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Problems of Interpretation of the Norm Within the Scope of Judicial Discretion in Administrative Proceeding

The issue of discretion of the administrative body is one of the vaguest and explanatory issues, which in turn is bound by the boundaries set by the law.[1]

According to the General Administrative Code of Georgia, Article №2, paragraph "K": powers granting freedom to an administrative body or official to choose the most acceptable decision out of possible decisions under the legislation, to protect public or private interests. According Article № 6: If an administrative body is granted discretionary powers to resolve any issue, it shall be obliged to exercise the powers within the scope of the law. An administrative body shall be obliged to exercise discretionary powers solely for the purpose of exercising the powers that they have been granted. Acting in the frame of discretion it must not restrict rights and obligations of society.[2]

The main idea of this research is not to determine how administrative body issues the administrative acts in the frame of discretion, but the court itself, at the stage of exercising discretionary powers and what it might be the definition.

***Keywords**: General Administrative Code of Georgia, court discretion, norm definition.*

1. Introduction

In order to understand the essence of discretion it is necessary to examine the rights and freedoms that exist in human history that have brought us to the present day[3]. The first signs of discretion dates back to ancient times. In 75 BC, one of the king's slaves destroyed another slave's pottery and weapons in the palace of *Alexander Janus*, king of Judea. To resolve the dispute, the king summoned seventy-one judges under the direction of Simon, but none of them had the right to express their opinion on the incident at the king's palace and disagree with the king. On the day of the trial, the king personally summoned both Simon and the other seventy judges, and as a sign of the supremacy of justice, he bowed his head to them, at the same time entrusting the resolution of the case in full. This is one example of the fact that the desire for judicial independence has never been new to mankind. This

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1 *Morstein M.,* Comparative Administrative Law: A note on Review of Discretion, University of Pennsylvania Law Review and American Law Register, Harrisburg, 1999, 973.

2 *Toradze D.*, Responsibility in Exercising Public Powers towards other Persons on the Examples of Georgian and German Administrative Law, Tbilisi, 2019, 53 (in Georgian).

3 *Goodnow F.,* Private Rights and Administrative Discretion, American Bar Association Journal, Vol. 6, 1918, 789.

fundamental right was followed by discretion the right of the court to select the most acceptable and objective decision from several decisions.[4]

The discussion of discretionary powers in the early scientific literature is directly related to the establishment of an independent administrative court in Austria. On December 21, 1867, the basic law of the state on the judiciary was adopted. According to Article 15 of this law, an administrative court was established. The Administrative Court was empowered to review decisions made by administrative bodies, except for decisions made within the framework of "free discretion". According to the discussion of the doctrine of discretion: which still characterizes the doctrine of discretion today. The discussion was driven by the notion that where free discretion of an administrative body begins, judicial control ends.[5]

The variability of time and political regimes has formed seven signs of judicial discretion:

According to the first sign, as a result of scientific and theoretical analysis, it can be said that the purpose of a judge is to act thoughtfully;

Second, the court's decision must be well-founded within its discretion;

Third, the court of all instances is obliged to conduct its own decision, the so-called Fact-Finding test, which determines whether the decision made within the discretion, the requirements and purposes of all elements of law, which are invoked in the decision;

Fourth, attention should be paid if the legal or quasi-legal forces, will be able to deviate from the goals of the Constitution based on this decision and thus carry out their activities;

Fifth, discretion is used when the disputed issue is not regulated by law and the judge has to use explanations and analogy of law;

Sixth, when it comes to following the proper rules. In particular, when a judge has to be guided by established standards rather than written norms, he or she must limit his or her decision to a "flexible limit" on justice;

Seven, discretion is the freedom of the court to allow unwanted stereotypes to be avoided.[6]

2. Discretionary Decision and Georgian Court Practice

The relation of law is carried out like a logical operation, in particular it includes the following stages: 1. Fact-finding; 2. finding the appropriate norm of law; 3. to determine whether the fact complies with the rule of conduct given in the norm; 4. determining the legal result. For its part, the judge, especially in administrative law, has the discretion or right to choose the most optimal of two or more options to resolve the dispute. Decisions based on discretionary powers are considered by the Supreme Court as disputes over the legality of an administrative act.[7] The peculiarity of judicial review due to the specificity of the discretion does not mean that the court is deprived of the

4 *Maurice F.,* Judical Self-Limitation, Harvard Law Review, Vol. 37, 1923-1924, 338.

5 *Khoperia R.,* Control of the Decision Made by Administrative Body within the Discretion, Iv. Javakhishvili Tbilisi State University, Faculty of Law, Dissertation, 13, <http://press.tsu.ge/data/image_db_innova/samartal/revaz_khoferia.pdf> [22.06.2021] (in Georgian).

6 *Isaacs N.,* The Limits of Judical Discretion, The Yale Law Journal, Vol. 32, 1923, 340.

7 Decision of October 10, 2010 case № BS-739-714 (K-10) of the Supreme Court of Georgia.

opportunity to review the decision made on the basis of discretion and determine whether the discretion was exercised with or without mistake. The peculiarity of judicial control of discretionary powers is that the court does not make a final decision and thus does not dig into the discretion of the executive. If the court finds that the discretionary power has been unlawfully exercised, the case shall be returned to the administrative body receiving the act for further investigation of the circumstances and for a final decision. The Court of Cassation noted that discretion rests solely on the freedom to determine the legal outcome: Discretionary power exists only when, once the case has been factually established and the facts are complied with, the administrative body is given the opportunity to make the most appropriate decision. Discretionary power exists only when it is defined by law. However, the purpose of the discretionary power and the scope of its exercise should be determined through the definition.[8] It is important to note that according to the case law of the Supreme Court, the court cannot interfere in the jurisdiction admissible by the administrative body, although it is debatable when assignment of a new act serves only the extension of the relevant term by the administrative body in this case how the judge sees principle of equality and fair process.[9]

2.1. Annulment of Act without Resolving the Case and Related Problems

According Administrative Procedure Code of Georgia Article № 32, Paragraph № 4, If a court considers that an administrative act has been issued without investigating and evaluating essential circumstances of the case, the court shall be authorised to declare the administrative act null and void, without resolving the dispute, and to assign the administrative body to issue a new act after investigating and evaluating the circumstances. According this article court must prove why case cannot be resolved without investigation of circumstances around the case and must also court must prove why this circumstance can be considered as discretion of administrative part.[10] In practice, however, Article № 32, Paragraph № 4 has actually become the cause of inaction by administrative judges. As a result, we get ineffective administrative justice. In case of returning the case, the administrative body only formally "corrects" the act, although it leaves it unchanged in content. The pursuant party has to start a dispute to check the material legality of the act.

The exercise of discretion is not a means of arbitrariness where a public servant tries to avoid his wrong decisions, but it is a kind of public order for him to do his job based on high democratic standards and the rule of law. Discretion is not within any scope of use but, surprisingly, is an essential part of the development of the industry.[11] At the same time, judicial discretion examines regulatory reservations and imposes uniform controls.[12]

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8 *Giorganashvili K.,* Error in Exercising Discretionary Powers, Administrative Law Scientific-Popular Journal, №1, 2013, 31 (in Georgian).

9 *Smith M.,* Decision Making by Public Bodies: How to Avoid Legal Challenge, London, 2008, <https://www.fieldfisher.com/en/insights/decision-making-by-public-bodies-how-to-avoid-legal-challenge> [22.06.2021].

10 Decision of July 22, 2010 case № BS-534-514(K-10) of the Supreme Court of Georgia.

11 *Harvey P.,* Administrative Discretion and the NLRB, Vol. 18, № 2, 1939, 280.

12 *Frank J.,* Kentucky Law Journal, Law Review, 1918, 326.

In court, opinions on the Art. 32, Par.4 are divided into two parts, and the "supporters" of this article indicate the future refinement of the activities of the administrative body. In particular, the Court considers that, on the one hand, the administrative body will take into account and correct the unexamined acts in the future, and on the other hand, the studied circumstances will help the court to make a new decision. With the second opinion this practice might be wrong and administrative bodies could use their legal power in wrong way.

2.2. Completion Deadline of the Decision Issued in the Frames of Discretion

The time limit for completing a defective decision issued by an administrative body within its discretion is not established by procedural law. However, the court is obliged to set a deadline on the motion of the administrative body.[13]

It is noteworthy that the court has a positive obligation to indicate to the administrative body, not to exceed the reasonable time limits for review of the act[14], which should naturally arise from the administrative process[15], although the practice indicates other. According to one example, in labor disputes, when a court invalidates an administrative act, it does not resolve the issue and points to a better investigation by the administrative body into issuing the relevant act. This period of execution is not a fixed term, where the administrative body can issue a similar act months or years later. A person who has been fired has to appeal against a new act and re-enter the path he took several years ago. Given that the efficiency of the court is one of the main concerns for any society[16], such a practice indicates the inefficiency of the court and discourages certain groups of citizens from going to court in the event of a dispute. Accordingly we have a classic example of that, how the court can, on the one hand, vaguely interpret the norm and, on the other hand, completely jeopardize the whole system and its effective operation.

The goal of human existence is always to break down boundaries, and administrative discretion is the boundary that administrative bodies always want to break down.[17] Of course, this can not be assessed positively, but the goal of lawyers is to ensure the maximum explanation of court decision and less incentives for administrative bodies. Contrary to Georgian practice and law, paragraph №113 of the German Administrative Procedure Code is more succinct and clear about what kind of task it gives to a judicial administrative body. Because a particular public servant, in his time, was unable to issue the act under consideration, the court is paving the way for how it should be examined and

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13 Researching the issue and reading the relevant literature, it is established that in a number of European countries (including Germany) the approach of the court to such cases is quite strict. The judge himself sets the deadline for the study of the document and indicates which part of the disputed act is particularly important in order to exclude future meetings of the administrative body as much as possible.

14 *Jeffrey P.,* Principles Governing the Court's Discretion to Extent time, Singapore Academy of Law Journal, Vol. 25, 1999, 1.

15 *Bikle W.,* Administrative Discretion, George Washington Law Review, Vol. 19, 1933, 2.

16 *Lurigio A.,* Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court, Justice System Journal, Vol. 30, Issue 2, 2009,196.

17 *Arthur S.*, Administrative Discretion in the Award of Federal Contracts, Michigan Law Review, Vol. 53, 1955, 817.

issued. Only 15-20% are the number of cases where the administrative body has re-examined the issue and the new act has a different content. For their part, public officials are reluctant to make new and different decisions, which raises a lot of additional questions.[18]

Misinterpretation of the relevant discretionary norms, and in turn incorrect practice, creates the following defects: 1. the plaintiff receives as a result a dysfunctional court, whose direct duty is to resolve a legal dispute; 2. the administrative body is given additional possibilities to strengthen its decision and justify the previous individual. An act that puts the parties in an unequal position. At the same time, the administrative body tries to extend the deadlines for the study of the issue as much as possible, in order to avoid the responsibilities of specific public officials; 3. Trust in court is declining and disputes have been going on for years.

3. Explanation of the Norm and Its Relation to Discretion

The activities of a judge are directly related to the interpretation of norms. The source of his real power is the goodwill of the people.[19] If not the possibility of a multifaceted interpretation of the norm, the legal discussions would have lost their meaning and the law itself could not have been as it is today.[20] In this way, the primary goal of a judge in interpreting a norm is to evaluate it in terms of philosophy, history and sociology[21] in order to achieve a high standard of objectivity.

The problem of explaining the norm of law in the legal literature is one of the most important and constant. The concept of explanation is pluralistic. In many cases, the rule of law is vaguely conveyed, which consequently manifests itself in its application, in such cases an explanation must be provided in order for the relevant authorities to properly implement this norm in life. The types of explanations are differentiated according to the subjects and the volume. Forms of formal and informal explanations are distinguished according to the subjects, while types of literal, limited and extended explanations are considered according to the volume. Different methods of explaining the norm in the literature are derived from natural law and sociology.[22]

It was the process of explanation that created the joke: two lawyers – three views. The main task of the explanation was and remains a uniform understanding and ensuring the correct understanding of the norms of law in the whole territory of the state, strengthening the unity, its legal field.[23] However, the use of discretion by the judge is explicitly related to how the judge interprets the relevant norm.

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18 Last fall, I had meetings on this issue with several judges of the Tbilisi Court of Appeals who are concerned about the misinterpretation of the relevant discretion by the Court of First Instance. Eventually the case goes to the Court of Appeals and the party who has lost interest in the dispute for years is still losing precious time to get an effective trial.

19 *Bufford S.,* Defining the Rule of Law, Judge's Journal, Vol. 46, Issue 4, 2007, 15.

20 *King A.,* On Court Rates, Law Magazine, or Quarterly Review of Jurisprudence, Issue 2, 1830, 351.

21 *Blach E.,* Interpretation of Law, Marquelle Law Review, Vol. 16, 1932, 107.

22 *Zaiets A.,* Problems of the Definition of Law Topic of the Issue: The Legal System of Ukraine: Topical Issues of Theory and History: Section I: Peculiarities and Developmental Trends of the Legal System of Ukraine, Law of Ukraine, Kyiv, 2013, 23.

23 *Mosulishvili M.,* Explanation of the Rule of Law-Faces, Methods, Acts, Grigol Robakidze University. Academic Herald, Tbilisi, 2015, 56 (in Georgian).

3.1. Logical and Systematic Interpretation of Law

The logical interpretation of the law seeks to determine the meaning and purpose of the law and, based on the interrelationship of the norms of law, to determine the meaning and specificity of a particular norm. This is done by the system method. Systemic exacerbations may indicate that there is a collision of norms. The collision of norms is resolved by observing the following requirements: a) If the collision norms have different legal force, then the hierarchically superior norm obeys the lower norm: *Lex superior derogat legi inferiori*. b) If the collision norms have equal legal force, then the special norm takes precedence over the general norm: *Lex specialis derogat legi generali*. The special norm usually regulates a narrower circle of mutual relations than the general norm. c) If the collision norms are special and at the same time have equal legal force, then the late issue norm is preferred to the earlier issue norm: *Lex posterior derogat legi priori*. The norm of law issued late reflects the will of the legislator more precisely.[24]

3.2. Teleological Definition of the Norm

"Telos" in Greek signifies purpose, result. The teleological definition clarifies the objective purpose of the law and not the initial will of the legislator (insofar as the law terminates its connection with the legislator upon its adoption). Clarifying the purpose of the norm is of great importance in the process of using the norm by the judge. The norm of law is based on a goal – the goal is the creator of all law. If we understand the purpose of law, then we also understand law.[25] A teleological definition means defining the objective purpose of a rule of law. Its purpose is to determine the possibility of implementing the rule of law. The teleological definition refers to the attitude of the rule of law towards the principles of legal certainty, equality and expediency. Given the fact that legal-ethical principles are enshrined in the Constitution, the teleological definition includes a definition corresponding to the constitutional law. In a broad sense, the methods of interpretation include the extension of legal norms in cases that have not been provided for or deliberately regulated by the legislature, as well as cases that have been caused by a change in circumstances. Extensive interpretation of the law is the power of a judge to apply the law by analogy to legally uniform cases or, on the contrary (Argumentum e contrario), to exclude the use of a rule of law in another case, as this case should not be covered by law.[26]

4. Recommendation of the Council of Europe to the Member States about Discretionary

The Committee of Ministers of the Council of Europe adopted a recommendation in 1980 on the exercise of discretionary powers by administrative bodies.[27] The Committee of Ministers of the

[24] Legal dictionary, <https://gil.mylaw.ge/ka/term/879.html> [25.06.2021] (in Georgian).
[25] *Khubua G.,* Theory of Law, Tbilisi, 2004, 156 (in Georgian).
[26] See, ibid, 158.
[27] Council of Europe, Committee of Ministers, Recommendation № R (80), <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804f22ae> [25.06.2021].

Council of Europe considers the increasing involvement of administrative bodies in various spheres of life and the frequent use of discretionary powers by them in decision-making, wishing that the administrative powers of the Member States be exercised on the basis of recognized principles. he purpose of this recommendation is to protect human rights and freedoms, to protect the interests of individuals from the abuse of discretionary powers. The recommendation adopted by the Committee of Ministers of the Council of Europe consists of four parts: 1. Purpose and definitions of concepts; 2. Basic principles; 3. Procedure; 4. Control.[28] The principles set out in the document are used to protect human rights, freedoms and interests when issuing an administrative act by an administrative body within its discretion. An administrative act, as defined by the Committee, means any individual action or decision taken by a public authority or official which directly affects the rights, freedoms and interests of a person. Discretionary power means the authority that gives an administrative body some degree of freedom in making a decision when an administrative body can select one of the most relevant, best decisions from a variety of legal decisions.

5. Conclusion

After the research it's desirable for the court to determine the administrative bodies to investigate the matter and a reasonable time frame for the issuance of a new act, which cannot be assessed as an interference at the discretion of the administrative body, as only this can protect the rights of the other party having the access to effective jurisprudence.

The position of the Court of Appeals that using article must be argumentative, should be shared, criticizing the practice of the first instance and not to violate the principle of economy of process. This issue is directly related to the building of a strong democratic state, which is a prerequisite for the formation of a society with high legal consciousness. Accordingly, the constitutional principles discussed above, such as the existence of the principles of the rule of law, democracy and the welfare state, constitute the most important action provisions in public law, which implies the strict implementation of the above principles by any state body and the existence of a normative basis.

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27. Legal dictionary, <https://gil.mylaw.ge/ka/term/879.html> [25.06.2021] (in Georgian).