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Abstract

The relevance of this study stems from the ongoing reform of the Russian Federation (regulatory guillotine) in the control and supervisory domain of enforcement authorities. The emphasis of the reform is enhancing security and elimination of excessive administrative burden on regulated business entities, construction of new mandatory requirements that are abreast with up-to-date technological development and risk-based approach, introduction of detailed rules governing the organization of supervisory activities. The instrument for attaining the reform objectives is “regulatory guillotine” which involves an inventory of all existing mandatory requirements in numerous legal acts for determining the relevance of the requirements to contemporary realities. Relevant norm remains intact; if it fails to meet the requirements, it is cancelled or modified. It is known for certain that some norms subjected to legal analysis through the lens of the “regulatory guillotine” were adopted in the USSR. The article analyses the administrative discretion in the supervisory activity of public authorities. Strengths and weaknesses of exercising administrative discretion in the control and supervisory activity of public authorities are considered. A study is underway on certain provisions of the Federal Acts “On Mandatory Requirements in the Russian Federation”, “On State Control (Supervision) and Municipal Control in the Russian Federation”. Moreover, it examines impact of digitalization on the administrative discretion. The study identified issues that need to be addressed in the reform of the “regulatory guillotine”, views on the necessity to enhance the institution of administrative discretion, the urgency for its legislative regulation and improvement of implementation.

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1. Introduction

Recently Russian and international science has been devoting increasing attention to study of discretion in law as to its nature, concept, limits, positive and negative effects on all social sectors and the state. A large number of researchers are dedicating their efforts to the study of this legal phenomenon. There have been myriad academic contributions to the promotion of better understanding of this legal institution from the foreign scientists such as Professor A.V. Daisy, Lord Thomas Bingham, Blankenagel A. and others. The continued proactive participation of Russian scientists G.V. Atamanchuk, A.A. Berezin, V.N. Dubovitsky, V.M. Manohin, A.A. Malinovsky, Y.N. Milshin, Y.A. Tikhomirov, Y.P. Solovey, E.A. Chaban and other members of national scientific community in research and deliberations on this specific issue would benefit the development of legal science as a whole. Discretion is up and running legal phenomenon and a powerful tool in administrative activity of public authorities without which law enforcement is inconceivable (Manokhin, 1990). Administrative discretion is a cross-cutting issue in all elements and stages of public administration from the adoption of a regulatory act, particular law enforcement act and up to their direct implementation. Discretion is thus one of the central concepts of administrative law in general (Blankenagel et al., 2014).

2. Problem Statement

There is no scientific consensus and this issue has been on the table for more than 200 years. Solovey (1982) believes administrative discretion to be understood as the fact assessment, on the grounds (criteria) well-established and specified in legal norms, made by an authority (official) when choosing within the limits allowed by regulations, the best solution of a specific administrative issue.

Chaban (2013) defines administrative discretion as a form of law-enforcement discretion which constitutes a free choice by an authorized state body or municipal administration represented by its official, i.e., a public servant, of possible lawful conduct. Factual grounds for administrative discretion are based on objective ambient reality within the discretionary power of these bodies, method of legal regulation of public-law relations implemented through the legal regulation of public legal relations.

Administrative discretion in control and supervisory activity is one way of exercising law enforcement discretion, the need for a study on control and supervision of public authorities stems from a number of reasons:

- control (supervision) is the crucial public administration element in any existing legal system of the world;
- control (supervision) is cross-cutting element in all social sectors and state;
- practical application of control involves a wide array of supervisory public authorities.

The breadth of the law governing supervisory interaction between the controlling (supervising) public authority and controlled (supervised) subject (object) requires unification and streamlining. A proper legal private-public balance should be ensured in evolving relations between the controlling (supervising) public authority and the controlled (supervised) subject (object), etc.

The topicality of the study is still due to the ongoing reform in the Russian Federation (regulatory guillotine) in the realm of control and supervisory activities of public authorities. The reform is related

mainly to upgrading the safety and security and elimination of administrative redundancy concerning business entities under control, the construction of a new mandatory framework that keeps up-to-date state of technology landscape and risk-based approach, the introduction of detailed rules governing the organization of control and supervisory activities. The “regulatory guillotine” is the means to accomplish the tasks the reform is entrusted with and entails an inventory of all existing mandatory requirements in a broad array of legal acts to ascertain their consistency with current realities. If the regulation is consistent, it remains, if it fails – cancelled or amended. Many are well aware that some norms subjected to legal review through the lens of the “regulatory guillotine” were adopted in the USSR.

3. Research Questions

The subject of this study is discretionary mechanism for control and supervisory activities of public authorities. So, the Federal Law of 31.07.2020 №247-FL “On mandatory requirements in the Russian Federation” came into force in Russia from 01.11.2020. Under the law, mandatory requirements are legal and institutional framework for establishing and evaluating of application of the requirements contained in regulatory and legal acts which are related to business and other economic activities and whose compliance is evaluated the framework of state control (supervision), municipal control, administrative liability, licensing and other authorisation, accreditation, conformity assessment, other forms of evaluation and expertise.

4. Purpose of the Study

The study is meant to explore scientific research on administrative discretion, define the concept of administrative discretion in the control and supervisory activity of public authorities, establish how the legislation of the Russian Federation defines administrative discretion in the sphere of control and supervision of public authorities, sets its limits and regulates the evolving legal relations in the process of control and supervisory interaction. To identify strengths and weakness of administrative discretion with regard to the control and supervisory procedures. Suggest ways to better operationalize administrative discretion in the sphere of control (supervision).

5. Research Methods

The basis of the research methodology was a set of universal, general, scientific, private and private-law methods: method of cognition, analytical method, analysis of monographic literature, scientific articles and regulations.

6. Findings

The providing of control (supervision) is an indispensable function within the public administration of society, pervades the whole field of social life.

Analysis of the Federal Act “On Mandatory Requirements in the Russian Federation” suggests that this act is an example of direct attempt by the legislator to set margins of discretion for entities with the power to impose mandatory requirements on controlled and supervised subjects (objects).

In the public administration, the implementation of control and supervisory activity focuses on striking a balance between private and public interests. The mere existence of “accusatory bias”, i.e., lack of preventive and dissuasive function in the control and supervisory activity of public authorities cannot be allowed, neither can their activities be reduced to search for violations committed by a controlled entity with a view to punishment. Control and supervisory activity of public authorities need to be redefined and the prevention of future violations should be a priority.

Sociological survey conducted by the Special Communication and Information Service of the Federal Security Service of the Russian Federation, which aimed to assess the impact of the administrative environment on the development of business in the country in 2020, showed:

- More than two-thirds of respondents believe that their rights and legitimate interests are not sufficiently protected;
- 45 % noted that over the past three years administrative penalties have become more severe;
- 46.7 % of respondents pointed out that during all or some of the inspections verified compliance with mandatory requirements not previously known to them;
- 35.9 % of surveyed entrepreneurs believe that employees of control (supervision) agencies were aimed at detecting real violations and ensuring safety of citizens, as well as at providing assistance to entrepreneurs;
- 30 % of entrepreneurs indicate that the employees of control (supervision) bodies in general had a formal attitude to the performance of their official duties during the inspection.

These results clearly indicate problematic aspects of control (supervision) of public authorities, as an example, a large unreasonable number of legal norms that establish mandatory requirements, which inevitably increases the frequency of use of administrative discretion by controllers because their choice of legal behaviour becomes quite extensive.

The problem of broad administrative discretion in the control and supervisory activities of public authorities in the Federal Law “On Mandatory Requirements” can be solved through the publication by federal bodies of executive power in respect of their adopted normative legal acts of official explanations of mandatory requirements solely for the purpose of explaining their content. With their help there should be a narrowing of administrative discretion in the control and supervisory activities of public authorities, because they will be obliged from now on to be guided by official explanations of mandatory requirements. Public authorities entrusted with supervisory powers must ensure that controlled persons are informed through the introduction of a compliance guide for mandatory requirements. This guide describes the mechanism on compliance with statutory requirements, the rights granted and duties imposed, the powers of control and supervisory bodies and their officials and all other issues pertaining to the process of statutory requirements implementation. The undeniable and auspicious development of state control digitization by harmonization of procedures will significantly reduce the use of discretionary powers by officials of state control bodies. Thus, by digitizing supervisory activities not only the scope of

control and supervision be made more transparent, but it is possible to set new limits on the administrative discretion of officials.

This trend, in our view, is both an opportunity and a danger, since, as we have frequently stated, it is impossible to envisage all feasible scenarios in the sphere of control and supervisory interaction, and over-regulation may again lead to a proliferation of legal norms. There is a need to balance legal norms, taking into account public and private interests. An effective and sustainable approach to that problem requires the enlargement and upgrading of the administrative discretion institution in the activity of enforcement authorities. Legal relations, emerging from the process of supervisory and control activities, are varied and multifaceted.

Despite the positive objectives of the ongoing reform, updating and unification of control and supervisory standards in the Federal Act of 31.07.2020 №- 247-FA “On mandatory requirements in the Russian Federation” as well as in the Federal Act of 31.07.2020 N 248-FA “On State Control (Supervision) and Municipal Control in the Russian Federation”, which comes into force on 01.07.2021, the said laws contain many evaluative norms that establish procedures without interpreting the mechanisms for their application. For example, little attention has been paid to the risk-based approach. In spite of numerous innovations, Federal Acts “On Mandatory Requirements in the Russian Federation”, as well as “On State Control (Supervision) and Municipal Control in the Russian Federation” are in a lack of full disclosure of control and supervisory implementation mechanism, and most of the rules contained therein require further interpretation in by-laws; moreover, the above-mentioned laws still do not cover more than 20 types of state control (supervision).

7. Conclusion

Ultimately, a review of the current situation shows that the legislation regulating the control and supervisory activities of public authorities gives ample opportunity for control (supervision) bodies and their officials to exercise mass subjective discretion as it is filled with fuzzy legal constructions of the type “may”, “has the right”, “entitled to” (Martynov, 2019).

Unduly broad margins of administrative discretion for law enforcement can be a cause of corruption (Milshin, 2019). Many scientific studies on this topic conclude that to address this problem, legislators need to reduce the use of vague legal structures in the legal regulations their absence would limit the scope of enforcement discretion.

In our view, reduction of the above-mentioned regulations will not give significant results in corruption- risk cut down. In this situation, other measures should be sought to address the abuse of administrative discretion by law enforcers. Excessive legal regulation and multiplicity of norms will lead us to the same problem we want to get away from at this time, reforming the sphere of control and supervision by means of “regulatory guillotine”.

Our study thus concludes that administrative discretion in the control and supervisory activity of public authorities should be understood as intellectual and volitional act of federal executive agencies, executive authorities of constituent entities of the Russian Federation, local self-government bodies, as well as in cases provided for by federal laws state corporations, public-law companies, officials of control (supervisory) bodies to analyse the existing administrative situation, make an informed decision based on

the data obtained from the analysis of a particular situation, with due regard to established legal norms and principles of law within the mandatory limits of a possible enforcement option necessary for an appropriate and effective resolution of this situation.

In the context of the ongoing reform of the “regulatory guillotine” in the Russian Federation it is necessary to:

1. minimize numerous mandatory requirements contained in various legal acts, standardize and systematize them;
2. establish a clear delineation of competence and powers of entities engaged in control and supervisory activities, they are often similar or duplicative;
3. eradicate actual absence of mechanism for the prevention of irregularities in the exercise of powers by officials of controlling (supervising) authorities. For the most part, all activities of control (supervision) officials are reduced to accusatory (punitive) bias;
4. update the practice and regulation of administrative discretion in normative legal acts, to establish the principles and limits of its application;
5. improve the procedure for bringing entities vested with the power to exercise control (supervision) to responsibility.

It is worthwhile to say that control and supervision activities are still in need of improvement, adoption and systematization of new normative legal acts.

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