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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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