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**JUDICIAL DISCRETION
IN THE ADMINISTRATIVE JURISDICTION PROCESS**

Specialty 12.00.14 - Administrative law;
administrative process

The Abstract
of the dissertation for the degree of candidate of legal sciences

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Relevance of the dissertation topic.

Due to socio-economic, organizational, political, information and value changes in the world, it is quite difficult for the law as a state regulator of social relations to respond to changes in them. Legal norms, with all their diversity, systemic organization and details, cannot always provide legal regulation of the entire spectrum of real human relations. In this regard, judicial discretion in law enforcement practice for resolving specific cases plays an increasingly important role.

Due to recent active development of the administrative liability institution, the development of new regulatory projects in this field, as well as the progressive liberalization of legislation on administrative liability, there has arisen a need for doctrinal law-enforcement mechanisms in the activities of the courts in the administrative jurisdiction process. One of such mechanisms is the institution of judicial discretion, which needs to be developed in legal theory and substantiated by sectoral specifics with regard to administrative jurisdiction.

The modern practice of interaction between citizens and organizations and the public authorities is often unable to meet the demands of the persons concerned to safeguard their interests. In this case, the judiciary has a special role to play in optimizing such cooperation and is called upon to provide checks and balances in public administration. The effectiveness of justice depends not only on the content of the legislative framework but also on the quality of judicial discretion.

The active development of the institution of administrative liability in recent years and the drafting of the Code of Administrative Offences and the Code of Procedure of the Russian Federation, as well as the progressive liberalization of legislation on administrative liability, there is a need for doctrinal enforcement mechanisms in the activities of the courts in the administrative jurisdiction process. One of such mechanisms is the institution of judicial discretion, which needs to be developed in legal theory and substantiated by sectoral specifics with regard to administrative jurisdiction.

The reform of public administration in recent decades has necessitated the search for new designs to optimize public law institutions.

Judicial control over the executive branch activities is of particular importance in the context of the public administration reform. Judicial discretion in administrative and jurisdictional proceedings is a part of such control, which can limit the executive branch and safeguard the rights of citizens and organizations. To date, little research has been done on judicial discretion in administrative jurisdiction proceedings.

These factors determine the need for scientific development of the institution of judicial discretion in the administrative jurisdiction process and for proposals to optimize law-enforcement practice of the administrative courts.

The extent of the scientific problem elaboration. Issues concerning the right of the court to discretion were considered in the works of the pre-revolutionary researchers, including E.V. Vaskovsky, G.V. Demchenko, N.M. Corkunov, S.A. Krilichevsky, P.I. Lublinsky, M.I. Malinin, S.V. Pahman, L.I. Petragitsky, I.A. Pokrovsky, G.F. Schershenevich et al.

During the Soviet period, various aspects of judicial discretion were considered in the works of A.T. Bonner, N.B. Zeyder, A.E. Jalinsky, O.S. Ioffe, A.K. Katz, T.V. Kashanina, K.I. Komissarov, A.P. Korenev, V.M. Manokhin, V.V. Lazarev, A.I. Raroga, D.M. Chechot and others.

The sectoral differentiation of the studies of judicial discretion resulted in elaborating the issues of judicial discretion from the point of view of the civil (D.B. Abushenko, A.T. Bonner, N.B. Zeyder, O.S. Ioffe, K.I. Commissars, O.A. Popkova), family (A.K. Katz), criminal (A.E. Jalinsky, A.I. Rarog), administrative (A.P. Korenev, V.M. Manokhin, D.M. Cechot) rights.

In the modern period, the researchers working on the issues of judicial discretion are M.V. Bavsun, M.V. Baglai, Y.V. Gracheva, P.A. Guk, R.S. Danelyan, K.P. Ermakova, O.G. Ivanova, M.I. Kleandrov, S.A. Leontiev, R.O.

Opalev, O.A. Papkova, N.S. Pogorelova, V.D. Moscow, I.N. Senyakin, A.B. Styepin, V.I. Telyatnikov and others.

Among the publications of foreign scientists the most famous is the work of Aaron Barak «Judgment». The work of K.M. Ermakova, L.N. Berg, P.V. Markov, A.A. Berezin is devoted to the development of theoretical aspects of judicial discretion.

Alongside the elaboration of the issues of judicial discretion, scholars are actively exploring the specificity of administrative discretion (U.A. Tikhomirov, U.P. Solovey); police discretion (A.V. Girwitz), investigator`s discretion (P.G. Marphicin).

The issues of judicial discretion in administrative jurisdiction proceedings have hardly been studied by scholars, with the exception of the dissertation by N.S. Pogorelova and certain articles by S.V. Shchepalov.

The study of judicial discretion in administrative and jurisdictional proceedings is piecemeal and fragmented. The accumulated scientific experience in research on this topic and related aspects is required as the basis for the given study. At the same time, it needs fundamental reconsidering and transforming in the modern administrative and procedural environment. In such circumstances, the study of theoretical and practical aspects of judicial discretion in administrative and jurisdictional proceedings predetermines its effectiveness.

The purpose and objectives of the dissertation research. The main purpose of the dissertation is to develop practical proposals based on scientific analysis in order to improve the use of judicial discretion in administrative and jurisdictional proceedings.

The following objectives are to be achieved:

- to analyze the problem of judicial discretion in modern legal science;
- to determine legal characteristics of the concept and types of judicial discretion as a form of law enforcement;
- to justify the specificity of judicial discretion in administrative and jurisdictional proceedings;

- to highlight the stages and forms of judicial discretion in administrative and jurisdictional proceedings;
- to define the institutional structure of the system of judicial discretion in the administrative and jurisdictional process as a guarantee of its effectiveness;
- to highlight the problems of using judicial discretion in administrative and jurisdictional proceedings in the current context;
- to develop ways of improving the use of judicial discretion in administrative and jurisdictional proceedings in the current context.

The object of the dissertation research is the social relations resulting from the exercise of judicial discretion in administrative and jurisdictional proceedings, which are the basis for the establishment and development of an effective system of justice in the public sphere.

The subject of the dissertation research is the legal and administrative, administrative and procedural regulations governing administrative and jurisdictional activities and the law-enforcement practice of the judicial bodies of the Russian Federation, the basic provisions of administrative and administrative procedural law in this area.

The theoretical and methodological basis of the study. the methods of systems analysis and synthesis, theoretical modelling, the formal-logical method and the method of legal hermeneutics were used in the thesis, while assessing the theory and practice of judicial discretion in the administrative jurisdiction process.

The application of historical and comparative-legal methods of research enabled the author of the thesis to present the evolution of scientific views on the institution of judicial discretion, and its use in law enforcement to be seen in the light of the dynamics, and, ultimately, identify significant trends in its development.

During the study of judicial discretion in administrative jurisdiction process, methods of interpretation of legal concepts and provisions of normative legal acts were used. It highlighted the theoretical and practical problems of the use

of judicial discretion in administrative jurisdiction proceedings in modern circumstances.

The thesis has applied universal systematization methods for theoretical structuring of the system of judicial discretion in the administrative jurisdiction process and classification as a tool for structural analysis of its content.

The thesis also used methods of sociological research: a sociological survey of judges and a method of content analysis of judicial acts and scientific publications. The theoretical basis of the thesis is the fundamental works of scholars in the fields of administrative law and procedure, administrative law, the theory of State and law.

Developing the topics of the study, the author of the thesis used the provisions and conclusions in the field of the theory of State and law, which can be found in the works of M.I. Baitina, A.V. Malko, M.N. Marchenko, N.I. Matuzova, V.S. Nersesianca and others.

The theoretical basis of the thesis mainly consists of the works of such domestic scientists as D.N. Bahrah, A.I. Kaplunov, V.Y. Kikot, I.S. Kilyashkanov, A.V. Kirin, Y.M. Kozlov, N.M. Konin, P.I. Kononov, A.P. Korenev, E.B. Luparev, V.I. Majorov, I.V. Panov, V.N. Pligin, B.V. Rossinsky, N.G. Salisheva, I.N. Senyakin, P.P. Serkov, Y.P. Solovey, V.D. Sorokhin, Y.N. Starilov, A.I. Stakhov, M.S. Studenikina, Y.A. Tikhomirov, A.A. Fatyanov, T.J. Khabrieva, B.S. Ebzeev and others.

The theoretical basis of the study also includes the works of O.V. Grechkina, N.G. Salishcheva, A.P. Shergin and other researchers of administrative jurisdiction.

The scientific work draws on the findings of scholars specializing in the problems of justice in general and administrative justice, in particular, including P.A. Hooke, A.B. Zelentsov, V.D. Zorkin, V.M. Lebedev, P.P. Serkov, O.A. Jastrebov

The information basis for the thesis is the Constitution of the Russian Federation, federal laws and by-laws of the State authorities of the Russian Federation governing the use of judicial discretion in administrative jurisdiction process.

The validity and reliability of the research findings . The reliability of the results obtained is ensured by the clarity of the underlying theoretical and methodological positions. The framework, conclusions and recommendations resulting from the study are ensured by the systematic logic, methods and technologies of the scientific research. They are based on normative and specialized sources and consistent with the purpose and objectives, and are considered reliable and scientifically sound.

The scientific novelty of the thesis is determined both by the problem itself and by the approach to its development, given the lack of comprehensive studies of judicial discretion in administrative jurisdiction proceedings. At the monographic level, the theoretical, methodological and normative support of judicial discretion in the administrative jurisdiction process in the modern period is analyzed in terms of the need to optimize the appropriate type of law enforcement activity.

The following concrete results with elements of scientific novelty have been achieved:

1. The essence of judicial discretion is justified as the activity of the court, which implies the court's freedom to choose and make the best decision in a particular legal case, within the limits of social law and on the basis of the judge's internal conviction, and is an inherent characteristic of justice administration. Through the analysis of existing items on the differentiation of judicial discretion, the following criteria for the classification of judicial discretion are identified: sectoral ,substantive, subjective, formal and procedural.

2. The specificity of judicial discretion in administrative jurisdiction process has been defined, which is reflected in the following features: an element of

judicial discretion in administrative jurisdiction proceedings is a public interest correctly understood by the subject of administrative jurisdiction; it has a legitimate material and procedural component, provided by the administrative and administrative procedural legislation in force; it is carried out in the administrative and jurisdictional sphere, within the framework of the administrative procedure, the subject matter of the procedure includes the elements of administrative jurisdiction and other sub-categories of administrative and procedural activities in the context of a broad understanding of the administrative process (control, licensing, registration and other proceedings); it serves as a form of judicial control over administrative discretion; it is both an indicator of the Court's law-enforcement and a form (source) of judicial rulemaking in public administration.

3. The system of judicial discretion in administrative and jurisdictional proceedings is defined as a set of elements whose integrated functioning and interaction are intended to ensure the optimal use of the institution of judicial discretion in the field of public law. The structural elements of the identified system include an entity, a subject and substantive area; social and legal limits, sources and principles; stages, forms and discretionary techniques; the level (permissible degree) of judicial discretion, its procedural result and the direction of the development of law-enforcement in an administrative jurisdiction process under the influence of judicial discretion.

4. It has been substantiated that judicial discretion in administrative jurisdiction process has socio-legal limits which include substantive, procedural and moral restrictions on the court's freedom in the settlement of administrative disputes. The first two types of limits are subject to the content of administrative and administrative and procedural legislation, and the moral and legal limits are related to the specific understanding of public law principles by a particular judge throughout the sphere of his intellect and will.

5. The specific nature of judicial discretion in administrative jurisdiction process derives from the special ratio between judicial and administrative discretion in the public sphere. This ratio enables to include into the subject matter

of judicial discretion in administrative cases the discretion of the executive branch, over which judicial discretion is subsequent, acting as a form of judicial control over the activities of the executive branch. Judicial discretion in administrative jurisdiction proceedings also requires a particular understanding of a number of evaluation categories from the public interest perspective.

6. The need for a motivated implementation of discretion in judicial acts is justified in order to prevent its invalidity, as is the need to synchronize the principles of discretion while imposing an administrative penalty, considering administrative cases, which arise from the relations of State control (supervision) and municipal control, with the principles of the new regulation of control and supervision.

7. In order to optimize judicial discretion in administrative jurisdiction process, the need to develop the relevant legal positions of the Supreme Court of the Russian Federation and to strengthen the role of judicial practice has been justified, as well as the need for the following changes and additions to the Code of Administrative Offences of the Russian Federation:

Article 2.9 of the Code of Administrative Offences of the Russian Federation «Possibility of exemption from administrative liability in case of a minor administrative offence» should be interpreted as follows:

1. An administrative offence is of minor significance in the absence of a serious threat to the public relations being under protection.

2. In case of a minor administrative offence, the judge, authority or official, commissioned to decide on an administrative offence, may release the perpetrator from administrative liability and just make an oral reprimand ».

Add paragraph 6 to article 4.1. «General rules for the imposition of an administrative penalty» as follows:

“6. Administrative punishment is imposed by the judge, authority or official examining an administrative offence on the basis of the provisions of this Code, taking into account the objectives of the legislation on administrative offences, the

principles of law and legal position, contained in the decisions of the Constitutional Court of the Russian Federation, the Plenum of the Supreme Court of the Russian Federation and the Presidium of the Supreme Court of the Russian Federation”.

- to present article 26.4, para. 6. «Expertise» as follows:

6.The expert`s conclusion is not mandatory for the judge, authority or official in whose proceedings a case of an administrative offence is pending, but disagreement with the expert`s conclusion or the choice of one expert`s conclusion from two or more must be motivated».

The scientific and theoretical significance of the thesis is that it provides a comprehensive study of the substance of judicial discretion in the administrative jurisdiction process, its content and the conditions of use in which the conclusions are drawn, which are important for the further development of this legal institution under the present circumstances.

The practical significance of the study lies in the fact that the main conclusions, points and recommendations of the thesis can be used both for the further development of legal doctrine and for the law enforcement activities of the judiciary, to correctly characterize the actions of administrative bodies in the exercise of jurisdictional functions. The provisions of the thesis may be used in the further training of judges of the Russian Federation.

The main features of the thesis are presented in 11 publications (total volume 3.5 printed pages), 8 of which are published in journals included in the list of peer-reviewed scientific publications and journals (total volume 2.3 printed pages). The research materials are being used in the teaching process.

The structure of the study is based on its aims and objectives and includes an introduction, 3 chapters, which combine 6 paragraphs, a conclusion, a bibliographic list and annexes. The text of the study is 191 pages long.

 / Korolevskaya O.I.