteria:

a) internal security;

b) external security [16, 65-67].

It should be noted, however, that the Supreme legal act of the State policy in the area of security is a National Security Strategy of the Russian Federation, and other conceptual and doctrinal documents developed by the Security Council and approved by the President of the Russian Federation. For example, the orders of the President of the Russian Federation No. 120 from January 30, 2010 "On Approval of the Doctrine of the Food Security of the Russian Federation"; No. 608 from April 29, 1996 "On State Strategy of Economic Security of the Russian Federation (main provisions); No. 690 from June 09, 2010 "On Approval of the Strategy of the State Anti-drug Policy of the Russian Federation up to 2020"; No. 146 from February 05, 2010 "On the Military Doctrine of the Russian Federation"; as well as the Concept of counter terrorism in the Russian Federation and the Concept of the State migration policy of the Russian Federation for the period up to 2025.

Effective Federal laws and departmental normative legal acts of federal executive bodies, which are adopted in accordance with the Constitution and the National Security Strategy of the Russian Federation up to 2020, have created by now a number of administrative and legal institutes of National security. For example, Federal Law No. 116-FL from June 21, 1997 "On Industrial Safety of Hazardous

Production Facilities", as well as the Rules and norms for the safe conduct of work approved and put into effect by Rostechnadzor have created administrative and legal institute of industrial safety. Federal Law № 196-FL from 10 December 1995 "On the Road Safety" and Road traffic rules approved and entered into force by the Decision of the Government of the Russian Federation No. 1090 of October 23, 1993 have formed administrative and legal Institute of road traffic safety. Federal Law No. 69-FL from December 21, 1994 "On Fire Safety" and fire regulations have regulated administrative and legal status of fire safety. Similar approach allows speaking about administrative and legal institutes of radiation safety, environmental safety, and other administrative and legal institutions of the national security of Russia.

Ensuring the necessary level of fire safety and minimization of losses due to fires is an important factor of sustainable socio-economic development of the Russian Federation. Fire risk indicators characterize various aspects of fire safety in the country. The frequency of fires reflects the overall level of fire safety and the effectiveness of preventive fire protection activities of supervisory bodies and measures undertaken by citizens and owners.

Experts note that the deterioration of the situation is due to the lack of a well-functioning control system of fire safety, the low performance of its tasks and duties, reduction of the level of scientific and technical support of these activities, as well as the complexity and lack of study of the nature and characteristics of social interactions emerging between the various categories of participants of social relations in the process of creating and maintaining a sustainable fire prevention status of fire safety facilities [17, 3].

Fire safety is an integral part of the National security of the Russian Federation and represents a dynamically sustainable state, when objectively absent, excluded or prevented fires, their causes and sources, as well as their damage to the national interests of the Russian Federation.

The national interests of the Russian Federation constitute objectively-necessary criteria of existence and life support, independent, normal functioning and free progressive development of Russian society and State.

References:

1. *On approval of the federal target program "Fire Safety in the Russian Federation up to 2017" (with the "Concept of the federal target program "Fire Safety in the Russian Federation up to 2017"): Resolution of the RF Government No. 1464-r from August14, 2012* [Ob utverzhdenii federal'noi tselevoi programmy «Pozharnaya

bezopasnost' v Rossiiskoi Federatsii na period do 2017 goda» (vmeste s «Kontseptsiei federal'noi tselevoi programmy «Pozharnaya bezopasnost' v Rossiiskoi Federatsii na period do 2017 goda»): rasporyazhenie Pravitel'stva Rossiiskoi Federatsii ot 14 avgusta 2012 g. № 1464-r]. *System GARANT* [Electronic resource], Moscow: 2013.

2. On the Strategy of National Security of the Russian Federation up to 2020: Decree of the RF President No. 537 from May 12, 2009 [O Strategii natsional'noi bezopasnosti Rossiiskoi Federatsii do 2020 goda : ukaz Prezidenta Rossiiskoi Federatsii ot 12 maya 2009 g. № 537]. *SZ RF – Collection of Laws of the Russian Federation*, 2009, no. 20, article 2444.

3. On the Concept of National Security of the Russian Federation: Decree of the RF President No. 24 from January 10, 2000 [O Kontseptsii natsional'noi bezopasnosti Rossiiskoi Federatsii : ukaz Prezidenta Rossiiskoi Federatsii ot 10 yanvarya 2000 g. № 24]. *SZ RF – Collection of Laws of the Russian Federation*, 2000, no. 2, article 170.

4. On the Concept of Long-term Socio-Economic Development of the Russian Federation for the period up to 2020 (along with the "Concept of Long-term Socio-Economic Development of the Russian Federation for the period up to 2020): Resolution of the RF Government No. 1662-r from November 17, 2008 [O Kontseptsii dolgosrochnogo sotsial'no-ekonomicheskogo razvitiya Rossiiskoi Federatsii na period do 2020 goda (vmeste s «Kontseptsiei dolgosrochnogo sotsial'no-ekonomicheskogo razvitiya Rossiiskoi Federatsii na period do 2020 goda) : rasporyazhenie Pravitel'stva Rossiiskoi Federatsii ot 17 noyabrya 2008 g. № 1662-r]. *SZ RF – Collection of Laws of the Russian Federation*, 2008, no. 47, article 5489.

5. Ursul A. D. Global Processes, Security and Sustainable Development [Global'nye protsessy, bezopasnost' i ustoichivoe razvitie]. *Vek globalizacii – Globalization Century*, 2008, no. 1.

6. Glebov I. N. *Legal Problems of Ensuring National Security of the Russian Federation*: thesis abstract of a Doctor of law [Pravovye problemy obespecheniya natsional'noi bezopasnosti Rossiiskoi Federatsii : avtoref. dis. ... d-ra yurid. nauk]. Moscow: 1999.

7. Konin V. N. Concept and Essence of Security [Ponyatie i sushchnost' bezopasnosti]. *Administra-tivnoe pravo i protsess – Administrative Law and Process*, 2012, no. 3.

8. On Operational-Investigative Activities in the Russian Federation: Federal Law No. 144-FL from August 12, 1995 [Ob operativno-rozysknoi

deyatel'nosti v Rossiiskoi Federa-tsii: federal'nyi zakon ot 12 avgusta 1995 g. № 144-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

9. On Radiation Safety of the Population: Federal Law of the Russian Federation No. 3-FL from January 09, 1996 [O radiatsionnoi bezopasnosti naseleniya : federal'nyi zakon Rossiiskoi Federatsii ot 9 yanvarya 1996 g. № 3-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

10. On Fire Safety: Federal Law No. 69-FL from December 21, 1994 [O pozharnoi bezopasnosti: federal'nyi zakon ot 21 dekabrya 1994 g. № 69-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

11. On Industrial Safety of Hazardous Production Facilities: Federal Law No. 116-FL from July 21, 1997 [O promyshlennoi bezopasnosti opasnykh proizvodstvennykh ob"ektov : federal'nyi zakon ot 21 iyulya 1997 g. № 116-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

12. On the Road Safety: Federal Law No. 196-FL from December 10, 1995 [O bezopasnosti dorozhnogo dvizheniya: federal'nyi zakon ot 10 dekabrya 1995 g. № 196-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

13. Stakhov A. Concept of National Security of Russia: Administrative-Legal Aspect [Kontseptsiya natsional'noi bezopasnosti Rossii: administrativno – pravovoi aspect]. *Rossiiskaya yustitsiya – Russian Justice*, 2003, no. 3.

14. Kardashova I. B. *Russian Interior Ministry in the System of Ensuring National Security of the Russian Federation* [MVD Rossii v sisteme obespecheniya natsional'noi bezopasnosti Rossiiskoi Federatsii]. Moscow: 2006.

15. Kardashova I. B. *Ensuring National Security by the MIA RF: monograph* [Obespechenie natsional'noi bezopasnosti MVD Rossii: monografiya]. Moscow: 2007.

16. Dugenets A. S., Mel'nikov A. V., Vasil'ev F. P., Dashko M. N. Issues of Administrative-legal Regulation of Ensuring Safety of Russia Today [Voprosy administrativno-pravovogo regulirovaniya obespecheniya bezopasnosti sovremennoi Rossii]. *Administra-tivnoe pravo i protsess – Administrative Law and Process*, 2012, no. 3.

17. Ershov A. V. *Legal Aspects of the Qualitative Assessment of Work in the Field of Fire Protection in the Implementation of State Fire Supervision*: thesis abstract of a candidate of legal sciences [Pravovye aspekty otsenki kachestva rabot v oblasti ognezashchity pri osushchestvlenii gosudarstvennogo pozharnogo nadzora: avtoref. dis. … kand. yurid. nauk]. St. Petersburg: 1999.

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LEGAL NATURE OF TAX CONTROL IN THE SYSTEM OF STATE CONTROL AND OVERSIGHT

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By distinguishing between the supervisory and control activities of public authorities and analyzing norms of the Tax Code of the RF, which confer powers to tax authorities, here are alleged really implemented during tax audits state oversight functions, and not control ones.

The author notes that in respect of tax audits, both cameral and field ones, there is no the main feature, inherent to control activity – impact on the internal processes of an audited entity, adoption measures to increase its efficiency.

Keywords: tax control, control and oversight activities, state supervision, legal nature of control and oversight activities.

Through control and supervisory activity State guarantees the observance of legislatively established requirements designed to ensure on the one hand the rights and legitimate interests of citizens and organizations, and on the other hand the public interest of the very state.

Modern Russian legislation does not clearly distinguish the concepts of state control and supervision. In some normative legal acts these notions are even used as synonyms. For example, Federal law "On Protection of Rights of Legal Persons and Individual Entrepreneurs in Carrying out of State Control (Supervision) and Municipal Control" [2] in the very name allows the use of the notions "State control" and "Supervision" as interchangeable, identical ones. The Law also contains

a common definition for these two different, in our opinion, types of activity of public authorities, through which the State exercises its control and supervisory function.

However, Russian legislation contains definitions of such control and supervisory activities of the State as federal state forest monitoring, federal state fire supervision service, state harbor control, tax control, etc.

Analysis of these definitions gives reason to believe that the Russian legislation does not contain any separation of aims, objectives and basic principles of exercising state control and supervision. However, it should be noted that some normative-legal acts imply differences in functions of executive authorities of control and supervision [3]. The lack of a systemic, legislatively enshrined approach for differentiation the control and supervision activity of the State leads to problems in defining the terms of reference in part of exercising control or oversight, application of forms, methods and means of response not relevant to the aims and objectives of a specific kind of exercised activity, which finally poses a threat of violation of rights and lawful interests of controlled and supervised entities. Therefore, the issue of improving definitive norms in the sphere of State control and supervision activity does not lose its relevance.

Of particular importance is the implementation of the control and supervision activity of public authorities in the field of taxation. After all, proper execution of the legislation on taxes and fees by taxpayers, payers of fees and tax agents eventually affects the amount of tax revenue used in further to perform the totality of all state functions.

Science of administrative law contains reasonable generalized approaches to delimitation of state control and supervision. However, the issues of identification of the legal nature of control and supervision activities in a particular field still remain insufficiently studied.

The main purpose of this study is to identify the legal nature of tax control in control and supervision activity of the State on the basis of signs of state control and supervision developed by legal doctrine.

A. A. Tsvil-Buklanova defines administrative supervision as a systematic observation of the strict and steady observance of laws and subordinate act that is implemented by special bodies of management on jurisdictional issues in respect to non-subordinate to them bodies [4, 80].

Other authors note that supervision is a state check of compliance with law by a supervised object, with the subsequent initiation of the procedure of bringing it to legal responsibility for infringement of legislation implemented by an authorized

public authority in respect of public authorities, local self-government, undefined range of legal and natural persons, irrespective of their form of ownership and departmental subordination, not subordinated to the authorized body [5, 127].

Thus, supervision activity of public authorities is characterized by the use of the method of observation, the implementation of this activity with respect to an unsubordinated entity, the application of measures of legal responsibility as a result of revealed violations, the facts of commission of which are revealed during checks and recorded in the acts of executive authorities. At this, the method of observation does not involve the introduction of inspection body into the internal organization of the activities of an audited entity, identification the causes of violations, formulation of approaches to improve the functioning of the audited entity.

Analysis of state control definitions contained in the legal literature allows us to emphasize the signs of state control that distinguish it from supervision activity of public authorities.

Control activities are designed not only for revealing violations as causes of adverse consequences, but also for identification trends that explain their occurrence and suggestion measures to prevent them. For example, implementation of state financial control involves not only getting all sorts of information on budget execution, but also giving performance assessment of bodies executing budgets, tracking legitimate, targeted, effective use of budget funds. To achieve such result, control authorities are not deprived of the right to distribute their impact on internal organizational processes of a controlled entity.

State control is exercised by public authorities in respect of subjects under direct subordination. In addition, it is mistakenly to believe that state control is exercised only by executive authorities. This feature is characteristic just for supervision. When, state control can be also exercised by the legislative (representative) body, for example, in case of realization of state financial control.

Also in our opinion, wrongly the claim that audit is an exceptional form of state control or an exceptional form of supervision. The mere fact that a public authority applies such form of activity as checking, does not define the essence of activity itself. For the purpose of determination the legal nature of this activity, the goal of check acquires paramount importance.

Legislation of the Russian Federation on taxes and fees defines the concept of tax control as the activity of authorized bodies to monitor compliance with the legislation on taxes and fees by persons who are obliged to calculate and pay taxes and fees. To determine the legal nature of the activities of authorized bodies in the field of taxation, which has traditionally been called “tax control”, we need a more

detailed study of the established forms of their implementation, identification of their goals, relations between control bodies and controlled entities, documentation of results.

The Tax Code of the Russian Federation [1] defines the basic forms of tax control: tax audits, receiving explanations from taxpayers, tax agents and payers of fees, validation of accounting and reporting data, inspection of premises and territories used for deriving of income (profit).

As an aim of tax audits the Tax Code of the Russian Federation establishes monitoring over compliance with the legislation on taxes and fees by a fee payer, tax payer or tax agent. According to the author, such a wording is not correct, as it means that the aim of implementation one of the form of tax control is a control, in other words a process for the sake of process.

Tax authorities perform two kinds of tax audits – cameral and field. After analysis of the legal norms governing the procedure of these checks, we come to conclusion that the terms of reference of tax authorities during field audits are much wider than powers during conducting cameral audits. The list of powers of tax authorities is extended by the right to conduct an inventory of taxpayer's property, as well as to inspect production, storage, trade and other premises and territories used by the taxpayer for obtaining income or maintaining objects of taxation, in special cases, to seize documents.

The competent authorities during a tax audit, however, can only apply measures of tax responsibility for partial or late compliance with the obligation to pay taxes or fees, the amount of which is determined on the base of the actual productivity of a verifiable entity. In respect of tax audits, both cameral and field, there is no the main sign inherent to control activity – influencing the internal processes of an audited entity, adoption of measures to improve the efficiency of its activities. In other words, tax authorities as a result of a tax audit are not entitled to oblige audited entities to introduce changes in production and technological process of the tax payer or its management structure, etc. for increasing tax revenues.

Other forms of tax control – receiving explanations from taxpayers, tax agents and payers of fees, validation of accounting and reporting data, inspection of premises and territories used for deriving of income (profit), are applied, as a rule, during tax audits and, as separate components of the verification activity, cannot exceed it neither by aim nor by result.

From the study can be concluded. Contrary to the traditional judgment that takes place in the theory of tax law, that tax control is a state control activity, its signs indicate inherent legal nature of supervision.

In this connection, we propose changes in the Tax Code concerning renaming tax control in tax supervision, defining it as the activity of authorized bodies to monitor compliance with the legislation on taxes and fees by persons who are obliged to calculate and pay taxes and fees, and within their competence to apply stipulated by law measures of administrative responsibility in case of detection of offences.

References:

1. Tax Code of the Russian Federation (part I) from 31.07.1998, No. 146-FL (as amended on 03.12.2012) [Nalogovyi kodeks Rossiiskoi Federatsii (chast' pervaya) ot 31.07.1998 № 146-FZ (red. ot 03.12.2012)]. *SZ RF – Collection of Laws of the Russian Federation*, no. 31, article 3824.

2. Federal Law No. 294-FL from 26.12.2008 "On Protection of Legal Entities and Individual Entrepreneurs Rights in Implementation of State Control (supervision) and Municipal Control" (as amended on 12.11.2012) [Federal'nyi zakon ot 26.12.2008 № 294-FZ «O zashchite prav yuridicheskikh lits i individual'nykh predprinimatelei pri osushchestvlenii gosudarstvennogo kontrolya (nadzora) i munitsipal'nogo kontrolya» (red. ot 12.11.2012)]. *SZ RF – Collection of Laws of the Russian Federation*, 29.12.2008, no. 52 (part 1), article 6249.

3. Decree of the RF President No. 314 from 09.03.2004 "On the System and Structure of Federal Executive Bodies" (as amended on 22.06.2010) [Ukaz Prezidenta RF ot 09.03.2004 № 314 «O sisteme i strukture federal'nykh organov ispolnitel'noi vlasti» (red. ot 22.06.2010)]. *SZ RF – Collection of Laws of the Russian Federation*, 15.03.2004, no. 11, article 945.

4. Ovsyanko D. M. *Administrative Law* [Administrativnoe pravo]. Moscow: 1994.

5. Yakunin V. I., Sulakshin S. S., Porfir'ev B. N. and others. *The Problems of Forming State Policy on Transport Safety* [Problemy formirovaniya gosudarstvennoi politiki transportnoi bezopasnosti]. Center for problem analysis and state-management planning, Moscow: 2006.

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Khodzhakulova S. I.

COOPERATION OF COMMISSIONS FOR CASES AND RIGHTS PROTECTION OF MINORS WITH INTERNAL AFFAIRS BODIES (POLICE) IN THE FIELD OF PREVENTING FAMILY TRIBULATION

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The article shows the results of the poll secretaries of the commissions for cases and protection the rights of minors and heads of internal affairs bodies on the main forms of joint activity.

Despite the similarity of functions of the commissions for cases and protection the rights of minors and units of internal affairs bodies, here is noted a difference of their legal statuses, and as a consequence, unequal legal capacity to use means and methods of preventive impact on parents and persons replacing them in the matter of family tribulation, and well as the support and upbringing of minors.

The attention is focused on the shortcomings of mutual exchange of information between these entities, which, according to the author, do not bring positive results in preventive work.

Keywords: family tribulation, prevention of family tribulation, minors, commission for minors, prevention of child neglect and juvenile delinquency.

Interaction – one of the major philosophical categories, reflecting the processes of impact of various objects on each other, their mutual conditionality and change of state, as well as the creation of one object by another. Interaction is a kind of direct or indirect, internal or external relation [4].

By interaction of commissions for cases and rights protection of minors (KDN and ZP in Russian) with the bodies of internal affairs, in particular, the divisions dealing with juvenile (PDN OVD in Russian) should be understood their cooperation to make the best use of their available possibilities to perform tasks assigned to them and coordinate all efforts by directions of activities, as well as in the issue of prevention of family tribulation.

Speaking about the cooperation of the subjects of prevention system here is emphasized:

- constant interaction between the authorities, institutions and individual staff members throughout the course of performing their duties;
- temporary interaction of the bodies and institutions working together in addressing any specific problems, which then terminates.

Also, in addition to the given types of interaction allocate external and internal interactions, direct and indirect ones, as well as the horizontal type, i.e., implementation of interaction by actors who are at the same level in hierarchy, and vertical type of interaction [8, 113].

Article 4 of the Federal Law No. 120 "On Principles of Prevention of Child Neglect and Juvenile Delinquency" [1] defines the range of subjects of prevention child neglect and juvenile delinquency, which includes commissions for minors and protection of their rights formed in accordance with the legislation of the Russian Federation and the legislation of the subjects of the Russian Federation, management bodies of the social protection of population, education authorities, child welfare authorities, youth authorities, health authorities, employment services, internal affairs authorities.

A number of researchers in this field, depending on the functions performed by the subjects of the system of prevention, subdivide them into specific categories. So, S. N. Ryabuhina attributes the commissions for cases and rights protection of minors, as well as the organs of internal affairs to institutions of secondary special prevention, along with open and closed special educational institutions [7, 4-8]. It is difficult to disagree with this, since the commissions for cases and rights protection of minors and law-enforcement bodies, in particular juvenile departments, work with individuals who have already committed administrative offences and implement prevention of recurrence of such deeds.

Historically, the main bodies at regional and local levels, which are in charge for coordination and cooperation among all actors of prevention of child neglect and juvenile delinquency, are the commissions for minors and protection of their rights. For example, the regional law of the Leningrad region "On Commissions for Minors and Protection of their Rights in the Leningrad Region" [3], adopted December 21, 2005, stipulates that the regional commission for minors and protection of their rights coordinates the activity of bodies, institutions and organizations to prevent child neglect, homelessness and juvenile crime, to protect their rights and legitimate interests in the territory of the Leningrad region (see article 3 of the Law). A similar provision is reflected in article 1 of the Law of Moscow No. 20 from April 27, 2001 "On Commissions for Minors and Protection of their Rights" [2].

It is worth noting that the interaction within the territory of a single municipal district (formation) is the closest among such subjects of prevention family tribulation as commissions for cases and rights protection of minors and divisions of the bodies of internal affairs on dealing with juvenile. In particular, the conducted by the author expert poll of Executive Secretaries of commissions for cases and rights protection of minors and heads of divisions of the bodies of internal affairs on dealing with juvenile revealed that in 80% of cases, joint preventive measures were called as the primary form of collaboration (in the research process, to date, have been polled 100 inspectors of divisions of the internal affairs bodies on dealing with juvenile in Smolensk region, Irkutsk region, Kirov region, Moscow region, as well as the Executive Secretaries of commissions for cases and rights protection of minors in the similar subjects of the Russian Federation). In practice, this is often not true. It can be stated that these authorities largely have similar functions, but at the same time have a different legal status, and as a result, have unequal legal opportunities for the use of means and methods of preventive impact on parents and persons replacing parents in the matter of family tribulation, as well as the sustentation and upbringing of minors. This, in our view, partially affects the efficient performance of the mentioned authorities.

Before talking about proposals to improve preventive measures in the matter of family tribulation, it is necessary to consider such type of interaction of commissions for cases and rights protection of minors and bodies of internal affairs on dealing with juvenile as joint information and analytical work. This form of interaction is, in a general sense, a totality of the methods of forming actual data that ensures their comparability, objective assessment and elaboration of new output information. Analytical work is a part of creative activity. It is designed to evaluate information and make decisions. It is the core content of the daily work of each

manager and employee [5]. Employees of commissions for cases and rights protection of minors and bodies of internal affairs on dealing with juvenile have not become an exception. It is important to emphasize that timely received information acquires a particular importance in the issue of preventing family tribulation, because timely neutralization, its sequential prevention provides the opportunity to prevent crimes and other offences in respect of minors. Mutual exchange of information among actors, in most cases, is episodic, that, unfortunately, does not bring positive result in preventive work.

Summing up the said above, it can be stated that:

1. So far have not been resolved corporate questions aimed at improving preventive activity in general, as well as among such subjects of prevention family tribulation as commissions for cases and rights protection of minors and bodies of internal affairs on dealing with juvenile. It seems advisable to develop "The program of major directions in activities of the commissions for cases and rights protection of minors and bodies of internal affairs on dealing with juvenile in the field of preventing family tribulation". We believe that the Program will allow and show the given authorities of prevention at the local level the main directions in their work, respective responsibilities and will determine responsibility for failure to perform assigned duties.

2. Speaking about the efficiency of interaction between the commissions for cases and rights protection of minors and bodies of internal affairs on dealing with juvenile, we should enter a reservation that takes into account the level of professional training of staff involved in preventing family tribulation. Proceeding from the reality, it can be stated that in conditions of staff turnover, reforms in the system of internal affairs bodies, for service come people who are not ready or not capable to solve problems. Often, employees included in the commissions for cases and rights protection of minors do not have legal or pedagogical education, what certainly has an impact on the result of preventive work. Holding joint seminars, round tables for employees of the system of prevention neglect and juvenile crime, aimed at exchange of professional experience, as well as high-quality HR approach, in our view, can contribute to the successful solution of the issue of preventing family tribulation and preserving family institution. As noted the RF Presidential Commissioner on the rights of children at the federal level, Pavel Astakhov: "Nothing is better for a baby than its family" [6].

References:

1. Federal Law No. 120-FL from June 24, 1999 "On the Principles of Prevention Child Neglect and Juvenile Delinquency" (amended and supplemented)

[Federal'nyi zakon ot 24 iyunya 1999 g. № 120-FZ «Ob osnovakh sistemy profilaktiki beznadzornosti i pravonarushenii nesovershennoletnikh» (s izmeneniyami i dopolneniyami)]. *System Konsul'tant Pljus. Professional version* [Electronic resource], Moscow: 2013.

2. Law of Moscow City No. 20 from April 27, 2001 "On Commissions for Cases and Rights Protection of Minors" [Zakon goroda Moskvy ot 27 aprelya 2001 goda № 20 «O komissiyakh po delam nesovershennoletnikh i zashchite ikh prav»]. *System Konsul'tant Pljus. Professional version* [Electronic resource], Moscow: 2013. Available at: http://dic.academic.ru/ (accessed 06.02.2013).

3. Regional Law of Leningrad region No. 126-oz from 29.12.2005 "On Commissions for Cases and Rights Protection of Minors in the Leningrad Region" (as amended on 02.07.2011) [Oblastnoi zakon Leningradskoi oblasti ot 29.12.2005 № 126-oz «O komissiyakh po delam nesovershennoletnikh i zashchite ikh prav v Leningradskoi oblasti» (red. ot 07.02.2011)]. *System Konsul'tant Pljus. Professional version* [Electronic resource], Moscow: 2013.

4. *Cooperation* [Vzaimodejstvie]. Available at: http://dic.academic.ru (accessed: 12.02.2013).

5. Kuznetsov I. N. *Information: Collection, Protection, Analysis. Tutorial for information analysis* [Informatsiya: sbor, zashchita, analiz. Uchebnik po informatsionno-analiticheskoi rabote]. Available at: http://www.libok.net/writer/5556/kniga/16200/kuznetsov_igor_nikolaevich/informatsiya_sbor_zaschita_analiz_uchebnik_po_informatsionno-analiticheskoy_rabote/read (accessed: 12.02.2013).

6. Pavel Astakhov presented *the program "Russia – without Orphans"*. Available at: http://www.rfdeti.ru/display.php?id=4781 (accessed: 12.02.2013).

7. Ryabukhin S. N Child Neglect and Juvenile Delinquency as a Result of Socio-economic Transformation of Russian Society [Detskaya beznadzornost' i prestupnost' nesovershennoletnikh, kak sledstvie sotsial'no-ekonomicheskoi transformatsii rossiiskogo obshchestva]. *Analiticheskii vestnik – Analytical Bulletin*, Series 23: The main problem of the social development of Russia: Youth in conditions of socio-economic transformation of Russian society. Moscow: The Council of Federation of the Federal Assembly of the Russian Federation: Information-analytical department of the Federation Council, 1999.

8. Chumarova E. Yu. *Administrative and Jurisdictional Activity of Commissions for Cases and Rights Protection of Minors: monograph* [Administrativno-yurisdiktsionnaya deyatel'nost' komissii po delam nesovershennoletnikh i zashchite ikh prav: monografiya]. Krasnoyarsk: Siberian Law Institute of the Ministry of Internal Affairs of Russia, 2005.

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Channov S. E.

TOWARDS THE QUESTION ABOUT ONE RULING OF CONSTITUTIONAL COURT

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

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

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

L. Carroll. Alice through the Looking Glass

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

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

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

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

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

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

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

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

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

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

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

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

c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

– any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

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

A similar situation has occurred with the French original source:

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

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

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

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

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

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

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

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

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

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

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

References:

1. Convention No. 29 of the International Labor Organization "On Forced or Compulsory Labor" (adopted in Geneva on 28.06.1930 at 14th session of the General Conference of the International Labor Organization) [Konventsiya № 29 Mezhdunarodnoi organizatsii truda «Otnositel'no prinuditel'nogo ili obyazatel'nogo truda» (prinyata v g. Zheneve 28.06.1930 na 14-oi sessii General›noi konferentsii MOT)]. *Vedomosti VS SSSR – Gazette of the Supreme Soviet of the USSR*, July 02, 1956, no. 13, article 279.

2. Convention on the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 04.11.1950) (amended from 13.05.2004) [Konventsiya o zashchite prav cheloveka i osnovnykh svobod]. *SZ RF – Collection of Laws of the Russian Federation*, 2001, no. 2, article 163.

3. International Covenant from 16.12.1966 "On Civil and Political Rights" [Mezhdunarodnyi Pakt ot 16.12.1966 g. «O grazhdanskikh i politicheskikh pravakh»]. *Byulleten' Verkhovnogo Suda RF – Bulletin of the Supreme Court of the RF*, 1994, no. 12.

4. Federal Law No. 65-FL from 08.06.2012 "On Amendments to the Code on Administrative Offences of the RF and the Federal Law "On Meetings, Rallies, Demonstrations, Processions and Picketing" (amended from 02.14.2013) [Federal'nyi zakon ot 08.06.2012 № 65-FZ «O vnesenii izmenenii v Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh i Federal'nyi zakon «O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh»]. *SZ RF – Collection of Laws of the Russian Federation*, 2012, no. 24, article 3082.

5. Resolution of the Constitutional Court No. 4-P from 14.02.2013 "On the Constitutionality Test of the Federal Law "On Amendments to the Code on Administrative Offences of the RF and the Federal Law "On Meetings, Rallies, Demonstrations, Processions and Picketing" in connection with the request from a group of deputies of the State Duma and complaint of E. V. Savenko" [Postanovlenie Konstitutsionnogo Suda RF ot 14.02.2013 № 4-P «Po delu o proverke konstitutsionnosti Federal'nogo zakona «O vnesenii izmenenii v Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh i Federal'nyi zakon «O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh» v svyazi s zaprosom gruppy deputatov Gosudarstvennoi Dumy i zhaloboi grazhdanina E. V. Savenko»]. *SZ RF – Collection of Laws of the Russian Federation*, 2013, no. 8, article 868.

6. Information on the Decision of the ECHR from 07.07.2011 on the case "Stummer v. Austria" (complaint No. 37452/02) [Informatsiya o Postanovlenii ESPCh ot 07.07.2011 po delu «Shtummer (Stummer) protiv Avstrii» (zhaloba № 37452/02)]. *Byulleten' Evropeiskogo Suda po pravam cheloveka – Bulletin of the European Court of Human Rights*, 2012, no. 1.

7. Klepitskij I. A. Crime, Administrative Offense and Punishment in Russia in the Light of the European Convention on Human Rights [Prestuplenie, administrativnoe pravonarushenie i nakazanie v Rossii v svete Evropejskoj konventsii o pravah cheloveka]. *Gosudarstvo i pravo – State and Law*, 2000, no. 3.

8. *Comments of Office for Democratic Institutions and Human Rights OSCE in respect of article 99 of the Penal Code of the Republic of Kazakhstan (Warsaw, June 02, 2010)* [Kommentarii Byuro po demokraticheskim institutam i pravam cheloveka OBSE v otnoshenii stat'i 99 Ugolovno-ispolnitel'nogo kodeksa Respubliki Kazakhstan (Varshava, 2 iyunya 2010 goda)].

9. *Conventions and Recommendations Adopted by the International Labor Conference. 1919-1956. T. I.* [Konventsii i rekomendatsii, prinyatye Mezhdunarodnoi konferentsiei truda. 1919-1956. T. I.]. Geneva: International Labor Office, 1991. pp. 197-208.

10. Kudryavtseva V. P. What are "Compulsory Works" in Administrative Law and how their Exercising can be Organized? [Chto takoe «obyazatel'nye raboty» v administrativnom prave i kak mozhet byt› organizovano ikh ispolnenie?]. *Ispolnitel'noe pravo – Executive Law*, 2012, no. 4.

11. Lukashuk I. I. *Contemporary Law of International Treaties: in 2 volumes. Vol. 1: Conclusion of International Treaties* [Sovremennoe pravo mezhdunarodnykh dogovorov: v 2 t. T. 1: Zaklyuchenie mezhdunarodnykh dogovorov]. Moscow: Volters Kluver, 2004.

12. Lyutov N. L. *Russian Labor Legislation and International Labor Standards: Suitability and Prospects of Improvement* [Rossiiskoe trudovoe zakonodatel'stvo i mezhdunarodnye trudovye standarty: sootvetstvie i perspektivy sovershenstvovaniya]. Moscow: 2012.

13. Ryazanova T. *Italian strike blew up "Twitter", "Facebook" and the brain of Naryshkin* [Ital'yanskaya zabastovka vzorvala «Tvitter», «Feisbuk» i mozg Naryshkina]. Available at: http://www.specletter.com. (accessed: 24.03.2013).

14. Channov S. E. Administrative Penalties in the Code on Administrative Offences of the RF: Some Issues of Legislation Development [Administrativnye nakazaniya v KoAP RF: nekotorye voprosy razvitiya zakonodatel›stva]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2012. № 9.

15. Channov S. E. Compulsory Works or Forced Labor [Obyazatel'nye raboty ili prinuditel'nyi trud]. *EZh-Jurist*, 2012, no. 29.

16. Shugrina E. S. New Rules for the Organization and Holding of Public Events: What will the Constitutional Court of the Russian Federation Say? [Novye pravila organizatsii i provedeniya publichnykh meropriyatii: chto skazhet Konstitutsionnyi Sud RF?]. *Munitsipal'noe pravo – Municipal Law,* 2012, no. 3.

17. *Collection of Ongoing Treaties, Agreements and Conventions Signed by the USSR with Foreign Countries. Issue 19* [Sbornik deistvuyushchikh dogovorov,

soglashenii i konventsii, zaklyuchennykh SSSR s inostrannymi gosudarstvami. Vyp 19]. Moscow: 1960.

18. *Eradication of Forced Labor*. International labour office. Geneva, 2007.

19. *The Imprisonment and its Analogs in the German and Foreign Law* [Die Freiheitsstrafe und ihre Surrogate im deutschen und auslandischen Recht]. Baden-Baden: 1983.

20. *Le centenaire de la peine privative de liberte aux Pays - Bas*. Groningen: 1986. p. 113.

21. Valticos N. The Sources of International Labor Law. *International Law and Its Sources*. Deventer: 1989.