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JUDICIAL CONTROL OVER DISCRETIONARY ADMINISTRATIVE ACTS AND PROCEDURES IN THE RF: LEGAL PROBLEMS AND POSSIBLE WAYS OF THEIR RESOLVING

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The author analyzes and criticizes the attempt of prohibition of administrative discretion by Russian legislator. By analogy with the experience of some foreign countries here is offered to distinguish several forms of administrative discretion, the intensity of judicial monitoring of which should be different.

The thesis that judicial verification of complex administrative acts and administrative procedures cannot be limited to the formal-legal legitimacy, but should also gradually expand to individual requirements for validity and appropriateness, is given in the article

Keywords: discretion, administrative act, administrative procedures, principles of administrative law, principle of proportionality.

Absence or incompleteness of administrative procedures, lack of the procedure for fulfillment by public authorities or local self-government bodies (their officials) of certain actions or one of the elements of such procedure is qualified by the current Russian legislation as one of the corruption-factors that is the basis for the recognition administrative act invalid (see paragraph 3 of the Methods of anti-corruption expertise of normative legal acts and drafts normative legal acts [3]). One more of the most important requirements to administrative procedures – establishing of decision criteria (including, denial of taking positive decision).

Of course, the establishment of a legal framework for discretion is a necessary undertaking. However, excessive reliance of the Russian legislator on administrative procedures sometimes plays with it a bad joke. If we carefully examine the same administrative regulations, it is easy to see – enshrined "criteria" are often of too evaluative nature that may at any time be subject to judicial contesting, especially in the field of providing of rights. Indeed, if the absence of necessary documents is an easy formalized reason for refusal, then how to enshrine legal significance of the results substantial evaluation of submitted applications? Let's take as an example one of the administrative regulations of the Federal Agency for Management of Special Economic Zones [4]. According to paragraph 2.8 of the regulation, the number of grounds for refusal of providing corresponding state services includes non-compliance of business plan, attached to the application for conclusion an agreement on the carrying out of techno-innovation activity, with business plans' evaluation criteria established by the authorized body of executive power. The last ones are enshrined by an independent normative act [5] and include: the compliance of the project provided for by business plan with the objectives of creation of special economic zones, as well as with approved perspective plan of development a special economic zone, the degree of financial sustainability of the project provided for by business plan, the availability of necessary infrastructure, the level of elaboration of marketing strategy, the achieving of a positive social and economic effect associated with the implementation of the project, and so on and so forth. It is easy to see: these evaluation "criteria" need independent evaluative interpretations. In general, there is a vicious logical circle.

This means that the Russian legal order (as once other legal orders that rationalized public administration through administrative procedures) has faced a situation where even the most powerful "pressure" on discretion cannot to reduce it to zero. Like the horizon line, which moves away as we approach it, in management areas always remains a sphere that is elusive for administrative procedures. This means that the Russian courts must learn to "work" with discretionary administrative acts and administrative procedures.

Unfortunately, the Russian doctrine has not developed a theory of administrative discretion. And judicial practice has gradually embarked on the path of empirical implementation of the principle of proportionality. At that, most willingly the latter was used within the framework of constitutional court procedure, when evaluating predominantly rulemaking discretion from the standpoint of both public legal order and protection of the rights of citizens (organizations) (read more on this subject: Tolstykh V. L. Constitutional Justice and the Principle of

Proportionality [15]). Administrative court procedure very carefully implements this principle; taken attempts are reduced mainly to the scope of administrative coercion, responsibility – for the purpose of ensuring the protection of rights of powerless entities [16].

Another means of "counteraction" discretion (including – abuse of powers by state executive bodies) can be the established by the Constitutional Court of the Russian Federation requirement of certainty of legal prescriptions [6; 7; 8], which even has been reproduced by the Supreme Court of the RF in one of the decisions of its plenary session [9]. However, until recently this extremely evaluative judgment has been rarely used by the courts exercising administrative legal proceedings. It is not surprising that, when faced with any form of discretion, the courts (not related to the constitutional branch) preferred to evade relevant checks [10]. However that may be, already then another trend of increasing the role of judicial practice has begun to brighter manifest itself.

However, at some point, the situation with the discretionary acts and procedures has undergone significant change. Continuing to refuse isolation of discretion forms, determination their relation to the degree (density) of judicial control, the Russian legislator simply tried to prohibit administrative discretion. According to article1 of Federal Law No. 172-FL from July 17, 2009 "On Anti-corruption Expertise of Normative Legal Acts and Drafts of Normative Legal Acts" [1], "corruption-factors are the provisions of normative legal acts (draft of normative legal acts) that establish for law enforcer unreasonably wide margins of discretion or the possibility of unjustified application of exceptions to the general rules, as well as provisions containing vague, exigeant and (or) onerous requirements for citizens and organizations and thereby creating conditions for corruption". The corresponding resolution of the Government of the Russian Federation has listed corruption factors, enumerating among such:

1) breadth of discretionary powers – the absence or uncertainty of time terms, conditions or reasons for taking decision, the presence of duplicated powers of public authorities or local self-government bodies (their officials);

2) definition of competence according to the formula "has the right" – dispositive providing of the ability of public authorities or local self-government bodies (their officials) to carry out actions against citizens and organizations;

3) selective modification of the scope of rights – the possibility of unjustified making exceptions from the general procedure for individuals and organizations at the discretion of public authorities or local self-government bodies (their officials);

4) excessive freedom of sub-legislative rulemaking – presence of blanket and reference rules that leads to the adoption of bylaws invading the jurisdiction of public authority or local self-government body that has adopted an original normative legal act;

5) adoption of a normative legal act beyond the competence – violation the competence of public authorities or local self-government bodies (their officials) when adopting normative legal acts;

6) filling legislative gaps using bylaws in the absence of legislative delegation of appropriate powers – the establishment of universally binding rules of conduct in a subordinate act in the absence of law;

7) absence or incompleteness of administrative procedures – the lack of procedure for fulfillment by public authorities or local self-government bodies (their officials) certain actions or one of the elements of such a procedure [3].

On the one hand, the relevant provisions are largely sensible and commendable. But on the other hand, they suggest that the legislator has decided to fight with discretionary acts and procedures through "preventing" them at the stage of elaboration and adoption of normative acts. However, immediately raises the question: what shall we do if such corruption factors "break through" the sieve of multiple monitorings and expertizes? In the scientific literature even suggested that their judicial contesting is impossible, because the mere existence of corruption factors cannot be recognized as a violation of an act of greater legal force [14]. Indeed, the fight with evaluative provisions through providing courts other evaluative norms is a contradictory step. But Russian courts have independently tried to sort out this complicated situation.

We believe, that using the German classification of discretion forms, one can (with a known share of convention, of course) distinguish two approaches of Russian courts to the intensity of verification of discretionary administrative procedures and administrative acts.

First, discretion in the narrow sense (concerning commission of an action, failure to commit such or choice of conduct patterns) is indirectly, reluctantly – but recognized in the competence administrative authorities. Thus, the object of verification in the Supreme Court of the Russian Federation was the provisions of the administrative regulations on the oversight function in the field of fire safety. The contested norm of the regulations, providing a responsible official in the case of detection of violations the right to issue a prescription and take necessary measures to control the elimination of violations detected, directly enshrined the power of inspector to independently determine deadlines for eliminating these violations.

The Supreme Court of the Russian Federation stated that this discretion does not mean arbitrariness, since, according to legislation requirements, there was a criterion for calculation of designated time terms: they must be defined with taking into account the nature of violation of technical regulations requirements [12]. The position of the court, which, to put it mildly, found such weakly formalized norms sufficient, leads to the conclusion on recognition of the increased autonomy of subjects of public authorities within the framework of administrative procedures on taking discretionary decisions (in the narrow sense). Thus, the density of judicial control over this form of discretion should minimize, what, to some extent, puts Russian judicial practice closer to the German one.

But with respect to uncertain legal concepts Russian legislator, as has already been mentioned, takes openly hostile stance, urging the courts, within the framework of normative control, to "scrape" them as corruption-factors. Of course, the uncertain legal concepts are a peculiar instrument of legal regulation. But, not always appropriate. So, for example, the approved by the Ministry of Justice of the Republic of Tatarstan administrative regulations of rendering state services on providing permits for the use in the names of legal entities such titles as "Republic of Tatarstan" (and similar) contained the following grounds for refusing to render state services: the nature and scope of activities of legal entity do not have essential significance for the Republic and the citizens living in it; the position of organization in the relevant field of activity or in the markets of the Republic of Tatarstan and the international market is insignificant; types of goods (works, services) produced by a legal entity are not unique, unique to the Republic of Tatarstan. Courts of general jurisdiction rightly determined such non-formalized concepts as vulnerable from the standpoint of anti-corruption legislation and recognized them inoperative [11]. But if in certain circumstances we should agree with such assessment, then it seems not possible to support an aprioristic attribution of all uncertain legal concepts to corrupt factors. Repeat: bringing this logic up to absurd conclusion, the relevant provisions of anti-corruption legislation themselves can be recognized inoperative exactly because of their incorrectness. A constructive way out from the logical impasse should be an unspoken "legalization" of uncertain legal concepts with simultaneous deep judicial verification of not so much administrative procedures (within the framework of normative control), but administrative acts taken on their basis.

So, the initial attack on the administrative discretion through the judicial application of the principle of proportionality (mainly for the purpose of protecting the rights of powerless entities) in Russia had a known similarity with European

experience. However, in recent years this principle has gained an original, "Russian" direction – combating corruption (as a rule, within the framework of normative control). Incompliance with the "requirements" of anti-corruption legislation becomes a ground for cancellation of legal norms, including administrative procedures, especially in relation to uncertain legal concepts. While agreeing in general with the urgency of the problem of combating corruption, we believe it necessary to adjust the density of judicial control, by analogy with the German experience, on the one hand, concerning the forms of discretion, and on the other – concerning spheres of regulated relations.

Concerning the forms: we should limit judicial control over the procedures and acts of implementation discretion in the narrow sense (as the performance of certain actions within the competence) and strengthen it in relation to uncertain legal concepts. At that, in the latter case, accents should be moved from the normative control over individual acts.

Concerning the spheres of public relations, it seems advisable to perceive Western approaches that minimize external control over administrative acts adopted on the issues of examinations, planning, political issues, rights providing activity (such as social security, etc.). However, we should consider a gradual decrease of restrictions in the case of verification of administrative procedures and administrative acts of these groups on the subject of corruption. If the Russian doctrine and judicial practice will be able to develop relatively effective mechanisms for action of such direction of proportionality, it would be the Russian contribution to the international experience of judicial control.

The issues of evolution in Russia of density of judicial control over the discretionary acts and procedures are closely related to the problem of development of the grounds for their reconsideration. The above parsed phenomenon of the legislation on combating corruption is in itself confirmed the consolidation in the Russian legal reality of another relevant European trend – extension of the content of legality, the mimicry of other requirements (principles) of law under it. We think it would not be an exaggeration to claim that the recognizing a norm as corruptive says not so much about its illegality (since "anti-corruption norms" are largely devoid of a particular content), but much about its inappropriateness.

Complication of forms of managerial actions has strengthened the tendency of "blurring" the legality. To illustrate this thesis we take one of the most painful themes for the modern Russian society – the problem of public procurement regulation. We should immediately mention that: contracts concluded by public authorities to ensure state needs are not administrative acts. However, even if to deny their

nature of administrative contracts, they absolutely cannot be denied the status of private-legal forms of public management. In addition, conclusion of government contracts forms a complex set of legal facts in the unity with administrative acts. Therefore, a brief analysis of judicial control over the procedures of their conclusion will not be a deviation from the stated topic.

From the very beginning of introduction procedures for conclusion government contracts public opinion gets ample food for discussion, in the first place concerning the validity of procurements. Multimillion sums of repairs of officials' offices (with the cost of toilet brushes from 12 thousand rubles and above), purchase of medical equipment at prices that are multiply higher than average market price, purchase of absolutely necessary in daily administrative work things like a bed made of cherry, decorated with hand-carved and with headboard and footboard covered by a layer of gold 24 carat, Swiss gold watches with rubies, caskets decorated with fish skin, finally, carnival costumes of snowflakes, firebird, witches and sailors [13] – all of this cannot but raise questions. Immediately note: such powers were initially considered not simply as discretionary ones, but as taken out of the scope of judicial control. New Federal Law No. 44-FL from April 05, 2013 "On Contractual System in the Field of Central and Local Government Procurement of Goods, Works and Services" [2] among the novelties established, including, such a requirement as *substantiation of procurements* (article 18). However, having made a very important step for the "legalization" of reasonability as a property of legal form of management, the legislator has evaded a logically deriving next step. In accordance with articles 18 and 99 of the Law, verification of substantiation of procurement (and recognition them unfounded) is implemented in out of court procedure. Thus, following the literal interpretation of the Law, even the most ridiculous public procurements cannot be challenged in court because of their evident groundlessness. It is very difficult to accept such a position. We think it would be very useful to apply the British experience of evaluation managerial actions forms under the test of Wednesbury for their reasonableness. At that, the legal possibilities for such a precedent in Russia are very great; it's not just about the institutionalization of substantiation, but also about the anti-corruption legislation in general. Moreover, the test for reasonableness, seems, should be extended to all administrative procedures, administrative acts and other legal form concerning the issues of disposal of state property (except for "political" kind of interbudgetary relations).

So, constant complication managerial activity has thrown a famous challenge to administrative law in different countries. The main point of this challenge is that

even the "tightest" regulation of public administration through many administrative procedures does not allow us to sneak in some hidden sphere called administrative discretion. If we base on the classic dogmatics, such administrative acts and procedures should not be checked by the courts (after all, the courts are empowered only to identify obvious legal defects of legality). But such "precautionary" approach already is not enough for modern society. Today, for powerless subjects is important to have additional legal instruments (primarily judicial protection) from the obviously erroneous, unreasonable, irrational decisions. Learned Western legal orders try to differently resolve this problem. But here all of them follow the path of not so much adjustments to the legislation, but of elaboration of scientific doctrines and "mobile" judicial practices. The latter increasingly appeal to such principles of law as reasonableness, feasibility, justice (often masked as the legality). The direct tool for their application is most often the principle of proportionality.

Much of this can be useful for Russia. At that, the domestic experience with all its uncertain empirism conducts pretty interesting experiments (adapting, for example, the principle of proportionality for the purpose of combating corruption). Started searches and discussions will not end next few years (maybe decades), thus forming a new look of judicial control over public administration, and it means of forms of managerial actions with the procedures of their development, approval and implementation.

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