

## PROBLEMS OF REALISATION OF PUBLIC OVERSIGHT IN THE FIELD OF TRANSPORT COUNTERTERRORISM POLICY

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### Abstract

This paper is based on the analysis of transport, counterterrorism and public oversight statutes law and common practice, examines legal points of using public oversight for the convenience of the transport counterterrorism safety precautions. Terrorism on transport networks is a problem which may hardly be combated beyond transport security, which, in turn, is constitutionally and legally grounded in the Russian Federation due to its high importance. For example, Article 71 of the Constitution of the Russian Federation classifies economic development, federal transport and rail transport, defense and security as falling under the jurisdiction of the Russian Federation. Public security protection,

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social security, environmental security, emergency prevention and response, including in transport services, are classified pursuant to Article 72 of the Constitution as falling under the shared jurisdiction of the Russian Federation and the constituent entities of the Russian Federation.

### **Keywords**

Transport security; terrorist threats; safety of the transport system; transport legislation; public control

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### **1. Introduction**

Transport services as a form of social activity entail carrying any given objects and involves the transportation of cargos, passengers, luggage, and postal items. Transport, accordingly, is viewed as a crucial branch of economy supporting the commodity exchange process. Simultaneously, transport is also a part of national economy and, unlike the production sector and agriculture, and is designated at moving the existing tangible objects (and not creating new ones), establishing and supporting ties among business entities. Transport is also viewed as a critical component of the national security system. Given a special role of transport, normal and optimal functioning of the transport system is important to the economy, national economy, socio-economic sector, and Russia's national security.

The aforesaid circumstance coupled with the vulnerability of the transport system, its exposure to numerous threats of various nature and levels, including terror threats which are of particular interest to us for the purposes of this research, trigger the necessity of ensuring security on transport networks, which, in turn, determines the need for

clear and full legal support and system-wide organizational alignment of activities in this domain.

As for the second component of the “transport security” category in question, it should be noted that Federal Law No 390-FZ On Security of December 28, 2010, contains no legal definition of the term “security.” Previously, Law of the Russian Federation No 2446-1 On Security of March 5, 1992, which is no longer effective, defined security as the state of protection of vital interests of an individual, society and state against both internal and external threats.

Apparently, a lack of legal definition of this basic concept was bound to cause the emergence of numerous and highly diverse research definitions. Today’s scientific approaches to understanding the term “security” which we find to be the most adequate are built on categories such as protection, threat (yes or no), ability, activity, attitude, etc.

However, most viewpoints are based on understanding security as sort of protection of a system (part, structural element of a system) against undesirable effects and threats.

## 2. Methods

The founder of humanistic psychology Abraham Maslow perceived the need for security as a basic motivation mechanism underlying the human activity.

The analysis of evolution of security connotations shows that it has been traditionally interpreted within the framework of commonplace perceptions. For example, Enlightenment philosophers Thomas Hobbes, John Locke, Jean-Jacques Rousseau, etc. construed security in their works as a state of calmness resulting from a lack of real, physical or moral danger.<sup>4</sup>

K. S. Belsky notes that the term “security” can be found in the works of legal scholars of the 18th and first half of the 19th century specialising

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<sup>4</sup> N.N. Kunyayev, *Pravovoe obespechenie natsionalnykh interesov Rossiyskoy Federatsii v informatsi-onnoy sfere: avtoref. dis.... d-ra yurid. nauk* [Legal support of the national interests of the Russian Federation in the information sphere. Author’s abstract of Dr. Sci. (Law) Dissertation] (2010) (Russ.).

in police law,<sup>5</sup> they wrote that security in the sense of protection its nationals (citizens) “constitutes as if the life and soul of the state.”<sup>6</sup>

Jacques Georges Vedel defined security as the “activity aimed at preventing any danger which may jeopardize the team or individuals, ranging from the prevention of plots against national security to accident prevention.”<sup>7</sup>

Broadly speaking, the term “security” as regards a certain social system can be perceived as follows: security is the state of a system protected against / resistant to potential/real adverse effects/threats. It becomes obvious that the classification of security types is possible or (for categorization purposes) necessary depending on the type of threats, the field in which the system functions, and the interests being protected. This conclusion seems to be critical to any subsequent analysis of the role of transport security in the system of different security types, a capture of its essence and the underlying principles.

As for the term “national security”, the analysis of regulatory acts makes it possible to draw a conclusion about a dramatic change of approaches towards its definition as compared with the previously existing approaches, both domestic and international. Previously, it was used solely to define the state of being protected (as a nation) against the external military threats. For example, in accordance with the earlier National Security Concept of the Russian Federation (approved by Decree of the President of Russia No 1300 dated December, 17 1997) Russia’s national security was associated with the security of its multi-ethnic population as the bearer of sovereignty and the only source of power in Russia. Foreign scholars of this period also associated the concept of “national security” with protecting a country against the external military threats. In this regard, J. Romm noted: “generally speaking, for many decades, the term “national security” was a synonym of military security. In contrast, at present this connotation

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<sup>5</sup> K.S. Belskiy, *Politseyskoe pravo: leksionnyy kurs [Police law: a lecture course]* 258 (2004) (Russ.).

<sup>6</sup> K.S. Belskiy, *Politseyskoe pravo: leksionnyy kurs [Police law: a lecture course]* 9 (2004) (Russ.).

<sup>7</sup> Vedel G. *Administrativnoe pravo Frantsii [Administrative Law of France]* 466 (1973) (Russ.).

is increasingly questioned as the decreasing tension of the cold war coincided with growing concerns about diverse non-military security threats faced by America.”<sup>8</sup>

In recent years, the evolution of the legal category of “national security” has evolved to be understood as the state of being protected (as an individual, society or state) against both internal and external threats, which state allows protecting constitutional rights, freedoms, decent quality of life and living standards for citizens, sovereignty, territorial integrity and sustainable development of the Russian Federation, national defense and security.

### 3. Results and discussion

Consequently, possible national security classifications depend on:

- first, the subject whose interests are to be protected. From this perspective, security should be divided at least into national, public, and personal security. More detailed classifications can possibly include territorial, corporate security, etc.;

- second, the interests to be protected against (potential or real) threats. Possible types of security based on this criterion include social security (life and health, family, maternity, childhood, etc.), religious, financial, economic, defense (military, cross-border, mobilization, etc.) security. Naturally, more detailed classifications upon the same ground can possibly include geopolitical, domestic political, international, information, environmental, energy and, of course, transport security. Again, this is a non-exhaustive list.

The National Security Strategy of the Russian Federation approved by Decree of the President of Russia No 683 dated December 31, 2015, defines the national interests of the Russian Federation as the objectively meaningful needs of an individual, society or state for being protected and develop sustainably.

Praxeological analysis allows drawing an unambiguous conclusion that the problem of security protection has been transformed into specific national policies in different life spheres of the society and the

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<sup>8</sup> Joseph J. Romm, *Defining National Security: The Nonmilitary Aspects*. 122 (1993).

state. Multiple interests to be protected, as well as adverse factors/threats determine a variety of security types, further prescribed by legislation.

E.g., the terms used in Articles 37, 71, 74, 82 of the Constitution of the Russian Federation in addition to the “security” concept include: “security of state” (Articles 13, 55); “national security” (Article 114); “public security”; “environmental security” (Article 72); “security of citizens” (Article 56); “security of people”.

Article 1 of the Federal Law on Security contains mentioning of the following types of security: security of state, public security, environmental security, security of an individual, and other types of security as provided for in the laws of the Russian Federation. Consequently, the list of security types both listed in the Constitution and specified in the Federal Law On Security is not exhaustive.

A legal definition of transport security is contained in Federal Law No 16-FZ On Transport Security of February 9, 2007, in which transport security means the state of protection of transport infrastructures and vehicles against any acts of unlawful interference. The goals of transport security are to ensure sustainable and safe functioning of the transport sector, protect the interests of an individual, society and state in the transport field against any acts of unlawful interference. However, recently, vehicles have been increasingly used to commit terrorist attacks.

It is noteworthy that there are still no legal definitions or complete definitions of the following terror threats:

- electromagnetic terrorism, i.e. powered electromagnetic radiation via networks, supply cables, on air;
- the employment of unmanned aerial vehicles;
- insider.

The 2030 Transport Strategy of the Russian Federation provides for achieving the goal of Transport System Security Protection, which would allow improving the security of transport services, flights and navigation, ensuring efficient operation of emergency rescue services, civil defense units, special services, achieving a safe level of functioning of transport infrastructures, raising the level of transport system conformity to the objectives of a country’s military security, thus

creating the necessary conditions for the relevant level of nation-wide security and reducing terrorist risks.<sup>9</sup> It is further noted that “as part of achieving the aforesaid goal through a range of activities, the level of security of transport services, flights and navigation to be achieved is expected to comply with both international and national requirements. Owing to transport security, transport infrastructures will be better protected against wrongful acts, including of terrorist nature, which may jeopardize a safe and secure functioning of the transport sector.”

It should be further considered that the long-term national transport policy priorities prescribed by the National Program of the Russian Federation for Transport System Development include, but are not limited to, a comprehensive security and stable functioning of the transport system, including the enhancement of transport security, the reduction of adverse environmental impacts of transport and transport transition to new fuel types.<sup>10</sup>

Security (the state of being protected) is ensured through the activity of the security system participants (security protection activity). For example, the law construes transport security protection as the implementation of a state-defined system of legal, economic, organizational or other measures in the transport sector in line with the threats of commitment of any unlawful interference acts.

It would be reasonable to include in the participants in the system of counter-terrorist security on transport networks not only government authorities exercising supervision and oversight, juridical persons, executives or other persons, but also civil society institutes. However, initially, the role of public control received mixed reviews. For instance,

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<sup>9</sup> *Transportnaya strategiya Rossiyskoy Federatsii na period do 2030 goda, utverzhennaya rasporyazheniem Pravitelstva Rossiyskoy Federatsii ot 22 noyabrya 2008 g. № 1734-r* [The transport strategy of the Russian Federation for the period until 2030, approved by the order of the Government of the Russian Federation of November 22, 2008 No 1734-r].

<sup>10</sup> *Postanovlenie pravitelstva RF ot 15 aprelya 2014 g. № 319 “Ob utverzhdenii gosudarstvennoy programmy Rossiyskoy Federatsii “Razvitie transportnoy sistemy” (s izm. ot 31 marta 2017 g.)* [Decree of the Government of the Russian Federation of April 15, 2014 No 319 “On approval of the state program of the Russian Federation Development of the transport system” (as amended on March 31, 2017)], *Sobranie Zakonodatelstva RF* [Collection of Legislation of the Russian Federation], 2014, No 18 (Part III), art. 2165 (Russ.).

some authors objected against granting any rights to the general public.<sup>11</sup> Apparently, in such cases the rights and powers which are essential to any practical activity within the limits of formulated tasks get mixed with the rights to directly take corrective actions in respect of those who committed discovered omissions or violations from the government authorities to which public authorities render assistance. There is a need for broader positioning of the transport security problem in the society, distribution of powers and liability between the state and civil society.

Control is a critical area of activity for civil society institutes. The shaping and development of civil society institutes designated to counter-balance the power of state have to do with improving the nature of control of government authorities' activity.

It should be noted that applicable Federal Law on the Fundamentals of Public Control in the Russian Federation No 212-FZ<sup>12</sup> of July 21, 2014 (hereinafter "212-FZ"), when defining in Part 1 Article 4 public control as "the activity performed by public control subjects for the purposes of monitoring the activity of government authorities, local governments, state-owned and municipal organizations, other authorities or organizations exercising certain public powers under federal laws, as well as for the purposes of public audit, analysis and public assessment of their published acts and adopted decisions" relies on a somewhat different understanding of the objects and, most importantly, the subject of public control.

Therefore, it seems possible to argue that the subject of public control (under 212-FZ) can be defined as the activity of supervised authorities and organizations related to the exercise of public powers and, as emphasized by the provision of the Law, "their published acts and adopted decisions." Apparently, this kind of special emphasis on

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<sup>11</sup> A.P. Alekhin, *K voprosu o roli obshchestvennosti v upravlenii zheleznodorozhnym transportom* [On the role of the public in the management of rail transport], 3 *MSU Vestnik (Law)* 26–34 (1962) (Russ.).

<sup>12</sup> *Federalnyy zakon ot 21 iyulya 2014 g. № 212-FZ "Ob osnovakh obshchestvennogo kontrolya v Rossiyskoy Federatsii"* [Federal Law of July 21, 2014 No 212-FZ "On the Basics of Public Control in the Russian Federation"], *Sobranie Zakonodatelstva RF* [Collection of Legislation of the Russian Federation], 2014, No 30, part I, art. 4213 (Russ.).



a public power of the above-mentioned authorities and organizations has no legal meaning since the “issue of acts”, not to mention “decision making”, are an inherent and significant component of public powers. Apparently, a special focus is aimed at explaining more significant areas of public control and the applicable forms of control.

The legal definition of public control contained in Article 4 212-FZ, namely: “the activity performed by public control subjects for the purposes of monitoring the activity of government authorities, local governments, state-owned and municipal organizations, other authorities or organizations exercising certain public powers under federal laws, as well as for the purposes of public audit, analysis and public assessment of their published acts and adopted decisions,” despite its practical value, is not intrinsic in nature and does not disclose the signs of this phenomenon with the necessary level of detail.

Apparently, a lack of theoretical legal concept of public control gives rise to numerous misapprehensions adversely affecting not only the theoretical part of the issue, but also the practical aspect of legal regulation by kickstarting conceptual confusion with all that it entails. Undoubtedly, a clear and unambiguous definition of processes and phenomena of legal sense is a fundamental issue of legal science, being a methodological and general issue subject to scientific apprehension and subsequent legalization in positive law.

The exercise of public control is controlled by a special law and other regulations.

The objects of public control include, but are not limited to:

- activity in the field of national defense and security of state, social security, and public security protection;
- activity of the police, investigative agencies, prosecutor’s offices, and courts;
- enforcement related activity;
- control of traffic in narcotic drugs and psychotropic substances;
- maintenance of orphans and children abandoned by their parents;
- mental health services, etc.

Article 9 of the Federal Law “prescribes that the subjects of public control include and be limited to:

- Public Chamber of the Russian Federation;
- public chambers of the constituent entities of the Russian Federation and municipalities;
- public councils under federal executive authorities, public councils under legislative (representative) and executive authorities of the constituent entities of the Russian Federation.

This is an exhaustive list, but Article 3 212-FZ expressly entitles citizens, public associations or other non-governmental non-profit organizations to participate in exercising public control “in accordance with this Federal Law or other federal laws” by granting the latter, *inter alia*, the right to act as the organizers of public control forms, such as public monitoring, public consultation, or participate in exercising public control in such other forms as prescribed by this Federal Law. Moreover, the general rule is that participation of citizens in exercising public control is treated as an activity mediated by the exercise of powers of public controllers or inspectors.

#### **4. Conclusion**

Public control of security protection in the relevant fields is provided for in a number of special regulations.

For example, public associations are entitled to exercise public control of compliance with the applicable rules, standards, and regulations in the radiation security protection field.<sup>13</sup>

Public control in the environmental protection field (public environmental control) is exercised for the purposes of exercising everyone’s right to enabling environment and the prevention of violations of environmental laws. It is exercised by public associations or other non-profit organizations in accordance with their articles of associations, as well as citizens under the applicable law.<sup>14</sup>

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<sup>13</sup> Federalnyy zakon ot 9 yanvarya 1996 g. № 3-FZ “O radiatsionnoy bezopasnosti naseleniya” (s posl. izm. i dop.) [Federal Law of January 9, 1996, No 3-FZ “On Radiation Safety of the Population” (with the last amended and supplemented)], *Sobranie Zakonodatelstva RF* [Collection of Legislation of the Russian Federation], 1996, No 3, art. 141 (Russ.).

<sup>14</sup> Federalnyy zakon ot 10 yanvarya 2002 g. № 7-FZ “Ob okhrane okruzhayushchey sredy” [Federal Law of 10 January 2002 No 7-FZ “On Environmental

Certain provisions concerning public control are also contained in the applicable subordinate regulatory acts and by-laws in the transport field, including rail transport. These include the provision prescribing that arrangements be made for the exercise of public control in port by a public health and safety inspector elected from among trade union members or staff members, entailing the recording of all detected defects and corrective actions aimed at creating safe and healthy working conditions, the improvement of organizational aspects of preventive actions and operational control of compliance with the applicable health and safety standards and regulations by all employees.<sup>15</sup>

Paragraph 10.3 of the Decree of the Ministry of Railways of the Russian Federation on Rail Traffic Security Protection Measures further provides for a mandatory search for and implementation of new forms of public control, every possible effort to ensure the use of monetary and non-monetary incentives to encourage traffic security protection.

However, it is fairly obvious that there is no proper regulation of public control in the field of transport security and security on transport networks. It is hardly possible to claim the existence of a necessary system or at least a group of interrelated legal norms prescribing general provisions, public control policies and procedures in the transport security field. The above entails the need for developing scientifically grounded proposals for laying a legal foundation for public control in the transport security field.

As we see it, significant areas of activity of civil society institutes in the transport security field also include the establishment of transport associations, specialized public funds involved in transport security protection. Their highly important efforts encompass participation in coordinating interactions among transport security subjects, awareness raising, training, promotion and campaigning in general and among certain population groups. The necessity of establishing an authority

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Protection”], *Sobranie Zakonodatelstva RF* [Collection of Legislation of the Russian Federation], 2002, No 2, art. 133 (Russ.).

<sup>15</sup> *Pravila po okhrane truda pri vypolnenii peregruzochnykh rabot v rechnykh portakh*, utv. Mintransom Rossii 30.12.1999 (POT RO-00030171-99) [Rules for labor protection in the performance of reloading operations in river ports, approved], Ministry of Transport of Russia on 30.12.1999 (POT RO-00030171-99), 2012 (Russ.).

performing coordination roles in the transport security protection field is obvious.

Consequently, preconditions for counter-terrorist transport security protection include its further conceptual and methodological apprehension based on doctrinal approaches, as well as the development and scientific substantiation of proposals for the improvement of transport security and counter-terrorist security regulation. Analysis further shows that the potential of civil society institutes in the field of counter-terrorist transport security protection remains underutilized to a proper extent and even understudied and under-identified, thus causing the urgent need to apprehend possible areas and forms of participation of public associations and the associations of juridical persons in the efforts to combat transport terrorism.

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