

УДК 34.01

## **Discretion in Law: Human-Centric Approach**

**Alexey S. Skudarnov\***

*Siberian Federal University*

*79 Svobodny, Krasnoyarsk, 660041 Russia<sup>1</sup>*

Received 2.03.2011, received in revised form 8.06.2011, accepted 18.11.2011

---

*The article is devoted to the analysis of the discretion in law category. The article attempts to formulate a concept of discretion in law from the positions of the human-centric approach to the law understanding as well as to single out its basic signs.*

*Keywords: discretion, discretion in law, natural-positive law, human-centric approach to law understanding.*

---

The issue on discretion in law is rather complicated and debatable. Its complexity is stipulated first of all by a many-sided nature of the concept of law per se, and debatability is caused by the absence of unity in approaches to understanding legal nature of a “discretion in law” category.

For a long time the discretion problem has been a subject for criticism in the scientific world. Thus, Charles-Louis Montesquieu pointed out complexities arising in the process of law enforcement, and insisted on a mode of strict legality. “Judges of the people ... are no more than the lips saying words of the law, lifeless beings which can neither moderate force of the law nor soften its severity ... Nature of the republican government demands the judge not to recede from the letter of the law”. The major argument in favour of the principle of legality and against law application at discretion is uniformity in protection of citizens. The

philosopher highlighted that today the court “should operate the way it did yesterday in order citizens’ property and life to be so strongly secured as the state system itself. Invariability must reign in sentences so that they always are the exact application of the text of the law” (Montesquieu, 1955). Despite it, under M.V. Baglay’s fair remark, “discretion used to exist at that time but it has come in special demand now” (Baglay, 1999).

The Russian Dictionary under A.P. Evgenyeva’s edition defines ‘discretion’ as a conclusion, opinion, decision (Evgenyeva, 1999). To perceive is to come to a conclusion about availability of something, to recognize it as existing etc. Under V. Dal’s explanatory dictionary ‘to perceive’, ‘to discover’ is interpreted as ‘to see, to open, to distinguish and to plan’ (Dal, 1994). Short linguistic excursus gives the basis to ascertain the following: the term ‘discretion’ means ‘opinion’, ‘decision’ or ‘conclusion’,

---

\* Corresponding author E-mail address: aleksey\_s.86@mail.ru

<sup>1</sup> © Siberian Federal University. All rights reserved

while ‘to perceive’ means ‘to come to a certain conclusion’.

Research on the specified phenomenon is deemed more correct to begin with the law understanding issue clarification, in the framework of which it will be considered further.

The state-centric approach to law understanding prevailed in the Russian legal thought for a long time. It emphasized the regulatory school of law, to be more specific, its most rigid version. Law under such interpretation is perceived as a given one, as the scope of norms, external in relation to the individual system of rules, aimed at the guiding behaviour.

In addition, such law understanding matched the developed idea about a legal norm as of a general, ‘typical’ behaviour pattern, according to which the subject of law shall operate, while no deviation from this rule is admissible. Law enforcing normative -regulatory means were not a basic element of law organisation. ‘Normative’ means fixing all-obligatory character of law as well as proper behaviour prevailing in its structure.

It is well-known, that there is quite a lot of legal positivism or positive law definitions both in Russian and foreign literature. Firstly, positive law is defined precisely as “a sovereign’s orders, addressed to a person or persons who are submitted to him” (Harris et al., 1832). Secondly, it is simply defined as positive, official law, “issued first of all by the state bodies under the established order and fixed in regulatory legal acts in an appropriate way thereunder” (Uporov and others, 2000). Thirdly, positive law is considered as “a real, existing in laws and other documents, actually tangible, (and consequently -”positive (“) normative regulator on the basis of which legally inadmissible definition is made and legally binding, imperatively authoritative decisions are passed by courts and other state bodies (Alexeev,1997).

To satisfy the present research goals it is necessary to dwell on those signs of a positive law which require considering the possibility of discretion under the given definition of law.

Firstly, it is imperative (in the broad meaning of the word) character of a positive law. One of the initial positive law postulates in different variations (democratic, authoritative, liberal and totalitarian) was and frequently remains within a semiveiled ‘civilised’ way, thus, supporting J. Austin’s thesis about law as “a sovereign’s orders” in the name of the state, the monarch or “other sovereign institution acting in the form of the supreme political institution (as supreme political superiors)” (Austin, 1832). These rules – orders – are perceived by various state bodies and primarily by courts as official standards, certain samples according to which justice must be administered and “in the framework of which all their behavior shall fall” (Dias, 1995).

Secondly, it is a formal-legal character of positive law. It finds its concrete expression in the most various forms (Hart, 1994). However, the main thing here is that priority in the positive law is given not to a social side in the form of the essence, content and social purpose but its formal-legal side. Those applying law following in the footsteps of the legislator, in France, Italy, Russia or any other country where in an invariable or modernized way traditions of positive law are preserved, are of the least interest in social, substantial aspects of law. Formal-legal and more often technical-legal aspects entirely replace and supersede them in the consciousness and actions of those applying law.

Under the given definition of law, possibility to act at discretion, independently, choosing a certain alternative of behaviour to satisfy own requirements, is considerably limited. The main thing for a person is to obey detailed imperious commands, orders without thinking them over, while the task of the legislator is to limit

discretion possibility, establishing discrete rules of behaviour and providing their execution by possibility of the state compulsion. Moreover, herein the discretion problem is represented as a derivative of legality. Authors especially emphasised that in the sphere of law application considered by them, the decision choice must be bound by the bounds of another sort, i.e. the purpose which is either stated by the legislator, or follows from the sense of the law.

The Perestroika transition period in the USSR, and then liberalization of a social and economic, political life in Russia radically changed the content and directions of a legal thought. Doctrines about a lawful state a civil society, human rights came in demand. Search for new approaches to studying law allowing to connect all known legal theories advantages together has become especially timely.

At a certain distinction of the offered criteria, the general conciliating author's positions is to include the concept of law, a human being, their rights and freedoms in the orbit of the issue. The problem first of all is to find the approach to law, where its philosophical understanding must be completely focused on a human. G.V. Maltsev writes, "I hope that under new understanding, the primordial sense of law making a way in its historical development, contrary to all obstacles and arbitrariness, provision and protection of human freedom, definition of its possibilities, borders and guarantees will be expressed" (Maltsev, 1990).

From the positions of the human-centric definition of law, the essence of law is stipulated by a human's nature, their need for freedom, and self-determination. Freedom, in its turn, is expressed in the rights and freedoms. Therefore, the core deep issue in law is rights and freedoms of a person (Shafirov, 2004). Law is impossible without rights of a person, as well as law without and out of law. It allows to speak about law as

of characteristic of a person; to single out a legal side of a person which content is made by rights and freedoms.

In other words, in comparison with the state-centric approach, the system of normative-regulatory means is being formed. Law as a normative regulation is not reduced to norms or to their system. The legal norm is one of its displays, one of holders of the major characteristics of law. Therefore, in cases when the issue is a direct normative regulation over the entire complex of normative regulatory tools (principles, purposes, problems, definitions, norms, etc.) shall be associated with it acting as the internal form of expression of law as a common measure of freedom and justice. Orientation to norms only, that is to the phenomena of the most subjected to updatings, changes by lawmaking subjects, will inevitably lead to incorrect perception of the ideas fixed in law, as well as values, provisions, permissions and prohibitions, and as a result to a wrong, erroneous decision limiting discretion of a person and often impossible at all. The main thing that unites all variety of regulatory means from the point of human-centric approach to law is "a person's and a citizen's possibility to fulfill independent at their discretion actions fixed by these regulatory means of law" (Shafirov, 2004).

Having regarded a person and a citizen as of paramount importance, the law from the positions of human-centric approach does not prescribe the order and enforcements, but contains rights, possibilities for an independent, initiative and creative behaviour. Hence, it is not occasional that quintessence of the natural-positive law, as it has been noted above is expressed in the formula: "It is possible to do everything, that it is not forbidden by the law" (Shafirov, 2004). In other words, outside the accurately outlined circle of the forbidden, an individual is free in their choice and action.

There exist a lot of different definitions of 'discretion' concept in legal literature.

According to R. Krauthausen "free 'discretion' means legal actions committed in the course of a personal responsibility and according to understanding of norm of law by the law empowering a person to fulfill aims laid down by the law" (Krauthausen, 1955).

K. Devis highlights: "The official of the state obtains discretion in that case when the power execution limits give him freedom in choosing behaviour, proceeding from possible options of actions and inaction" (Davis, 1969).

A.P. Korenev considers discretion to be "a certain degree of freedom of a body as defined by legislation within a legal solution of a specific case, granted to take optimum decision on the case" (Korenev, 1978). J.P. Solovey shares the same point of view: "discretion is urged to facilitate taking an optimum decision, i.e. providing for achieving the goals established by law at most" (Solovey, 1982).

O.A. Papkova considers discretion to be a specific kind of a law enforcing activity adjusted by the law norms, executed in the procedure the essence of which is to grant power to individually resolve a disputable legal issue on the basis of law norms in certain cases, proceeding the goals pursued by the legislator, principles of law and other general provisions of the law, concrete circumstances of the case as well as from the commencement of rationality, conscientiousness, justice and moral bases (Papkova, 1997).

A. Barrack offered the following definition of the phenomenon in question "discretion is the authority given to the person possessing power to choose between two or more alternatives, where each of the alternatives is lawful" (Barrack, 1999).

According to J.A. Tikhomirov, discretion is a motivated choice to take lawful decisions and perform actions by a law empowered subject

within the limits of its competence to perform the tasks in view (Tikhomirov, 2000).

Analysis of the given definitions shows that the majority of authors are inclined to see an official or a law enforcing body vested with state-powerful authorities within its competence to be a subject vested with possibility to operate at discretion. In addition, the authors specify that activity at discretion has purposeful character and is mainly contained in law norms.

However, opinions concerning legal nature of the given phenomenon are different. Some authors understand discretion as a certain degree of freedom in actions of those who apply law, others as authority given to them to decide upon a certain issue.

From positions of the human-centric understanding it is deemed to be feasible to single out the following features distinguishing a 'discretion':

1. It is implemented by any capable subjects of law. The possibility of citizens to operate at own discretion in the legal space is not always admitted. Moreover, some authors especially emphasized that availability of authoritative powers is an obligatory condition of investment with the right to discretion (Sharnina, 2008).

However, in our opinion, the similar approach is hardly grounded. So, the use of right is the form of the right implementation when subjects at own discretion and wish use the rights and possibilities given to them, as well as satisfy legitimate interests. As scientists highlight, 'using' the right is based on the initiative of the subject, its discretion; in other words, action of the mechanism of legal regulation per se depends here on the will of the subjective right holder (Shafirov, 1982).

Thus, the possibility to operate at own discretion belongs not only to public authorities in the process of law enforcement, but also to citizens while implementing their rights and freedoms.

Thus, it is important to notice, that in the course of enjoying their right, a citizen implements discretion twice. The first time is when they choose the subjective right which allows to satisfy their interest to the greatest possible extent, and the second time is at implementing the selected right.

2. It is carried out through an authorized normative-regulatory means system. Direct rights and freedoms operation of a person is a universally recognized fact. However, the given fact recognition should not shadow, deminish own potentialities of a positive law. The majority of a person's and citizen's rights and freedoms are fixed in the positive law comprising its content. Therefore, it is not required to leave the boundaries of positive legal field to decide a predominant part of important issues. After the positive law being added with a natural one, their mutual close overlapping, the centre of gravity in the legal regulation moved from the establishment of what is due to the establishment of what is allowed. It has essentially increased the value of those rules of behaviour which without any order or prescription are capable of being effective, expedient, valuable landmarks for individuals' free choice and active actions at their own discretion. The whole complex of normative-regulatory means fixed by the objective law, i.e. permissions, is softly, without any pressure, directing a person's free choice and active behaviour in the modern jurisprudence. It is these permissions that are the source of discretion for subjects of law.

The structure of normative-regulatory means of permissions is made by subsystems of normative generalizations and authorizing norms.

Goals, tasks, legal principles, legal definitions, legal fictions and so on and so forth are referred to normative generalizations.

Possibilities put in them give the widest scope for a personal discretion, initiative; creativity for legislative regulation of behaviour is extremely restrained and is mainly reduced only to the generalising, compressed formulations.

Authorising norms are notable for a bigger concreteness of rights and freedoms content wordings. It does not exclude, but assumes self-determination, self-regulation of the person. Alternative, situational norms should be referred to norms-permissions.

All-allowed type of legal regulation opening the scope for a free choice and vigorous activity, promoting (or at least not interfering with) initiative, independence in these or those tasks solution is based on an allowed normative-regulatory means system.

It is emphasized in literature that the principle that everything is permitted except that is directly forbidden, does not match activity regulation in the sphere of law enforcement where an allowing order and identification of the exclusive competence of the administration must be applied. The exhaustive list of its rights and duties where "only that is allowed that is directly authorised by law" is a principle creating strictly lawful basis for public power bodies' discretion (Alexeev, 1987; Matuzov, 1999).

In our opinion, granting freedom to public authorities can be one of the means to achieve the main goal of law, i.e. protection of a person and creation of conditions for realization of rights and freedoms belonging to them, a guarantee of inadmissibility of unlawful decisions taking, a way of strengthening legality and law order.

So, the American model of precedent specifies admissibility of American courts 'evasion' from "even the clearest statute text if strict compliance with it and, accordingly, direct application of the given statute can lead to an absurd result" in the process of law application. (Manning, 2003).

Similar “deviation from the text, and actually partially from the sense of the law, authorised by the Supreme court of the USA more than a century ago and resulted subsequently into a so-called “the absurdity doctrine” (The Absurdity Doctrine), despite sharp criticism is still vigorous and meaningful. (Sunstein, 1995).

As an example, it is possible to refer to 1998 precedent-related court decision on “Clinton vs. New York” where the court hearing the case refused to follow the New York state law directly connected with the case in question (The Line Item Veto Act) in that part of it, where it contradicted with the Federal legislation, since the terms ‘individual’ and ‘the individual’ cover not only natural persons but various trading and other firms and associations (Clinton vs. New York, 1998). Court’s refusal in this case, to strictly follow the text, but not the sense of the law is explained and is legally justified by the fact that following an “absurd” text, from the point of view of the conventional terminology and common sense, will inevitably lead to “absurd” result from the legal point of view<sup>1</sup> (Manning, 2003).

Thus, the greatest possibilities for the subject of law to act at discretion, at choice of means and ways to satisfy own needs are given under an all-allowed type of legal regulation in the presence of the functioning system of authorizing normatively-regulatory means.

3. Has a purposeful character. The Big Explanatory Russian Dictionary defines ‘aim’ as “something that is aspired and is wished to be reached”. Activity at discretion cannot be aimless, it is always important to realize precisely, for the sake of what it is achieved.

Proceeding from a systemic interpretation of some provisions of the Russian Federation Constitution, a person and their rights and freedoms are required to understand the main

goal of law (Shafirov, 2004). The given goal predetermines the sense and content of the activity at discretion – protection of rights, freedoms and legitimate interests of a person, granting possibility and creating favorable conditions for rights and freedoms implementation.

4. Has an intellectual-strong-willed character. Analysing discretion in law institution, it is necessary to take into account that it mainly concerns the subjective (psychological) element of a lawful behaviour. Discretion contains intellectual and strong-willed aspects. Intellectual element of discretion is characterised by the fact that the subject, proceeding from the analysis of the rule of behaviour and certain life circumstances, realizes the possibility of choosing certain ways of behaviour given by the law to achieve a goal, and also foresees possible consequences which can happen. The strong-willed element is expressed in the desire to act according to the accepted decision and readiness to make necessary efforts for this goal.

5. It is revealed at every stage of a legal regulation (discretion is at a normative basis construction when the legislator designs rules of law and normative generalizations at own discretion; at legal relation occurrence when the subject of law per se defines whether to enter the legal relation or not, defines its content at own discretion; at realization of subjective rights when an authorized person carries out simultaneously all or randomly chosen legal powers arisen within the limits of certain legal relation).

Thus, it is possible to define the discretion in law as an implemented through allowed normatively-regulatory means creative, reasonable, strong-willed and lawful activity of a capable person aimed at the fullest and effective implementation of the person’s rights and freedoms.

<sup>1</sup> Probably, having applied the judicial discretion, proceeding from legislative purposes, the court would have managed to avoid an absurd situation described in the Russian newspaper on 18.03.2008 when according to the judgement the parent supporting the child, had appeared to be obliged to pay the alimony on his support to the other parent only because when filing the claim on definition of the child's residence at his mother residence the latter did not include the requirement on her release from the alimony payment for the child's support in a subject matter of the claim (Shafirov, 2009).

### References

S.S.Alekseev, Legal philosophy. History and the present. Problems. Tendencies. Prospects, (M, 1997), 28.

M.V.Baglay, Introductory article to A.Barrak's "The Judicial discretion", trans. from English, 1999.

A.Barrak, the Judicial discretion, (M, 1999), 13.

V.Dal, the Explanatory dictionary of the live great Russian language, (M, 1994), 896.

A. P.Evgenyeva, Russian Dictionary: in 4 v. V. 4, (M, 1999), 520.

A. P.Korenev, Norms of administrative law and their application, (M, 1978), 73 – 74.

G.V.Maltsev, "Law, freedom, democracy: materials of "the round table",. *Philosophy Issues*, 6 (1990), 17.

M.N.Marchenko, Judicial precedent: a variety of concepts and variety of forms of, manifestation *The Russian Law Journal*, 6 (2006).

N.I.Matuzov, Once again about a principle "not forbidden the law permits", *Jurisprudence*, 3 (1999)

S.-L. Montesquieu, On spirit of laws, (M, 1955), 222, 292.

O.A.Papkova, "Concept of judicial discretion", *The Russian Law Journal*, 12 (1997), 107.

J. P.Solovey, Discretion in administrative activity of the Soviet militia: Author's thesis. cand... legal science. Sciences, (M, 1982), 15.

J.A.Tikhomirov, "Administrative discretion and law", *The Russian Law Journal*, 4 (2000), 72.

I. V.Uporov, B.A.Skhatum, Natural and a positive law: concept, history, tendencies and development prospects (Krasnodar, 2000), 34.

L.A.Sharnina, "Concept of political discretion", *The Constitutional and municipal law*, 5 (2008).

V.M.Shafirov Legal activity of the Soviet citizens (Krasnoyarsk: Publishing house KGU, 1982).

V.M.Shafirov, "Natural-positive law: introduction to theory", (Krasnoyarsk, 2004), 87.

V.M.Shafirov, Establishment of the legislation sense and analogy of law, *the Russian justice*, 8 (2009).

V. New York, 524 U.S. 417 (1998).

R. Dias *Jurisprudence*, (L., 1995), 47.

K Davis, *Discretionary Justice* (1969).

H. Hart, *The Concept of Law*, (N. Y. 1994).

J. Harris, J. Austin, *The Province of Jurisprudence Determined*, (L., 1832), 134 – 135.

R. Krauthausen, *Ermessen und unbestimmter Rechtsbegriff*, (1955), 10.

J. Manning, *The Absurdity Doctrine*, *Harvard Law Review*, 8 (2003), 2388.

C. Sunstein, *Problems with Rules*, *California Law Review*, 83 (1995), 953 – 986.

**Усмотрение в праве:  
человекоцентристский подход**

**А.С. Скударнов**  
*Сибирский федеральный университет  
Россия 660041, Красноярск, Свободный, 79*

---

*Статья посвящена анализу категории усмотрения в праве. В статье сделана попытка сформулировать понятие усмотрения в праве с позиций человекоцентристского подхода к правопониманию и выделить его основные признаки.*

*Ключевые слова: усмотрение, усмотрение в праве, естественно-позитивное право, человекоцентристский подход к правопониманию.*

---