BECOMING OF CATEGORIES «DISCRETIONARY POWER»[1] IN SCIENCE OF CIVIL LAW

Pavel GRYNKO,
an assistant lecturer at the department of private law of
Poltava Law Institute of National University of «Law Academy of Ukraine named after Yaroslav the Wise»

Summary

The article traces the genesis of the concept discretionary power, scientists analyzed in terms of the legal nature discretionary powers, argues that unlike capacity , an element of which is the ability of a person to change his action only own legal scope, content discretionary power is able to unilaterally change a foreign legal scope, given the definition of discretionary power law as a form of subjective legal possibility of intervention in the foreign legal sphere in order to achieve legal results by single vote.

Key words: discretionary power, legal capacity, subjective right, civil legal relationships.

Аннотация

В статье прослеживается развитие понятия «секундарное право»; поддаются анализу точки зрения ученых на правовую природу секундарных прав; доказывается, что в отличие от правоспособности, элементом которой является возможность лица своим действием изменять только собственную правовую сферу, содержание секундарного права составляет возможность в одностороннем порядке изменять чужую правовую сферу, дается авторское определение понятия секундарного права как разновидности субъективной правовой возможности вмешательства в чужую правовую сферу с целью достижения правового результата путем одностороннего волеизъявления.

Ключевые слова: секундарное право, правоспособность, субъективное право, гражданские правоотношения.

Foreword. There exist diametrically opposite points of view on the concept of discretionary power in modern scientific literature. Some scientists deny existence of these powers [20, p. 113-130], others do not use this concept at all, although they agree that for progressive development of civil circulation participants of civil legal relationships are provided with opportunities to acquire and exercise those powers that although not given to them directly, but not prohibited by law [17, p. 58, 74, 79]. But there is a group of scientists who consider it to be appropriate to introduce a category of discretionary power into system of civil law categories [18, p. 42-44], the legal nature of the latter is grounded in different ways. Some of them believe that it is subjective civil law [7, p. 12], while others think that it is underdeveloped subjective law [5, p. 70-73], still other believe relate discretionary power to persons powers [19, p. 99-112]; still others refer it to the legal possibility of a unilateral expression of will to cause origination, modification or termination of civil rights and duties [8, p. 68-72] etc.

The relevance of the study is that in recent years discretionary powers are subject of scrutiny of research scientists. Scientists are trying to identify new legal possibilities that would give the holder more freedom of action – and what are the discretionary powers.

The task of this scientific article is to analyze the becoming and development in doctrine of civil law the categories «discretionary power».

Body. In order to determine the concept of discretionary power we would like to retrace the origin and development of this concept in the doctrine of civil law in Germany, where the abovementioned term was used for the first time, and also in Russia and Ukraine, where in recent years, views on the need for this category are more and more widespread. The choice of these countries is not accidental since their law refers not only to the common law family of continental European law, but also to its total Germanic branch. But, as it is correctly stated in the literature, it should not be forgotten that the historical and certain civil law proximity of these countries do not mean their identity.

The category of «discretionary power» owes its appearance to the study of the legal nature of subjective law, as a legal opportunity of subject of law. Such researches were actively conducted in the late XIX century by German scientists of civil law. As a result, there were developed several approaches to understanding of subjective law. Thus, B. Windscheid believed that it is the rule of the will of the authorized person [3, p. 99], R. Jhering considered it to be guarded by positive law interest of the individual [14, p. 301-321, 358]; L. Enneccerus thought subjective law to be the rule of a person in certain relationships [21, p. 244]. But scientists were unanimous to believe the existing subjective law may have certain characteristics. For example, E. Becker singled out the so-called negative laws (they were called countervailing power [2, p. 183]), he attributed to them right to dispute, right to offset counter claims, right to refuse of contract, to break a contract, right to divorce. E. Becker regarded them as subjective, since the application of these rights depended on the will of the authorized person, and their only feature was in the fact that each of them could prevent the existence of the rights of another person, eventually stopping, neutralizing or limiting the right of another person [1, p. 209].

Undoubtedly, the study of the subjective nature of law had its own peculiarities. If B. Windscheid and E. Becker turned their efforts to find criteria that would distinguish certain types of subjective law, other scientists analyzed the content of the subjective law.

Thus, already at that time scientists had different views on the legal nature of the legal capacity of individuals and their correlation with subjective law. Subsequently, E. Zitelmann united separate groups of legal possibilities,

[1] *In scientific literature Ukraine, Russia and some other countries is used the term «секундарное право». However romance literature there is a common term diritto potestativo, droit potestatif and that can be translated as «секундарное право» and as the power «discretionary». The doctrine of civil law in Germany also used the term «Gestaltungsrechte» or «Sekundare Rechte». However, in any case, the etymological origins of the term come from the word «power». In this paper we use the term «discretionary power» implying the «секундарне право», which is used in the scientific literature in Ukraine and Russia.*

which were by then well-known to civil-law doctrine, into general category of legal opportunities law. He attributed right to appeal, right to inherit, right to purchase, right to terminate a contract unilaterally, right to approval of the transaction, right to competency of contractual representative, right of appropriation of ownerless things, mortgage rights, right of waiting etc. He believed that all these rights have a common feature – the legal possibility of authorized person to generate an opportunity for themselves or for third parties certain legal consequences or prevent the onset of unfavorable legal consequences by means of expression of will [4, p. 258]. In terms of above, it can be stated that E. Zitelmann apprehended B. Windscheid's point of view regarding the fact that authorized person's will is crucial to the creation, modification or termination of subjective law [3, p. 99]. But, unlike B. Windscheid didn't single out a separate group of rights of legal possibility since the characteristics of the latter actually coincided with his notion of subjective law, E. Zitelman emphasized that this group is a derivative of human nature, as it implies the existence of major subjective laws [4, p. 20].

Integrated study of legal possibilities rights was held by E. Zekkel. Scientist not only specified their composition, but called this group of human «Gestaltungsrechte» («set right», «constitutive right»). Motivation is quite logical: the legal possibility is peculiar to any subjective law; hence the allocation of rights of legal capacity is meaningless. Besides E. Zekkel singled out the characteristics of Gestaltungsrechte as subjective rights, content of which is the ability to set (turn) the specific legal relationship by committing a unilateral transaction; he also developed classification Gestaltungsrechte [13, p. 211].

Opponents of Zekkel's theory attributed to its shortcomings, firstly, the lack of justification of how the will of the person, that is directed to the emergence of his own rights and obligations and is traditionally covered by the category of capacity, into a «set right», «constitutive right» and, secondly, the absence of element interference of in someone else's legal sphere among the characteristics of Gestaltungsrechte.

However, it is considered that Zekkel, first, did not consider «Gestaltungsrechte» as capacity, because legal possibility (capacity – P.G.), which is endowed with any person, is not an authority; each subjective right is the right-advantage, this is something more than anyone or most of them can do, an opportunity which does not belong to others. Secondly, the absence of the element of interference in someone else's legal scope could not be referred to him as a constitutive feature of «Gestaltungsrechte», only because these rights, as noted earlier, he divided in two groups: the right of interference, which is the result of foreign intervention in the legal sphere (for example, termination of interest-free loan agreement, contesting the contract giving gifted offset, counterclaims uniform requirements, etc.) and seizure law, the rights that directly affect their own legal cause or scope like a reflected influence on foreign sectors (e.g., right to make heritage, termination of guardianship due to cancellation of a decision on declaring a person incompetent, and in this regard the status of tutor).

Some work to refine the selection criteria for group rights that Zitelmann marked as rights of legal possibilities, and Zekkel as Gestaltungsrechte, later was done by other scientists of civil law. In particular, the notion «Sekundare Rechte» («discretionary power») firstly was introduced by A. F. Tur, believing that it will be generic with respect to «Gestaltungsrechte» of E. Zekkel, by selecting this constitutive feature of these rights as an element of foreign interference in the legal sphere, and the sole of such interference. However, he did not include capture rights into the discretionary power, which were part of Zekkel's «Gestaltungsrechte».

According to Tour's theory, rights which are the object of creation, modification or termination of human domination over individually-defined things (property rights) or the behavior of the obliged person (obligations Law) are discretionary power as the existence of subjective rights is assumed (domination – P.G.), which are their object.

Summarizing the above, it should be noted that in the doctrine of civil law in Germany to describe the general structure of legal opportunities of people different terms are used, they are «Gestaltungsrechte» (E. Zekkel) and «Sekundare Rechte» (A. F. Tour). Theory of discretionary is characterized by the following:

- Discretionary powers are secondary laws that may cause the arise, modification or termination of other basic rights in a foreign field of law;
- Its content is the intervention in a foreign legal sphere, and unilateral intervention;
- Passive subject is deprived of duty;
- Discretionary power can not violate, namely legally prevent its implementation actions individual granted right.

Along with this, the search for answers to questions about the legal nature of discretionary power continues in doctrine of German law event in modern conditions.

Excursus into doctrine of German law is done with one purpose to compare used by it the category of discretionary power with category with the same name in the doctrine of Russian and national law.

Pre-Soviet scientists didn't use the notion «discretionary power», but as German scientists solved problems related to subjective law and its structural elements, capacity, treating in different ways to determine the nature of these categories. A. Worms was first known to mention discretionary powers. He believed that there are powers of persons that do not fall under such categories as characteristics of capacity and subjective right and having analyzed the legal relations arising from the issuance of a promissory note in which the payee is not listed, he concluded that the issuance of a promissory note is a verbal agreement complicated by such obligations as agreement required draft form (the document does not include all details of the promissory note). The legal nature of right, of the person who has promissory note, is an opportunity to add those details, which it is lack, was described by scientist as competence, and aimed at changing the legal status of the person, since its implementation turns promissory note form into promissory note. A. Worms believed that the legitimacy of the category of subjective rights, which German law defines as a type of additional rights, namely "Sekundare Rechte", enabling the person to their unilateral expression of will to change the legal status of another entity. This scientist came out of number

of rights to change the legal status is very large, for example, the right of the recipient of an offer to contract [10, p. 19].

M. Agarkov was a successor of concept of discretionary power, who came from the fact that any person by operation of law has standing as an abstract possibility of a law which if certain legal facts into a full subjective right, and which becomes part of the respective legal relation. However, in certain cases a person by virtue of contract or law shall have the possibility of its unilateral will to cause emergence of subjective rights. This feature is not yet a complete subjective right, but it is neither an abstract possibility but a concrete one. At the same time scientist believed that not every legal action can be considered a manifestation of subjective rights, because sometimes it does not commit a person creates the obligation to take appropriate action, although a certain period of its binding ability of such action. These actions of Agarkov attributed to discretionary power, stressing that the proposal to conclude an agreement that is not subjective right, but just right, "arising" or so-called discretionary power [5, p. 70-73]. He believed that discretionary power was a subjective right of a person.

Later scientist changed his view of human understanding of discretionary powers, calling them is subjective rights, but a manifestation of dynamic capacity, assuming that the latter varies depending on the circumstances in which the entity operates. Thus, in one case, a person can realize the constituents of capacity gave rise to a subjective right, which was characterized by the fact that it opposed the obligation of another person, and another case – discretionary power, which does not rise to the obligation of another person to take appropriate action. It turned out that discretionary power is a category broader than individual capacity, but narrower than its subjective right. However, he didn't make any arguments for the right of discretionary power manifestation of dynamic capacity; he did not cited distinguished features of discretionary power.

Theory of dynamic capacity was criticized by civilians who shared the traditional view of capacity. Thus, S.M. Bratus did not distinguish between the capacity and subjective right connection, adhesion agent chain - discretionary powers, although believed that the latter do exist, but attributed them to the subjective rights, while emphasizing that the solution of discretionary powers depends on understanding the category of subjective right, and as should be guided by a broader understanding of it, then discretionary power are subjective rights [9, p. 5-6, 8, 10].

However, if we consider the basis of the subjective rights of its inextricable link with the corresponding legal duty to him in legal and legal understanding only in its classical representation-binding model (right – the obligation), it is hardly characteristic of discretionary power as subjective, perfect as discretionary power, as it is known, not provided with the duty of passive subject.

It seems that just the need to clarify the legal nature of rights is not secured by obligation, divided scientists into those who refused existence of discretionary power, and those who followed a different view. The first group of scientists can be attributed, for example, O.S. Ioffe. It is known that the scholar distinguished such notions: standing as a precondition for the emergence of individual rights and responsibilities and implement them last; subjective right as far as possible conduct and to demand certain behavior from the parties liable, legal facts as the intermediate link between the capacity and subjective right. O.S. Ioffe proceeded from the fact that for the occurrence of certain civil legal a single legal fact is not sufficient, particular transaction, and requires them to set, or so-called actual composition and considered the formation of subjective rights as a multistage process, each stage of which creates a visible, although not completed legal consequences. However, the scientist pointed out that the formation of subjective rights – this is just the process leading to the emergence of subjective rights, which in no way conditional on the emergence of discretionary powers. Agreeing that the offer itself doesn't create a contractual relationship, the scientist insisted that as part of a statutory legal basis of their appearance, offer creates such an opportunity. The person, whom the offer is addressed, yet acquires certain civil rights and obligations at the latest, but may purchase them if it accepts [15, p. 123].

V.I Serebrovsky can be attributed to the group of scholars who belonged to the separation of positively of discretionary powers. Thus, the scientist, examining hereditary relationship, pointed out that by its legal nature heritage decision is a unilateral transaction, that is an expression of the will of only one person - the heir, not facing up to anyone and does not require the consent of the others. However, this transaction entails legal consequences not only for the heir, but also for other persons, other heirs, creditors of the testator and so on. On this basis the scientist has concluded that the right to host heritage - is a special (discretionary power) the right heir. Taking into consideration that Serebrovsky admitted the existence of subjective civil rights, not obligations secured [18, p. 163-164], it is logical that discretionary powers were described as a subjective right by him.

The best model for discretionary powers as subjective was shared by V. Byelov, which, in particular, believes that as a result of sending the offer in a particular subject there is an opportunity for its expression of the will cause the contract. Considering that discretionary power rises only in the person addressed to offer, allow scientist to talk about the possible existence of subjective civil law [11, p. 769].

It is believed that the most consistent in the characterization of discretionary power for its time was O. Pevzner, who considered the existence of subjective civil rights not secured by obligations [16, p. 22] impossible and hence, separating discretionary power could not recognize their subjective rights, treating them as the legal form of connectivity behavior of two or more specific persons scientist shared legal phenomena associated with unilateral manifestation of the will of a person into two groups: Rights, which are precondition for the emergence of legal and law, within the existing legal relationships. The first group of O. Pevzner took legal phenomena that occur at the intermediate stage (in the interim legal relations – ILR) in all cases, when they occur in full is required the actual composition – the right to accept, the right to host heritage. Scientists refused to recognize these legal phenomena of subjective rights because they are – just display capacity [16, p. 23]. Content of legal relations in the intermediate O. Pevzner not included rights and responsibilities,

and the «interconnectedness of behavior of participants». As for the rights that are included in an existing legal relation, this particular legal opportunities that are part of the last (right to cancel the contract, the right choice in alternative obligation, etc.). In contrast to the subjective right of these legal opportunities specific duty of another person is not responding. These possibilities scientist took to discretionary power, considering their main characteristic is that they do not generate any demands or claims. Purpose of discretionary power to provide authorized person with access to their unilateral actions and in their interests to change or terminate the legal relationship. The legal effect of these legal possibilities comes into force unilateral will of the authorized person [16, p. 34].

Y.M Denisevych, exploring the problem of unilateral contracts, comes to other conclusions. Thus, he notes that the refusal to join a third party to the contract for its benefit, ceases organizational preconditioning legal relation, which contained the possibility for beneficiaries to become a creditor in relation to party has assumed in her favor "waiting" duty [12, p. 12]. This conclusion is logical, based on the theory of legal relations as a legal phenomenon [12, p. 24], a dynamic that promotes academic. Y.M Denisevych emphasizes that the actual composition of strictly to the law of accumulation of legal facts of the occurrence of an intermediate already produces legal effect as douning (legislative) or legal powers of connectedness. The terms "founding" and "legislative" competency scientists use to describe incomplete subjective civil law, that law in the process of its formation. Thus, the concept of competency of discretionary power scientist gave a percentage of the value of subjective rights, which is the basis for unilateral expressed desires aimed at modification or termination of relationships [12, p. 14].

F.O. Bogatyrev, exploring the hereditary relations, notes that discretionary power – a special competency, which is between capacity and subjective right. And discretionary power as discretionary duty is part of the heritage along with subjective rights and duties of the heir. This allows the transfer of scientific discretionary power hereditary rights in legal relations with others, but denies the possibility of such transfer under the agreement [8, p. 70].

O.B. Babaev, completing a comprehensive study of discretionary power, concluded that discretionary power is subjective civil law, as authorized subject is to satisfy your interest. It may be a subject of judicial review and has the ability to transfer the procedure of universal succession. Discretionary power is a part of the relative rights along with legal requirements. Unlike the active party liability - creditor interest discretionary authorized person met through their own actions. The author highlights discretionary authorizing law, binding and termination [7, p. 9].

C.N. Azimov also worked on problems of discretionary power, exploring such non-jurisdictional way to protect civil rights as self-defense. A scientist argued that self-defense by its nature is discretionary power, as there is on the basis of existing commitments and sold through independent action [6, p. 22].

We believe that discretionary power is kind of subjective possibility of legal intervention in the foreign legal scope to achieve the legal result by the unilateral will. If the element is the capacity of the person the opportunity to change their action only its own legal sphere, the content of discretionary power is the opportunity to unilaterally change someone else's legal sphere.

Conclusions. Summarizing the above, we note the following. The legal nature of discretionary power is a purely theoretical problem, but solving it will make it possible to see the scope of opportunities that arise in the subjects of civil relations in the aggregate of certain legal facts. This, in turn, will give an opportunity to choose more adequate means of protecting rights and interests of these entities in the event of their violation.

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ГНОСЕОЛОГИЧЕСКИЕ ЗАКОНОМЕРНОСТИ ФОРМИРОВАНИЯ ВНУТРЕННЕГО УБЕЖДЕНИЯ СУДЬИ

Наталья ГУРАЛЕНКО,
кандидат юридических наук,
доцент кафедры теории и истории государства и права
Черновицкого национального университета имени Юрия Федьковича

Summary

Based on the analysis of a large number of sources stated that some aspects of the problems of scientific and theoretical understanding of the nature of belief is reflected in the work of the representatives of different sciences. In the context of the legal analysis, legal opinion is primarily a symbiotic process and outcome evaluation of the evidence. As ethical and intellectual factors play an important role in the formation of an objective assessment of the performance of judges. Therefore, in the conditions of the rule of law is necessary to form, above all moral culture, the level of which depends on the effectiveness of enforcement of persuasion. The steps in this direction should result in the system for conceptual form.

Key words: legal conviction, legal thinking, law enforcement, legal reasoning, proof.

Аннотация

На основании анализа определенного количества источников констатировано, что отдельные аспекты проблематики научно-теоретического осмысления природы убеждения отражены в работах представителей разных наук. В контексте правового анализа правовое убеждение – это, прежде всего, симбиоз процесса и результата оценки доказательств. Как морально-этические, так и интеллектуальные факторы играют важную роль в формировании объективной оценки деятельности судей. Поэтому в условиях становления правового государства необходимо сформировать, прежде всего, нравственную культуру, от уровня которой зависит эффективность правоприменительного убеждения. Шаги в этом направлении должны быть системными и в итоге получить концептуальную форму.

Ключевые слова: правовое убеждение, правовое мышление, правоприменение, правовая аргументация, доказывание.

Постановка проблемы. Ответственность, независимость и беспристрастность правоприменителя перестают быть только декларируемыми лозунгами. Эти качества чрезвычайно востребованы современным обществом и правовым государством. В условиях постсоветской Украины начала формироваться новая «антиэтатическая по своему смыслу» система нормативного регулирования, закрепляющая естественно-правовую конструкцию прирожденных и неотчуждаемых прав и свобод человека. В практической реализации такой теоретической природно-правовой платформы значительную роль призвана играть собственно судебная ветвь власти, к первоочередным задачам которой принадлежит не формальное, а реальное обеспечение эффективного механизма защиты основных прав и свобод человека. При этом бывшие концептуальные схемы, которые ориентируют на несколько упрощенное понимание суда как бюрократической машины, которая лишена элементов убеждения и рутинно занимается исключительно рассмотрением конкретных гражданских, уголовных и административных дел, подвергаются критике. Возникает потребность в новых методологических подходах, что дали бы возможность рассмотреть этот институт с широких позиций: видя в нем реального гаранта естественных прав человека, который, руководствуясь принципом свободы оценки доказательств, имел бы твердую и сознательную уверенность в правильности принимаемого решения, а в случаях наличия разрывов между конституционными положениями и реальной действительностью был не только «механическим» правоприменителем, но и создателем права.

Актуальность темы исследования. Правовое убеждение – один из важнейших составляющих компонентов познавательного процесса, который обеспечивает способность субъекта права в процессе целена-