Original Article

Specifics of implementing the rule-making competence by public authorities of the Sirius federal territory

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ABSTRACT

The article considers the rule-making powers of new public and legal institutions in the Russian Federation, i.e., federal territories as exemplified by the Sirius federal territory. The possibility of creating federal territories is a procedural innovation in Russian law but some foreign legal systems have already enshrined it. Thus, it is appropriate to study the experience of other countries in this field. The study aims at determining the specific rule-making competence of public authorities in federal territory. The research objective is to analyze a new mechanism for implementing the rule-making competence of public authorities developed in coordination with the Russian government. The US and Russian legal orders were assessed comparatively and a content analysis of new Russian laws on federal territories and the doctrines on the competency-based method in state formation and management. The authors have concluded that the powers of public authorities in a federal territory have two levels. One of them is inherent like such powers, and the other has a discretionary and fictitious nature.

Keywords: Sirius federal territory, Public authorities, Rule-making competence, Russian law, Legal system

Introduction

On March 14, 2020, the federal law of the constitution of the federation of Russian No. 1-FKZ [1], among other amendments, reformulated Clause 1 of Article 67. It supplemented it with a new proposal that federal territories can be established in the Russian Federation as per federal laws. Public power in federal territories is established by federal laws. Federal Law No. 437-FZ of December 22, 2020 [2] created the first federal territory. Article 2 determines that the Sirius federal territory is a public-law entity of strategic importance.

The research subject is Law No. 437-FZ [2] which implements new methods of legal regulation for state formation and management. The public authorities of federal territories are endowed with powers in aggregate that are usually distributed among different levels of state authority and administration. This article aims at conducting a comprehensive analysis of certain rule-making powers (competencies) of public authorities within federal territories.

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Materials and Methods

The research methods comprise comparative analysis, content analysis, inductive and deductive syllogisms. Since the phenomenon of "federal territory" is a tool of federal formation, it was studied through the comparative analysis of the US legal system. The indoctrination of this "federal territory" model was used worldwide to allocate the powers of the capital territory.

Content analysis revealed the meaning of new Russian laws that utilize the above-mentioned rule-making competencies due to the lack of national law enforcement practices. Inductive syllogisms are used in a systemic relationship with general theories of competencies and their redistribution in the making of the Russian Federation. To conclude, we used the deduction

method. We also applied the principle "contradictio in contrarium" (Latin "from the opposite") to highlight the special conclusions of this study.

Results and Discussion

Content of regulatory and legal research materials

Law No. 437-FZ [2] mentions the possibilities of delegation and reverse delegation of powers between public authorities of different levels, i.e., the Russian government, self-government bodies, and members of the Russian Federation. The combination of the above-mentioned conditions relating to the regulatory and legal execution of the public-law entity powers (a federal territory) allows revealing the property of administrative-legal autonomy in a given subject of public relations defined as an inherent property of a public-law entity and its ability to adopt legal norms in the prescribed manner. However, its source is not the sovereignty of people as a source of power but the special tasks of developing the Russian Federation. To achieve these goals, Russia separates this regime from the traditional one. For example, the independent formation of the planning structure in developing the innovative infrastructure of some territory and its independent nature based on the presence of its geographical location. The etymology of its constitutional status is not expressed [3].

However, Federal Law No. 437-FZ [2] is more peculiar in terms of implementing regulatory powers by the public authorities of a federal territory not independently but in agreement with other state jurisdictions of the Russian Federation. In general, regulatory legal acts can be adopted by the public authorities of a federal territory on certain issues specified in Federal Law No. 437-FZ [2] only as per the Russian Federation Government.

In addition, the specific exercise of state (except for tax) control (supervision) or municipal control in a federal territory is established by regulatory acts of its public authorities in agreement with the bodies authorized by the existing legislation of the Russian Federation.

There is also a reverse scheme, namely the approval of a program for developing the Sirius federal territory by the Russian Federation government before the approval of its public authorities (Article 43 Clause 14 of Federal Law No. 437-FZ).

In one case (Article 8 Clause 1 of Federal Law No. 437-FZ), the need for coordination with the Russian Federation president's administration was enshrined. According to this provision, the public authorities of a federal territory in agreement with the Administration of the President of the Russian Federation exercise certain powers of the Federation within its jurisdiction and the joint jurisdiction it and members of the Russian Federation, transferred following federal laws, decrees of the Government as well as President of the Russian Federation.

A governing body whose rule-making competence is connected with the condition of its prior approval by another authority is not self-sufficient. Thus, the autonomous competence of public authorities does not correspond to this concept referring to similar public authorities and local self-government bodies.

Doctrinal essence of the rule-making competence realized by a public-law actor

The competence of state authority could be understood through multiple methods, a local self-government body, or, after the introduction of a new category in the Constitution of the Russian Federation, a public authority. The Soviet legal school considered the competence of governing bodies and separated it from jurisdiction [2].

Thus, B.M. Lazarev [4] indicated that the competence of a governing body was its rights and obligations to carry out specific management functions in a particular area. The sphere is assigned to a governing body from the outside, while the rights and obligations are immanent by the nature of such a governing body. The scholar also concluded that delegation was the authorization of one body by the other body to resolve the issue under the jurisdiction of the former body.

While developing the Soviet concept of management, O.E. Kutafin and K.F. Sheremet [5] highlighted that competence is a complex legal category consisting of jurisdiction, rights, and obligations.

Considering the main functions of government bodies, I.L. Bachilo [6] gave them an assessment of the types of impact on management objects. This can be a range of issues and cases under consideration, a range of subjects and objects in respect of which a governing body exercises power. This approach allows classifying functions into sub-functions, actions, and operations, using the degree of power impact as the main criterion for their division.

An independent theory of competencies was developed by Yu.A. Tikhomirov, in which the scholar defined the concept of "competence" as "the scope of public affairs legally assigned to an authorized entity". In the course of the study, he highlighted the following elements of competence: a) established goals; b) jurisdiction as legally defined spheres and objects of influence; c) power as a measure of decision-making and action guaranteed by law [7]. Later preliminary approaches to an independent (post-Soviet) theory of competencies were developed [8]. The rule-making competence, including that of federal executive bodies and regional executive bodies, has a different nature than legislative federal, and regional rule-making is represented as laws.

In modern doctrines, rule-making competence is not regarded as delegated, in contrast to competencies in the spheres of management, economics, money circulation, etc. In other legal orders, even the possibility of using legal violence is considered a power that can be transferred to a private person: for example, private military companies or private institutions for the execution of criminal punishment.

Comparative analysis of implementing the rule-making competence

The idea of delegating competencies is based on the doctrine of State Action [9] developed by the US Supreme Court. It claims that the prohibitions to the US federal government and the governments of states imposed by the First, Fifth, and Fourteenth Amendments to the US Constitution [10] are as mandatory for individuals as for public authorities in case of disrupting particular freedoms and rights. At the legal level, this issue remained unresolved but the US Supreme Court called on individuals to be held accountable as actors of the state when they collude with public representatives to suppress the people's rights enshrined in the US Constitution.

In Marsh v. Alabama, 326 U.S. 501 (1946), the US Supreme Court judged that the state boundary law was not liable in the prevention of the spreading religious items on the pavement, even if it is city property under the control of a private company [11]. This led to the conclusion that a public business being opened is a "public function" and not a state act.

In Shelley v. Kraemer, 334 U.S. 1 (1948), the US Armed Forces referred to the same doctrine and concluded that if any contract or contractual right exercised by a person or establishment out of court, then it was not an act of the state, but if sued to protect their contractual right, then this could be classified as a state act [12].

Brentwood Academy v. Tennessee Secondary School Athletic Association, 535 U.S. 971 (2002) stated that if administration agencies were in a private organization, then the organization's actions could not be regarded as state acts, but if the government was "pervasively linked" to the administration of such a private organization, the actions of this organization could be regarded as state actions. This connection was revealed in the Board's unequivocal endorsement of the TSSAA Rules and reserved the right to revise them in the future. Moreover, the association employees were assigned state pensions. As a rule, the association could essentially "force" participating schools to follow its rules with the support of the state and the state police [13].

Although the US legal system criticizes this doctrine due to the inaccurate notion that it is centered on the assumption that citizens have the final say in determining the nature and extent of public services that they will support with their tax payments [14], the Russian legal order adopted the given doctrine in Clause 4 of Article 1 of Federal Law of the Federation of Russia of May 2, 2006 No. 59-FZ at the insistence of the Constitutional Court of the Russian Federation [15, 16]. It extended the effect of the law not only to self-administered firms and administration of the public but also to other persons on whom the performance of public functions is entrusted (delegated) by law. This provision is included in the law to implement Clause 2 of Resolution of the Russian federation's Constitutional Court of July 18, 2012 No. 19-P [17]. It recognized the interrelated provisions of Clause 1 of Article 1, Clause 1 of Article 2, and Article 3 of the aforementioned law unconstitutional as they prevent the provisions of this federal law from being extended to relations related to the consideration by self-administered and state firms of applications from citizens' associations, including legal entities, as well as the consideration of applications by state and municipal institutions performing publicly significant functions and other organizations. Clause 5 of the Resolution of the Constitutional Court of the Russian Federation noted that the right of citizens' associations, including legal entities, to apply to public authorities is a derivative of their constitutional right to send individual and collective appeals to state bodies and local self-government bodies. Accordingly, these rights and freedoms, including the right to appeal to state bodies and local self-government bodies, should be guaranteed to citizens' associations since they not only contribute to the defense and execution of citizens' rights and freedoms but also implement them. The refusal to recognize legal entities and citizens' associations as holders of the constitutional right to appeal, based on its purpose of ensuring the exercise of other rights and freedoms, violates the principle of equality and justice arising from Clause 1 of Article 19 and Clause 3 of Article 55 of the Constitution of the Russian Federation.

In Clause 6 and Clause 6.2 of the reasoning part of Resolution of July 18, 2012 No. 19-P, the Constitutional Court of the Russian Federation indicated that the range of addressees of citizens' appeals was consistent with Article 33 of the Constitution of the Russian Federation, and it did not condition the legislative consolidation of guarantees of the rights of citizens when they apply to other (apart from public authorities and their officials) independent parties of legal relations. At the same time, such a possibility is not excluded by the Constitution of the Russian Federation. The Constitutional Court of the Russian Federation has repeatedly noted that certain publicly significant functions can be assigned by the legislator to other actors that do not belong to public authorities (see Resolution of the Russian Federation's Constitutional Court of May 19, 1998 No. 15-P [18], Resolution of the Russian Federation's Constitutional Court of December 23, 1999 No. 18-P [19], Resolution of the Constitutional Court of the Russian Federation of December 19, 2005 No. 12-P [20], Resolution of the Constitutional Court of the Russian Federation of June 1, 2010, No. 782-O-O [21], etc.). Such actors can establish the corresponding guarantees to ensure additional human rights and civil freedoms with due regard to the activities of certain organizations having public-legal significance, and specific conditions for developing the political and legal system of the Russian Federation (see the Russian Federation's Constitutional Court judgment of December 9, 2002, No. 349-O [22] and Decision of the Constitutional Court of the Russian Federation of November 9, 2010 No. 1483-O-O [23]).

One way or another, the relations under consideration are the delegation of competencies by government agencies and local self-government bodies in favor of public authorities.

Content analysis of the Russian legal regulation

There are several opinions on the rule-making competence summarized by Yu.G. Arzamasov [24]: "the rule-making competence is enjoyed by the Russian Federation administration, federal ministries and services also partly having a special kind of the rule-making competence". The basis of this competence is

the Russian Federation's Constitution that endows powers (competencies) to the Administration of the Federation of Russia in Article 114 and grants it the right to adopt binding acts in Clause 2 of Article 115.

According to Clause 2 of Article 5 of Federal Constitutional Law of the Russian Federation of November 6, 2020, No. 4-FKZ [25], the Government of the Russian Federation issue regulatory acts in the form of resolutions, while acting on operational and other issues that do not have a regulatory nature are issued in the form of orders.

Thus, the Government of the Russian Federation is an entity endowed with rule-making competence. One of its forms has not been named but can be referred to as "conciliatory".

The Presidency of the Federation of Russia is formed by its President, who is endowed with the rule-making competence but has not delegated it to this body, whose status is determined by Presidential Decree of March 25, 2004 No. 400 [26]. According to this document, the Administration of the President of the Russian Federation is a state body that ensures the functioning and exercises control over the implementation of decisions of the President of the Russian Federation. This body is not endowed with the rule-making competence, therefore the competence to "coordinate" the implementation of the powers granted to the public authorities of a federal territory by certain laws, decrees, and resolutions cannot consist in determining the procedure for exercising this rule-making power.

Nowadays the rule-making function of the Russian Federation Government is carried out in conformity with a subordinate legal act, in particular, the Regulation of the Government of the Russian Federation approved by its Resolution of June 1, 2004 No. 260 [27]. This document contains legal procedures governing the rule-making process of the Russian Federation Government but does not provide a procedure to "approve draft regulatory acts issued by the public authorities of a federal territory".

After analyzing Federal Law No. 437-FZ, we have concluded that the competence of government agencies in a federal territory consists of three independent elements: powers, rights, and authorities.

The latter are power potentials in a certain area exercised by public authorities based on laws on the powers of public authorities of the Russian Federation, public authorities of the constituent entity of the Russian Federation, and local self-government bodies.

The powers of public authorities of a federal territory can be divided into mandatory (the obligation to fulfill them is inalienable) and optional (their execution depends on the presence (absence) of an agreement on their acceptance for execution by a public authority and their transfer by a public authority or a local self-government body).

The rights of public authorities are defined as opportunities that can be implemented at the discretion of the public authorities of the federal territory. Unlike powers, rights can be implemented or remain a potential opportunity to be realized when a need arises.

The power transferred and accepted is subject to execution, being an expression of the public duty of an authority.

Thus, public authorities of a federal territory have the following rights:

1. To participate in the exercise of the powers of the Russian Federation on the conditions granted to the constituent entities of the Russian Federation by Article 26.3-1 of Federal Law of October 6, 1999, No. 184-FZ [28];
2. To exercise the rights of local self-government bodies of urban districts established by Article 16.1 of Federal Law of October 6, 2003, No. 131-FZ [29];
3. To establish the specific regulation of certain relations in a federal territory and introduce an experimental legal regime in the Sirius federal territory in cases established by federal laws and decrees of the President of the Russian Federation, decrees of the Government of the Russian Federation adopted in accordance with them, and apply regulatory legal acts establishing the relevant specifics.

The legal category of an "experimental legal regime" is defined in Article 13 of Federal Law of July 31, 2020, No. 247-FZ [30]. Accordingly, it consists in the application of special regulation concerning a certain group of people or a certain territory for a certain period, including full or partial refusal to apply mandatory requirements by a certain group of people or in a certain territory, or refusal to carry out permitting activities concerning the object of such a permitting activity.

Currently, the regulation of experimental legal regimes in the field of digital innovations is enshrined in Federal Law of July 31, 2020, No. 258-FZ [31].

Thus, specific regulation in certain areas and experimental legal regimes differ in the temporary limitation of the latter due to legal requirements.

The entire list of industries in which special regulation can be established is provided in Article 44 of Federal Law No. 437-FZ and contains 16 positions, with urban planning being the fourth. The realization of this right is covered by Article 46.1 of Federal Law No. 437-FZ. This establishes the specifics of exercising rights in the field of urban planning activities and divides them into two types: carried out independently and carried out in agreement with the Government of the Russian Federation. In the system regulating public authorities of federal territory, the establishment of specific regulation is not a competence-based power but rather a right, whose possible implementation is subject to its prior approval by the Government of the Russian Federation.

The realization of such a right under condition means the presence of a complex legal structure, consisting of the actual discretion to exercise the right and the counter obligation to exercise the right upon the occurrence of the condition [32]. The condition and its occurrence in the relations under consideration do not have an objective nature (might depend on the will of the parties). The condition for approving the rule-making function of one governing body by another body is entirely subjective, i.e. completely depends on the will of the controlling actor. However, the procedure for such an agreement should acquire the properties of certainty and get the corresponding regulation [33-40].

Powers are property rights concerning property, whose legal status is provided by their transfer from one public-law organization to another, for example, from federal property, the property of the constituent entity of the Russian Federation, or municipal property [41-45].

Public authorities have been granted powers but not titles, i.e. special ownership of the above-mentioned property.

The doctrine of competencies developed by Yu.A. Tikhomirov emphasizes that "the powers of executive bodies of various levels and local self-government bodies are based on their jurisdiction" [7], which contradicts the provisions of Federal Law No. 437-FZ. The powers of public authorities are determined by referring to the powers of authorities vested with derivative property rights and legal fictions, i.e. powers under condition.

The new rule-making tool "on agreement" indicates that public authorities do not have full rule-making autonomy concerning the competencies assigned and the list of powers exercised in Article 8 of Federal Law No. 437-FZ is not reliable based on the common legal understanding of the "governing body" term. According to Clause 1 of Article 2 of Federal Law of December 8, 2020, No. 394-FZ [46], public authorities are immanent in the property of their unity, inseparability from each other. The specified norm states, "The single system of the public power is understood as […] bodies in their sets performing in constitutionally the set limits […] and the activities…".

Conclusion

Public authorities by their nature are not bodies but are in extremo (Latin "borderlands") of administrative firms and constituent entities of the Federation of Russia, and local self-administrative bodies.

Summarizing the above, we have drawn the following conclusions:

1. The nature of public figures of a federal territory differs from that of general public establishments and local self-government bodies. These terms are not synonyms and have various semantic content. Regarding the scope of their competencies, public authorities of a federal territory derived from general public authorities and self-government bodies;
2. The specific urban planning regulation considered in this article allows us to conclude that the powers of public authorities in a federal territory have two levels. The first level powers whose mandatory implementation is inalienable. The second level powers that can be executed depending on the presence (absence) of an agreement on their acceptance for execution by a public authority and on their transfer by a public authority or a local self-government body;

The establishment of the specific regulation of legal relations within the boundaries of a federal territory is a special power that is subject to the agreement between the Russian government and the above-mentioned bodies.

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