Original article
UDC 342.98
doi: 10.46741/2686-9764.2023.62.2.009

Administrative Discretion in Activities of the Federal Penitentiary Service: Theoretical and Doctrinal Interpretation

SERGEI A. STAROSTIN
Kutafin Moscow State Law University (MSAL), Moscow, Russia
Vologda Institute of Law and Economics of the Federal Penitentiary Service, Vologda, Russia
SASTAROSTIN@msal.ru, https://orcid.org/0000-0002-0108-7916

Abstract

Introduction: the article is devoted to the study of issues related to the development and formation of the administrative discretion doctrine in Russian legal science, legislative regulation of administrative discretion and discretionary powers of subjects of public administration. *Purpose*: to present a theoretical and doctrinal interpretation of administrative discretion with regard to the specifics of activities of the Federal Penitentiary Service. *Methods*: our research is based on the dialectical method of scientific cognition. The article uses general scientific (analysis, synthesis, induction, etc.), private scientific and special methods of cognition (comparative legal, formal legal). *Results*: a general characteristic of concepts, such as administrative discretion, discretion in law and discretion (discretionary powers), is presented and logical connections between the content of these concepts in terms of their doctrinal understanding are considered. Problems of implementing administrative discretion in practice are studied. The dualism of administrative discretion in the penal system in terms of the implementation of anti-corruption measures in the field of execution of criminal penalties is revealed. *Conclusion*: based on the study of domestic and foreign experience, possible prospects for developing the institution of administrative discretion in the activities of public administration, including in the Federal Penitentiary Service of Russia, are indicated. The intersectoral nature of administrative discretion is emphasized. The issue of the modern role of administrative discretion in activities of the Federal Penitentiary Service of Russia, taking into account the specifics of the sphere of legal realization, is revealed.

Keywords: administrative discretion; discretion; discretionary powers; penal system; Federal Penitentiary Service of Russia; public administration.

5.1.2. Public law (state law) sciences

For citation: Starostin S.A. Administrative discretion in activities of the Federal Penitentiary Service: theoretical and doctrinal interpretation. *Penitentiary Science*, 2023, vol. 17, no. 2 (62), pp. 196–202. doi: 10.46741/2686-9764.2023.62.2.009.

Introduction

Nowadays, there is no unified approach to administrative discretion either in domestic legal science or legislative activity. This circumstance substantiates the necessity to consider this doctrine, which, according to many scientists, "is in its infancy and basically boils down to a somewhat confused statement of its ex-

istence, as well as laconic remarks about the need to restrict it by law" [1].

The quote we presented is taken from an article prepared by K.V. Davydov in 2017. The author of the paper refers to the works of 8 Russian researchers, written in the period from 1968 to 2014. We believe that the selection of works conducted by K.V. Davydov is not representative and unjustifiably random. So, the scientist refers to I.S. Samoshchenko, A.P. Korenev, A.N. Zherebtsov and some others, but "forgets" about V.N. Dubovitskii, Yu.A. Tikhomirov, Yu.N. Starilov, Yu.P. Solovei, O.N. Sherstoboev, P.P. Serkov, O.V. Korablina, T.G. Slyusareva, A.V. Girvits and many other reputable scientists.

It seems that the ideas of 8 researchers mentioned in the article, with all due respect to each of them, hardly reflect the full richness of the palette of views on administrative discretion, which is already available to the domestic administrative and legal science. However, K.V. Davydov writes "et al" at the end of the footnote, thus alluding to some other scientists working on the issue, including those we have highlighted.

When analyzing the article by K.V. Davydov, we cannot but note that he refers to the article "Discretion, Arbitrariness, Persuasion: Linguistic, Doctrinal and Legislative Approaches", prepared by by S.G. Shevtsov and published in the Eurasian Law Journal. S.G. Shevtsov comes to a conclusion that "the question of the correlation of legal categories of discretion and arbitrariness has not yet been unambiguously resolved" [2, p. 50].

In its own way, K.V. Davydov's reference to the article "The Principle of Expediency in the Activities of Executive Authorities" written by a student of the Saratov State Law Academy A.S. Cheremisina, published in the journal "Administrative Law and Procedure" and occupying only two journal pages [3] is also interesting. Without detracting from the student's ability to express her position on a complex and debatable issue, we will only note that in this article there are no indications of the lack of the administrative discretion doctrine formation. But the reason lies in another: the article is devoted to a completely different issue.

It is worth mentioning that K.V. Davydov's ideas were seriously criticized by Yu.P. Solovei, noting that the issue stated hangs in the air, is not disclosed in detail, not sufficiently proved, and not compared with other researchers' point of view. Undoubtedly, one can argue with such a statement, but the disputing person turns out to be in a more unfavorable, a priori losing position, since the author of this statement can always state that in fact he meant something completely different than what has just been refuted.

Based on the above, it should be stated that at the present time, various views on the legal nature of administrative discretion and its importance in public administration have been formed in the scientific community.

Research methods

Our research is based on the dialectical method of scientific cognition. General scientific methods of cognition, special methods of legal science and individual methods of social sciences were applied when writing the article.

General scientific methods used in the work include the following: induction and deduction, comparison and analogy, synthesis and generalization, statistics and system analysis. To solve the research tasks, private scientific methods in the field of jurisprudence, such as comparative legal and normative logical, were widely used. Some problems were considered as intersectoral, existing at the junction of branches of law, which was due to the tasks of a comprehensive analysis of relations within the framework of the topic under analysis.

Discussion

Discretion, in general, and administrative discretion, in particular, are interdisciplinary (interscientific) categories, so they should be freed from semantic and meaningful "layers" of other sciences. It is always necessary to be aware of how significant the mistake in choosing a particular decision or behavior can be. We will consider the importance of this statement for the Federal Penitentiary Service as well.

A legal researcher should clearly understand that the same institution can simultaneously be legal, social, economic, philosophical, ethical, etc., however, he/she can use only legal tools in the study. Accordingly, not to study the psychological side of the issue with the help of the formal dogmatic method, it is necessary first to "separate the wheat from the chaff", that is to separate psychological and legal aspects of the debated problem. The above fully applies

to other social sciences and humanities, whose representatives demonstrate a scientific interest in the exercise of discretionary powers.

To clarify the nature of administrative discretion, it would be obviously insufficient to simply demonstrate which its aspects are the subject of legal study and which are the subject of other sciences (philosophy, economics, sociology, history, etc.). It is equally important to answer an elementary, at first glance, question: which branch of legal knowledge (both fundamental, sectoral, and applied) administrative discretion belongs to? Does it belong only to administrative law and administrative process or, perhaps, to public law in general? And even at this stage of the discussion of the topic raised, a serious foundation for scientific discussion is formed.

On the one hand, representatives of some branches of legal science unequivocally classify everything related to the exercise of discretionary powers by executive authorities and their officials as their "patrimony". For example, L.A. Sharnina in her doctoral dissertation notes that "in constitutional law, along with a special constitutional discretion inherent only to it, there are traditionally distinguished types of discretion – judicial and administrative" [4, p. 123].

This stance is unusual, but even more unusual is the stating intonation of the sentence, which is further enhanced by the use of the adverb "traditionally". At the same time, the author does not make references to works with the corresponding concept, which gives grounds to imply that this concept has long been a common issue of constitutional and legal science.

This year we will celebrate the 30th anniversary of the Constitution of the Russian Federation. It can be firmly argued that the largest constitutionalization of public relations in Russian history has taken place since 1993. So, it would probably be accurate to say that all domestic legal and somehow related institutions have long had either direct or indirect constitutional content. However, it does not follow from this that, for example, fiduciary transactions or murder for hire fall within the subject area of constitutional law.

In Russian legal literature, there is another categorical approach that also attracts attention: when a branch scientist declares that in his/her branch of law there cannot be (should not be) administrative discretion by definition.

Thus, a representative of one of the schools of financial law O.N. Gorbunova writes that "it is impossible to regulate financial activities of the state with the help of administrative law norms in any case", because "discretion and voluntarism will immediately appear in such regulation", and in financial law "every norm ... is based on its economic content which is objective and does not depend on the will of people" [5, p. 87]. This point of view has a very rational argumentation, but still we cannot but object to O.N. Gorbunova: what about financial planning in this case, whether there is no room for discretion in it?

To sum up the stated above, we can conclude the following.

First, Russian researchers have tried to differentiate various components of administrative discretion, such as philosophical, economic, ethical, etc., leaving in it only those elements that are directly or indirectly related to law. It should be emphasized that this work is not finished at the moment, but it was not started yesterday either.

Second, not only representatives of administrative and legal, but also constitutional and legal, financial and legal and other branch sciences have certain views on administrative discretion. In addition, discretion is considered in fundamental studies of legal theorists, which we do not focus on [6]. Thus, for the time being, Russian legal science demonstrates not confusion in front of a problematic category, but ontological and methodological confidence, sometimes reaching extremes.

The next natural step for the formation of the administrative discretion doctrine is to differentiate this type of discretion from its other types. In order to understand, for example, how to exercise control over activities of judicial and executive authorities, it is very important to determine (both theoretically and practically) similarities and differences between administrative discretion and judicial one. Undoubtedly, both types have been considered by Russian legal scholars [7–9], but judicial discretion in more detail.

So, the following conclusion suggests itself: there is no unified Russian doctrine of administrative discretion due to a great number of them. Some authors (for example, Yu.P. Solovei) can claim that specific doctrines are as-

sociated exclusively with their name. And these doctrines are not "in their infancy", but at that wonderful age when they can successfully fight for a place in the sun.

When discussing this issue, we cannot but recognize the fact that all the issues discussed earlier are largely trivial in nature, since administrative discretion was studied in the Russian Empire, then in the Soviet Union and finally in post-Soviet Russia. Taking into account the traditionally high level of domestic jurisprudence and Russian lawyers, it is strange to even assume that during this gigantic period of time, our legal thought has not developed any ideas on the debated problem at all. Of course, this thesis does not correspond to objective reality, and we have briefly demonstrated the reasons.

Concluding a brief analysis of the doctrine of administrative discretion, we briefly note another equally important aspect of the problem – the problem of implementing administrative discretion in practice. Let us take, for example, emergency administrative and legal regimes.

So, in March 2020, in order to prevent the spread of a new coronavirus infection (COVID-19), a high-alert regime was introduced in Moscow, the Moscow Oblast, as well as in regions of the Far East, Siberia, the Urals, and the Volga Oblast. Could the authorities introduce any other regime, for example, an emergency regime? Undoubtedly, they could. What was the reason for introducing the high-alert regime, and not another one? There is no answer.

We believe that it is not worth looking for any conspiracy reasons for this, since they can be explained by the authors' incompetence or ignorance. In the examples given, we are dealing with administrative discretion expressed in a managerial discretionary decision, the motives of which are still hidden from the general public. Why is this important? Because every emergency administrative and legal regime restricts the rights, freedoms and legitimate interests of a significant number of Russian citizens.

Researchers believe that motives of each discretionary decision should be made public sooner or later (better sooner than later), but in practice this does not always happen. The task of science in this situation is not to open any new horizons, but to offer real legal guarantees to ensure the rights of the population when public authorities exercise their discretionary powers. The decision-maker should clearly understand legal consequences of a decision, anticipate possible mistakes and understand the extent of his responsibility.

Let us turn to the example of the application of administrative discretion in activities of the Federal Penitentiary Service. The identified problem has already been raised earlier, so we will briefly focus on some most significant works. First of all, it is necessary to mention the article by P.V. Golodov, "Administrative Discretion in the Management Practice of Institutions and Bodies of the Penal System" [10]. This article contains interesting theses related to the exercise of discretionary powers by institutions and bodies of the Russian penal system. At the same time, another article "Law Enforcement Risk in the Management Practice of Institutions and Bodies of the Penal System" by P.V. Golodov devoted to the issues under consideration is also of great interest [11].

A certain contribution to the problem is also found in the article by E.V. Naumov "Administrative discretion as a corruption determinant at execution of punishments" [12]. There are other works, but we will not dwell on them separately. Let us just note that, in our opinion, these works are clearly insufficient compared to the scale of corruption both in our country as a whole and in the penal system in particular [13].

Indeed, there is a common and, in general, fair opinion in the administrative discretion doctrine that administrative discretion is one of the main sources of administrative arbitrariness and corruption. However, discretionary powers allow executive authorities and their officials to respond to threats arising in their activities as flexibly and promptly as possible. So, discretion is a general legal phenomenon. In view of the above, we cannot but refer to E. Schmidt-Assman, who presents discretion as "administrative weighing of correctness criteria while observing the purpose of the law" [14, pp. 205–207].

From the ontological point of view, this is the dualism of administrative discretion [15], especially characteristic of the penal system: its implementation can lead to both positive and negative consequences. In addition, the same action performed within the framework of administrative discretion can generate both minor negative and significant positive results, and vice versa.

In the articles written by P.V. Golodov, this idea seems to be recognized, but somehow implicitly, between the lines, while in our opinion, it is the main doctrinal prerequisite for any reasoning about the discretion of executive authorities, and even more so about the discretion of officials of institutions and bodies of the penitentiary system, who often have to act in extreme conditions.

Scientists and practitioners should understand that in some cases it is impossible to fulfill one duty without violating another, or to protect one right without breaching another. Therefore, the main task of a law enforcement officer in such situations is to first weigh risks, and only then make a decision.

It is enough to pay attention to how often decisions taken by public authorities in the conditions of COVID-19 went beyond the legal framework, violated the constitutionally established rights and freedoms of citizens (introduction of high-alert regimes, establishment of administrative responsibility with the help of technical means of fixation, etc.). At the same time, we observed positive consequences of the decisions taken. We dare assume that they allowed us to cope relatively easily with consequences of the spread of COVID-19 and to prevent mass deaths of people for this reason?

It is well-known that the essence of criminal liability lies in the obligation of the guilty person to undergo certain hardships for committing a criminal act. In turn, bodies and institutions of the penal system are called upon to ensure the implementation of criminal liability, thereby limiting the rights and freedoms of convicts. The decision-making process in the field of public administration is always focused on making the most optimal decision to achieve the goal, taking into account available resources and limitations. In the executive authorities of a positive orientation, discretion is mainly expressed in finding the best solution, while in the system of the Federal Penitentiary Service – in choosing the least worst solution. This is the fundamental difference between the "ordinary" administrative discretion and "penal" discretion, which, unfortunately, has not been paid attention to until now.

In particular, in 2020, the Chief State Sanitary Doctor of the Federal Penitentiary Service introduced a temporary ban on long and short-term visits to convicts (the Resolution of the Chief State Sanitary Doctor of the Federal Penitentiary Service No. 15 of March 16, 2020 "On the introduction of additional sanitary and anti-epidemic (preventive) measures, aimed at preventing the emergence and spread of a new coronavirus infection (COVID-19)"; Order of the Federal Penitentiary Service No. 196 of March 19, 2020 "On urgent measures to prevent the spread of coronavirus infection (COVID-19) in the Federal Penitentiary Service"). The establishment of this type of restrictive measures was dictated by the sanitary and epidemiological situation not only in the Russian Federation, but also in the world, caused by the COVID-19 pandemic, and urgent measures to prevent the spread of coronavirus infection [16, p. 113]. At the same time, the quarantine measures taken in the form of a ban on the provision of visits in penitentiary institutions, on the one hand, violated the right of convicts to communicate with their loved ones, but, on the other hand, allowed to restrain and, in some cases, even prevent the mass spread of COVID-19 among convicts and save their lives, since the conditions of isolation would not allow to fully comply with all necessary preventive measures, in particular, to ensure the necessary social distance among convicts.

At the same time, the adoption of such decisions should exclude administrative arbitrariness on the part of the authorities. As Lord Thomas Bingham points out, "when exercising state powers, a certain discretion on the part of public officials is necessary, but at the same time such discretion should be necessarily controlled" [17]. In particular, the need for judicial verification of possible violations of fundamental rights and freedoms committed by administrative authorities was indicated by A.W. Bradley and K.D. Ewing [18, pp. 630–631]. At the same time, elements of discretion are also not excluded in activities of the judicial authorities [19].

Why are these circumstances recognized as extremely important? Since it is precisely when exercising discretion in the implementation of negative public management activities that risks must be put at the forefront, that is, such factors that will inevitably entail negative consequences. This is the essence of the risk-based approach. And in this regard, P.V.

Golodov quite rightly refers to the topic of law enforcement risk (another question is that he probably should have used a different, narrower and more relevant term to the problem under discussion, such as "administrative and legal risk"). Any law enforcement risk, according to G. Braban, should be implemented "in strict accordance with the law, even if it is a matter of discretion" [20, pp. 192–195].

Thus, administrative and legal risks are the most important problem in the exercise of discretionary powers of the Federal Penitentiary Service, which, combined with the dual nature of administrative discretion, makes them one of the most difficult problems of administrative law and the administrative process as such.

Results

Administrative discretion is an important element of public administration, which makes it possible to make managerial decisions aimed at protecting public interests promptly, taking into account the current situation and on the basis of current legislation.

It should be stated that without discretion, the effective achievement of managerial goals in any sphere of public relations is impossible, but it should not be unlimited and uncontrolled, despite the fact that it is aimed at the optimal solution of managerial functions, taking into account public interest, legality and expediency.

We cannot but take into account the positive consequences of the application of administrative discretion measures by subjects of public administration: administrative discretion helps flexibly respond to specific unforeseen situations that constantly arise in life, the resolution of which cannot be fully regulated by law.

Considering the most important and most relevant characteristic of administrative discretion in activities of the Federal Penitentiary Service of Russia, we can conclude that the subject of administrative and legal risks allows us to emphasize the intersectoral character of administrative discretion in activities of the Federal Penitentiary Service of Russia. Administrative discretion has obvious genetic links with administrative and administrative procedural law, as well as with criminal, criminal procedural and penal law. However, in terms of activities of the Federal Penitentiary Service, another important category appears, which is directly affected by the discretionary powers of employees of this service, we are talking about the constitutional rights and freedoms of man and citizen. Administrative discretion in intra-organizational relations needs deep scientific and legislative elaboration due to the dynamism and lack of systematic legislation regulating these relations. Therefore, the constitutionalists' interest in administrative discretion is quite understandable and justified.

REFERENCES

1. Davydov K.V. Discretion and mistakes of the legislator. *Zhurnal administrativnogo sudoproizvodstva = Journal of Administrative Proceedings*, 2017, no. 2, pp. 57–65. (In Russ.).
2. Shevtsov S.G. Discretion, arbitrariness, persuasion: linguistic, doctrinal and legislative approaches. *Evraziiskii yuridicheskii zhurnal = Eurasian Law Journal*, 2011, no. 11 (42), pp. 48–52. (In Russ.).
3. Cheremisina A.S. The principle of expediency in the activities of executive authorities. *Administrativnoe pravo i protsess = Administrative Law and Procedure,* 2013, no. 3, pp. 66–67. (In Russ.).
4. Sharnina L.A. *Usmotrenie v konstitutsionnom prave: dis. … d-ra yurid. nauk* [Discretion in constitutional law: Doctor of Sciences (Law) dissertation]. Moscow, 2019. 353 p.
5. Gorbunova O.N. *Izbrannoe* [The selected]. Moscow, 2017. 542 p.
6. Nikitin A.A. *Pravovoe usmotrenie: teoriya, praktika, tekhnika: dis. … d-ra yurid. nauk* [Legal discretion: theory, practice, technique: Doctor of Sciences (Law) dissertation]. Saratov, 2021. 514 p.
7. Denisenko V.V. Administrative and judicial discretion in proceedings on administrative offenses: general and special. *Obshchestvo i pravo = Society and Law*, 2013, no. 1, pp. 229–234. (In Russ.)
8. Markov P.V. On the ratio of administrative and judicial discretion. *Trudy Instituta gosudarstva i prava Rossiiskoi akademii nauk = Proceedings of the Institute of State and Law of the Russian Academy of Sciences*, 2011, no. 5, pp. 85–95. (In Russ.).
9. Shchepalov S.V., Zaitsev D.I. Administrative and judicial discretion in Russian Science: problems of correlation. *Vestnik Tomskogo gosudarstvennogo universiteta. Pravo = Tomsk State University Journal of Law*, 2022, no. 46, pp. 107–118. (In Russ.).

10. Golodov P.V. Administrative discretion in the management practice of institutions and bodies of the penal system. *Vestnik Instituta: prestuplenie, nakazanie, ispravlenie = Institute Bulletin: Crime, Punishment, Correction*, 2017, no. 2 (38), pp. 73–79. (In Russ.).)
11. Golodov P.V. Law enforcement risk in the management practice of institutions and bodies of the penal system. *Vestnik Instituta: prestuplenie, nakazanie, ispravlenie = Institute Bulletin: Crime, Punishment, Correction*, 2017, no. 3 (39), pp. 57–61. (In Russ.).)
12. Naumov E.V. Administrative discretion as a corruption determinant at execution of punishments. *Vestnik Kuzbasskogo instituta = Bulletin of the Kuzbass Institute*, 2012, no. 5, pp. 41–44. (In Russ.).
13. Nagornykh R.V. Systemic, institutional and idiosyncratic factors of corruption in foreign penitentiary systems: experience in countering administrative discretion. *Penitentsiarnaya nauka= Penitentiary Science*, 2022, vol. 16, no. 4 (60), pp. 417–424. (In Russ.). doi: 10.46741/2686-9764.2022.60.4.008.
14. Schmidt-Assmann E. *Das allgemeine Verwaltungsrechtals Ordnungsidee :Grundlagen und Aufgaben der verwaltungsrechtlichenSystembildung*. Berlin, 2006. Pp. 205–207. (In German).
15. Zaitsev D.I. Genealogy of administrative discretion. *Sibirskoe yuridicheskoe obozrenie =Siberian Law Review*, 2023, vol. 20, no. 3, pp. 105–119. (In Russ.).
16. Aniskina N.V. *Administrativnoe prinuzhdenie v ugolovno-ispolnitel'noi sisteme Rossiiskoi Federatsii: dis. kand. yurid. nauk* [Administrative coercion in the penal system of the Russian Federation: Candidate of Sciences (Law) dissertation]. Moscow, 2021. 247 p.
17. Bingham T. *The rule of law*. London, 2010. 213 p.
18. Bradly A.W., Ewing K.D. *Constitutional and administrative law*. Harlow, 2014. 824 p.
19. *Administrative discretion: meaning and grounds of control*. Available at: https://lawbhoomi.com/grounds-of-control-on-administrative-discretion/ (accessed March 15, 2023).
20. Breban G. *Frantsuzskoe administrativnoe pravo* [French administrative law]. Moscow, 1988. 488 p.

INFORMATION ABOUT THE AUTHOR

SERGEI A. STAROSTIN – Doctor of Sciences (Law), Professor, professor at the Department of Administrative Law and Procedure of the Kutafin Moscow State Law University (MSAL), Moscow, Russia; professor at the Department of Administrative and Legal Disciplines of the Law Faculty of the Vologda Institute of Law and Economics of the Federal Penitentiary Service, Vologda, Russia, SASTAROSTIN@msal.ru, https://orcid.org/0000-0002-0108-7916

Received May 5, 2023