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CONCEPT AND TYPES OF THE DISCRETION OF THE LAW

The discretion of the law, its main types and problems of judicial discretion seems very important in view of the fact that no legal discipline does not distinguish this issue with its own place.

The question of discretion in law is very complex and controversial. Its complexity is due to the versatility of the very concept of law, and the discussion is dictated by the discussion approaches to the understanding of the category of «discretion.»

It is common knowledge that these limits are established by objective law. However, within the limits of these limits the subject of law is absolutely free.

The category of «discretion» is multidimensional. At the same time, when analyzing it, one should pay attention to the fact that it belongs mainly to the subjective (psychological) side of lawful behavior. In this regard, discretion can be defined as the choice of the subject of a certain goal and the means of achieving it, or as an opportunity to express their will and make decisions regardless of the will of others. Discretion includes intellectual and volitional aspects.

The intellectual side of discretion is characterized by the fact that the subject is aware of the right granted by the right to choose the options of behavior to meet his interests and chooses the option that is most prevailing for him, based on an analysis of the legal prescription and specific life circumstances.

The will party is characterized by the intention to act in accordance with the decision and willingness to make the necessary effort for this.[1]

In this regard, it should be noted that from a psychological point of view, subjective discretion is a rather complex process consisting of a number of successive stages:

– introspection, that is, self-analysis, on the basis of which the subject is aware of the specific needs, which leads to the formation of his interest, which is subject to satisfaction (the motive to the corresponding behavior).

– in the presence of a lawful institution, the discretion determines the choice of the proper purpose and means of achieving it, translating, mental experiences into the legal sphere.

The subject knows the legal means by which he can achieve his goal and, in the end, chooses the subjective right, within which he will satisfy his own interest.

[1] Малиновский В. С. Усмотрение в праве // Государство и право. – 2006. - № 4. – С. 84.

– when the legal consciousness fulfills the assessment and regulatory functions, the subject, with the help of psychological mechanisms of volitional regulation, begins to exercise actions in the exercise of subjective law. Moreover, constantly evaluating the process of implementing law in terms of its effectiveness to achieve the goal, the subject can correct this process or even abandon the implementation of this subjective right, considering it inappropriate in terms of the most complete satisfaction of its interest.

At some point, a subject may, under certain circumstances, return to one of the above stages in order to clarify their needs and (or) review their goals, again to choose the legal means to achieve them.

Some features that characterize discretion as a legal phenomenon can be attributed:

– legal (the possibility of subjective discretion provided by objective law);

– intellectual-volitional character;

– ability and capacity of the subject of discretion;

– relevance of discretion (discretion is always aimed at the choice of behavior, -necessary to achieve a specific goal).[1]

In order to give the subject the right to freedom carried out by him at his discretion, the legislator uses a variety of actions with the help of legal technique

– uses a dispositive method of legal regulation, providing the subject to independently determine the time of entry into the relationship, the timing of the exercise of subjective law, the extent of their rights, responsibilities and extent of liability (for example, within the framework of the treaty).

– constructing a legal norm, formulates relatively-defined or alternative regulations that make it possible to choose the type of lawful conduct, refrain from absolutely defined provisions;

– if necessary, uses appraisal concepts in order to expand the limits of subjective discretion;

– does not impose a ban on an extensible interpretation of certain terms or circumstances;

– restricts the sphere of interference of state bodies and officials in the decision-making process by the discretion of the entity.[2]

First of all, the discretion of the subject of the choice of a particular right to achieve his own interests should not lead to abuse of the law.

The limits of discretion in the law can be established not only by the current legislation. Depending on the country's legal system, they can be governed by religious norms (for example, the norms of the Koran that

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[1] Кондратьев П. Е. О пределах усмотрения правоприменителя в процессе принятия уголовно-правовых решений // Актуальные проблемы применения уголовного законодательства в деятельности органов внутренних дел. – М, 2001. – С. 34

[2] Малиновский В. С. Усмотрение в праве // Государство и право. – 2006. -№ 4. – С. 85.

restrict the freedom of the discretion of an orthodox Muslim), political norms (when the ideological dogma of a totalitarian state regulates human behavior), as well as the norms of customs and traditions.

It is possible to distinguish some types of discretions in the right-administrative discretion and judicial discretion.

The ability to express their will and make decisions regardless of the will of others characterizes the nature of discretion. As G.F. Shershenevich writes, the nature of discretion in law is due to the very nature of subjective law, which is the measure of freedom granted to the subject to pursue his own interest.

In the most general form, discretion in law should be understood as the intellectual and voluntary activity of the authorized person in the choice of subjective law and the way of its implementation, in order to meet their own interests.

At the discretion of the authorized person, both objective and subjective factors are influenced by the influence of which the choice of a particular subjective right and method of its implementation depends to an extent. Among the objective factors, one can distinguish:

- socio-economic,
- political,
- ideological
- cultural
- other features of the specific historical period in which the authorized entity operates.

The subjective factors include: the level of individual legal consciousness, obedience to the person, the peculiarities of his intellectual, emotional and volitional qualities, moral qualitie of the person, the religion of the individual, etc. the possibility of choosing any behavior taking into account the prohibitions established by the current legislation.[1]

An essential difference between subjective discretion and administrative and judicial discretion is the approach to determining the degree of freedom of subjects of discretion. In the first case, the discretion of the subject obeys the rule: «everything permitted is not prohibited by law,» and in the second, «only what is expressly permitted by law» is permitted. Therefore, it is clear that the limits of discretion in the first case are much wider than in the second.

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ПОЧЕМУ ФОРМА ПРАВЛЕНИЯ МОНАРХИЯ АКТУАЛЬНА И В СОВРЕМЕННОМ МИРЕ?

Парламентские и президентские республики, как государства с демократическими формами правления, широко распространены в современном мире, однако, это не отменяет того факта, что и державы с верховной властью осуществляемой единолично (или практически единолично) и, как правило, переходящей по наследству, существуют и сегодня. Но играют ли монархии такую значительную роль в общественно-политическом процессе в XXI веке, которую играли всего лишь 100 лет назад, и есть ли в них смысл сейчас?

В Европе, например, 12 монархий, из которых только одна абсолютная, да и та теократическая – это Ватикан. Все остальные – монархии конституционные: Великобритания, где королева не только символ страны, она еще и назначает и распускает правительство; Дания, династия которой является самой старой в Европе; Бельгия и Голландия – государства в которых королевские дома появились только в XIX веке; Норвегия стала самостоятельной монархией вообще лишь в начале XX века, а ранее ей правили короли Швеции, которые и сегодня остаются при короне; в Испании монархия на 40 лет была утрачена в результате провозглашения республики, которая, в свою очередь, создала условия для диктатуры генерала Франко, однако в 1975 году Хуан Карлос возродил в стране демократию и предотвратил попытку военного переворота в 1981, показав себя образцовым современным королем; остальные европейские королевские дома властвуют в карликовых государствах – Андорре, Монако, Лихтенштейне и Люксембурге.