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JUDICIAL CONTROL OVER DISCRETIONARY ADMINISTRATIVE ACTS: EUROPEAN EXPERIENCE[1]

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Judicial control over discretionary administrative acts in France, Germany and the UK is analyzed in the article. The author puts forward the thesis: discretionary acts require special concept of further judicial control over them. The focus is given to the known genetic similarity between some French claims, the German doctrine and practice of the principle of proportionality in relation to discretionary acts and the elaborated by English courts test on reasonableness of an administrative decision. It is concluded that in developed foreign legal systems courts increasingly check administrative acts not only in terms of legality, but also their reasonability and justness.

Keywords: discretion, administrative act, administrative procedures, principles of administrative law, principle of proportionality.

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Until recently, the exercising of public authority, in any case, in the Romano-Germanic legal tradition, was based on number of postulates (axioms). In particular, on a more or less strict separation between authorities (their functions), the demarcation of the rulemaking and law-enforcement. The forms of managerial actions themselves were examined through the prism of a formalized and "discrete" approach: from the plethora of conducts of an authoritative subject in a particular situation only one option was recognized, firstly, lawful, and, secondly, correct; therefore, all other managerial decisions were denied such a property. On the other hand, after facing with discretionary powers, the courts limply evade the issues of verification of the forms of managerial actions taken within the framework of their implementation (that, bearing in mind the constantly spreading competence of the executive power, made the latest all less subjected to external control). The legislator, in this situation, tries to create the most "dense" regulation, formulate the maximum number of administrative procedures, within the framework of which it seeks to set strict criteria for taking administrative decisions. Jurisdictional oversight bodies orient on literal interpretation of such legal norms, considering the deviations from the latter (or more precisely, from their verbatim interpretations of administrative procedures) as illegal, and therefore subject to modification or cancellation.

However, management system is being changed. First, as rightly pointed out in the scientific literature, in a constant changing environment (e.g., new technologies) the need for decision-making related to the managerial risks causes blurring of boundaries between the rule-making and law-enforcement in the modern administrative law [5, 91]. Because it is increasingly difficult to rely on a predefined algorithm that would ensure the selection of only correct decision. This non-trivial fact is studied and in foreign science of administrative law [8].

Second, the role of law principles increases dramatically. It is related with the same predicament (or even impossibility) of hard all-encompassing juridization (legalization) of administrative procedures, administrative actions and criteria for their adoption. At that, the principles encompassing not only "traditional" requirements of legality, but also – the principles of appropriateness, reasonableness, soundness, become more and more significant. This intensification of the "work" of principles inevitably has an impact on judicial control. At that, this impact is many-sided. On the one hand, they force the courts to "expand" and "deepen" their control (supervision) in respect of managerial decisions of public administration, "rising" over procedural and other normative requirements, and on the other hand – itself this increase of non-traditional

regulatory legal means is the result of an increasingly active role of judicial bodies.

The third, key trend (simultaneously – a factor, prerequisite and consequence) of complication of public management is associated with administrative discretion. The role and value of the last increases dramatically; not without reason many foreign researchers believe that the problem of regulation of administrative discretion and judicial control over it is one of the most important and complex problems of European administrative law [11, 73; 12, V]. At that, individual authors as the main vector declare shift in emphasis from "law protection" approach (i.e., judicial control) to prevention of "bad" decisions through the development of new, more perfect (including – informal) administrative procedures [8]. Of course, it would be at the least strange to deny the usefulness of aprioristic rationalization of public management, establishment of rather flexible and effective regulatory mechanisms. However, the hope only on the resources of public administration itself and administrative procedures, in our view, is fundamentally wrong. On the contrary, in process of complication of the latter, the judicial control itself also must inevitably become more complex. Just this begins to most clearly show the above factors of blurring the boundaries between rule-making and law-enforcement (not just public administration "balances", taking complex administrative acts, but also court decisions are beginning to penetrate deeper into the legal system); increasing the role of legal principles (exactly courts give "final point" in the assessment of forms of managerial actions, and often are guided by not only and not so much the specific rules, but by the principles of law, or at least by extensive interpretation of certain norms). Finally, exactly the assessment of discretionary decisions has exacerbated the need for implementation of not so much formal-juridical dichotomous approach ("legally" – "illegally"), but – of based on dialectical logic "grading scale", where itself a violation of certain requirements (including – administrative procedures) does not mean aprioristic nullity. Conversely, absolute support of "hard" procedures does not guarantee the legalization of managerial decisions on the part of courts.

Thus, the evolution of public management – is largely an evolution of the legal regulation of administrative discretion, which in turn forces to reconsider traditional approaches to both themselves administrative procedures and judicial control over them. Let's try to check the said statement (so far – in the rank of hypothesis) through analysis of a number of European legal orders.

We think that we should start with France. After all, exactly there have been taken the in many ways unique for continental Europe of that time first attempts to

legalize such property of an administrative act as its legitimate purpose. According to a very accurate remark of A. I. Elistratov, "we can outline new horizons for the development of public law in the idea of a legitimate purpose of administrative act. A judge appointed for the interpretation of the purpose of law inevitably rises from the formula of law to those public interests, to which the law should serve. The compliance of an administrative act to public service tasks becomes its supreme criterion for determining the legality of the act. To find this criterion, a judge posed between the ruling authorities and citizens should reduce the law to its own understanding of public benefit, harmonize it with its own legal consciousness" [4, 157]. The origin of this trend meant the attempt to extend administrative justice to administrative discretionary power [4, 266]. The main legal means of verifying the corresponding administrative acts are the mentioned above claims because of abuse of authority (contentieux de L'exces de pouvoir). Let us briefly explain: a complainant in such dispute is going to prove not the violation of its subjective rights, but inconsistency of a contested act to applicable legislation, norm of administrative law. Judicial practice highlights several reasons for the cancellation of a contested decision.

And if most of those are very familiar and traditional for contemporary reality (defects of form or procedure; incompetence of an authority or official; violation of substantive law norms [1, 283-284]), then at least one of them – deviation of power (detournement de pouvoir) – still looks very original. The novelty of such direction in checking administrative acts that are being considered for deviations from lawful purpose is most pronounced in the "deviation of power". There are various examples of such cases in the scientific literature: closing of a private plant by local administration under the pretext of non-compliance with sanitary regulations, and in fact for elimination of unwanted competition to state plant; dismissal by a Mayor of an official who has drawn up a Protocol against saloon-keeper, who host political supporters of the Mayor; ban on getting naked on the beach not for reasons of public morality (formal cause), but in order to people pay for use of paid municipal cabanas [1, 284; 4, 266]. It is easy to see: in case of claims for deviation of power we can observe a significant expansion of the boundaries of judicial verification of administrative acts (which is exercised, we note, not by the legislator, but by law-enforcer): technically it is also about the rule of law, but in reality the authorized body reconsider administrative act for its feasibility. This is done in order to link administrative discretion by external control.

This step of the French administrative law not only immediately attracted attention, but also caused very strong feelings of some researchers of the late 19th-

early 20th centuries. So, according to categorical statement of L. Djugi, since then "there is not and cannot be the discretionary acts of management" in France [10, 208; 4, 267]. However, after at least a century the initial enthusiasm must be tempered. As noted in the contemporary literature, in practice the cases of voiding of an administrative decision in connection to abuse of authority are extremely rare, since it is very difficult to prove the illegality of aim of a contested decision [1, 284]. Thus, the above attempt (the first of the Romano-Germanic legal orders) to extend administrative justice to the sphere of administrative discretionary acts proved to be original, but ineffective.

It is difficult to overestimate the contribution of German (wider – Romano-German) administrative law in the development of European doctrine and legislation. But for a long time in a part of the judicial assessment of discretionary judicial acts the situation evolved somewhat differently. Administrative justice of Germany for a long time as if was in a trance – first from the absolutist monarchy of Hohenzollerns. The doctrine and judicial practice of the German Empire categorically denied the ability to verify discretionary acts (on this issue see: Fleiner, Einzelrecht und öffentliches Interesse Staatsrechtl. Abh-Festg. BD. II, pages. 3-39 [4, 266]), and then was paralyzed by Nazi tyranny. However, since the mid XX century, after shaking off the torpor and recovering from years of confusion, the German legal system intercepts from France the leadership in attempts to resolve the issue of judicial verification of forms of management activity not only in terms of their compliance with certain formal (and therefore the simplest) procedural and substantive criteria, but also with other, more complicated, in advance hard formalized requirements. One of the main legal instruments of such becomes the principle of proportionality, which has incorporated the French concept of the aim of act and creatively finalized it. The specified principle of law-enforcement is based on the correlation of aim with taken legal efforts, and this is the next step in the long path of legal verification of formally-legal phenomena. At the same, exactly in Germany, begins to take shape an independent theory of discretion, in which with some conventionality we can distinguish the following main elements: form of discretion, the grounds for judicial reconsideration and the density (intensity) of judicial control.

But first, let us turn to the legislation. According to paragraph 40 of the Law of Federal Republic of Germany from 1976 on administrative procedure (hereinafter – LAP), if an administrative body has the power to act on its own discretion, then it must exercise this right in accordance with the purpose of delegated powers and comply with the statutory boundaries of discretion [2, 39]. The provisions of LAP in part of judicial verification of corresponding administrative acts have

been developed in paragraph 114 of the Law of Federal Republic of Germany from 1960 "On Administrative and Judicial Process": "If an administrative body is competent to act at its own discretion, the Court also checks whether an administrative act or refusal of its publication or omission of an administrative body is illegal insofar as the statutory limits of discretion have been exceeded or the right to discretion has been exercised in a form that is not appropriate for the purpose of the powers granted. Only in administrative-court proceedings administrative body may supplement its ideas concerning the right of discretion regarding administrative act" [2, 136]. Easy to see the accentuation of the aim of an administrative act as a kind of property that is beyond the formal dictations of law norms. However, according to correct comment of German legal scholars, the above legal prescriptions – in fact the only ones that are trying to regulate the reconsideration of discretionary acts. But the norms of LAP and LACP are completely inadequate, they demand strengthening by general provisions of the doctrine of discretion [11, 78].

Let's start with the forms of discretion. Traditionally, in German scientific and educational literature separate two such forms of discretion as undefined legal concepts and discretion itself (in the narrow sense). Undefined legal concepts ("justice", "honesty", "reliability", "public interest", "good reason" and so on) are set out in legal acts, but have very little concrete information, needing further clarification. Specification of these norms takes place in law-enforcement activity of administrative bodies. Therefore, there is already some space for actions of administration, within which it can interpret the legal concepts and even decide whether they can be applied to the circumstances of a particular case [1, 323]. The second form is "ordinary discretion" ("discretion in the narrow sense"), it is determined by H. Maurer as follows: "Discretion takes place, if under certain circumstances determined by law the management **may choose between different modes of action** (emphasis added). In this case the law does not correlate circumstances with one legal consequence (unlike management linked to the law), but empowers the management to independently determine legal consequence, at that, it is offered two or more options or a specific area of actions. Discretion may refer to whether the management want to resort to a permissible measure (**decision at discretion**), or to what of various permissible measures it wants to use in case of actions (**choice at discretion**)" [6, 67]. Thus, a crucial element of discretion in the narrow sense is the choice between the various types of action proposed, which, in any case, from a legal point of view are equivalent [6, 67].

Along with the above mentioned, in the scientific literature often distinguish other forms of discretion, including - discretion in planning [11, 78-81; 6, 38-39, 76-85].

Subsequently judicial practice and doctrine in close collaboration have elaborated different grounds for reconsideration (in other words - "groups of errors") of discretion, primarily for the ordinary discretion (but not only):

1) going beyond discretion (body choses an action with legal consequence, lying outside the statutory powers);

2) failure to use discretion (in the case of provision of space for discretion an administrative body is required to use it, even if the discretion of the body includes the question, will it resort to any action or not);

3) erroneous use of discretion (administrative body deviated from the purpose of a power or relied on erroneous considerations in assessing circumstances);

4) violation of fundamental rights or general administrative and constitutional principles [1, 326].

However, for this study the greatest interest is represented by the third problem - the elaborated by the German legal system density of judicial control over administrative discretionary acts. Figuring out of the limits of judicial reconsideration of the latter is similar to the search for the philosopher's stone. Indeed, as has been noted above, the legislative prescriptions on this subject are rather scarce; however, it cannot be otherwise, because there is a situation, by definition going beyond the literal content of "typical", specific-regulatory legal norms. The vacuum caused by the imminent withdrawal of the legislator is tried to be filled in, on the one hand, by courts and, on the other hand, by legal scholars.

Verification of discretion in the narrow sense (to which were devoted paragraph 40 LAP and paragraph 114 CACP) takes place in two stages. First, they find out, what is aim of power to exercise discretion, and then evaluate a specific case and analysis of the use of discretion in accordance with the aim of this discretion [1, 325-326]. It is not difficult to see that already here the teleological interpretation by court of corresponding authorizing norms from the perspective of the principle of proportionality comes to the fore.

However, a much more complex problem is the issue of judicial verification of vague legal concepts, these quasi-legal dot-dash lines, for obvious reasons deprived of any formalized content. How should an external controlling instance act in this situation? Should it content with verification of "classical" legality? But it is extremely difficult (if at all possible). Adherence to this position allows complying with the familiar axiom of inadmissibility of judicial

control penetration in areas that increasingly difficult to call the legality (and which are getting closer to the other fundamental principles of administrative law and administrative procedures – feasibility, reasonableness, and fairness). Exactly this path was chosen by German doctrine. According to K. Raytemayer, the works of A. Bachofen, who has elaborated the so-called doctrine of space for estimates, have become the foundation of theoretical approaches to the verification of indefinite legal concepts. According to him, administrative bodies have to get some space for estimates, in which they being free from any instructions can take autonomous decisions. Administrative courts must accept these decisions and have the power to check only the fact of staying of administrative bodies within the borders of this space. Almost all German legal scholars share this theory, building on and complementing it [1, 325].

But the conservative desire to preserve the "purity" of judicial control has one obvious and irremovable consequence – increase of administrative discretion that is beyond not only administrative procedures, but also not subject to judicial verification. That is fraught with adverse consequences for powerless subjects. Apparently, that by these considerations were guided German courts, gradually and increasingly resolutely rejecting restrictive doctrinal approaches. As an example we take the decision of the Federal Administrative Court of Germany (hereinafter FAC) from November 10, 1988 on the case of the license for the production and sale of pesticides [16]. The circumstances of the case are as follows: the claimant had a license for the production and sale of pesticides. However, the authorized federal executive body denied to extend the license (for earlier legalized pesticides), as well as to issue another for a new product. The applicant has fulfilled all the necessary procedural requirements. The refusal was justified by conclusion, which has revealed that the pesticides may have unacceptable harm in terms of science. Refusal was appealed to the Administrative Court of first instance. The latter has established the following. According to article 15 of the Law on Plant Protection (Pflanzenschutzgesetz), pesticides must not pose a threat to human health, animals, have harmful effect on water resources, as well as should not have "other consequences", in particular – "for the ecological system, which from the point of view of scientific knowledge are unacceptable". According to the Court, this means that the refusal to provide license is valid only in cases where there is a high degree of probability of harmful effects of pesticides on the environment. And then the Court, actually having evaded from the checking the presence or absence of harmfulness of pesticides, decided on the partial satisfaction of the claim and obligated the licensing body to extend the license for two

years and 10 months. With a rather strange, in our view, motivation: because during such limited period the harmful effects on the environment should not be expected.

Decision of the Court of first instance was appealed to the Federal Administrative Court. The position of the executive body was that the wording "other consequences for the ecological environment" is an indefinite legal concept, and therefore is subject just to a limited judicial verification, and this when exactly the administrative body is vested with discretionary powers to assess. The Court can check this administrative act only for errors (including procedural ones) in the application of discretionary power. However, the FAC did not agree with either licensing body or the Court of first instance, holding that courts are empowered to conduct full verification of indefinite legal concepts. This means that judicial control is not restricted, as it is in the case with verification of ordinary discretion. The Administrative Court of first instance had to fully check all the facts concerning the case, and concretize for the purposes of the last all the concepts, including "other harmful consequences". Despite the fact that the power to determine harmful or not harmful effects of pesticides belongs to the executive body, exactly the courts are empowered to check the correctness of application of the law to the facts, including by examining new evidence, expert opinions, etc. [11, 119-122].

However, among the "ordinary" undefined legal concepts German courts distinguish an independent group of concepts with the so-called "space for assessments". These typically include assessments of examinations (and similar decisions); assessments in the field of service law; evaluative decisions on the part of authorities, consisting of highly specialized experts or representatives of the groups expressing different public interests; predictive (planned) decisions, particularly in the area of economic law; decisions of administrative-political nature [1, 325; 24, 44-65]. If, however, the German administrative courts are trying to respect the special position of designated spheres of social relations and their respective administrative acts, the Federal Constitutional Court of Germany (hereinafter FCC) went on the real offensive.

Here is the first example – the decision of 1990 on the case about the verification of short story «Josephine Mutzenbacher» [17]. Authorized executive authority imposed certain restrictions, in accordance with the legislation on distribution of books, dangerous for minorities, on the publication of a pornographic novel, dedicated to the life of a Vienna prostitute. The applicant in contacting the FCC insisted that the provisions of the mentioned legislation do not apply to the publication, since it is a "work of art". The FCC decided that judicial control in this

case also applies to the evaluation of concept of "harm to minorities", and the executive body does not have freedom of assessments.

The second example is more indicative and touches upon the sphere of examination results. The applicants challenged the understated, in their view, results of estimations on the status of lawyers. The Administrative Court of first instance and the FAC refused to reconsider administrative decisions due to the fact that there are indefinite legal concepts with the space for administrative assessments. But the FCC in its decision of 1991 [18] approached the situation somewhat differently, pointing out that the courts had the right to fully check the academic questions of exam answers (even if it would involve experts), "confirming", however, actually the right of relevant organizations to put examination assessments [11, 115-117].

We think that even a little bit – and the German court procedure "will break" the last restrictions on judicial control over administrative acts through not only its application on the verification of compliance with the administrative procedures and other requirements of legality, but also through definitive, unambiguous and irrevocable enshrining of the courts' power to assess the form of managerial actions from the perspective of the principle of appropriateness. However, the thesis of L. Djugi from the 19th century concerning the disappearance of discretionary acts in respect of modern Germany still was a bit hasty. So, the judicial practice with respect to sphere of planning comes from a reasonable reduction of density of judicial control in this sphere [11, 80-81; 6, 42-43, 60-64, 76-84].

Thus, in the Romano-Germanic legal system was a distinct process of juridization of the forms of managerial actions (as the climax of which, apparently, should be recognized the adoption of laws on administrative procedures). The hope only on procedures, however, did not answer the question of how to deal in the situation with discretionarily taken administrative acts. That stimulated the doctrinal development of discretion and judicial control over it.

In parallel with all these existential searches on the continent, other reality was forming within the framework of Western European jurisprudence. We mean, of course, the Common Law System, specifically its British branch. However, we immediately note: for us, the representatives of the Roman-Germanic legal concepts, the legal reality of the UK is so unusual, and the system of precedents is so complex and multifaceted, that seems that if you want in it you can find any approaches and justify any, even the most opposing theses. Therefore, all further reasoning can be as true as false at the same time precisely because of the inherent ambivalence of Common Law System in the eyes of European positivists (such as the author of this study).

So, first we need to distinguish between "classic" judicial control over administrative acts and the appellate powers of the Parliament of Great Britain. As noted by P. Cane, one of the key differences lays in the grounds for reconsideration: if the appellate court examines all the advantages of an administrative decision, the judicial control is reduced to verification of the legality of administrative decision [9, 35].

As for the most complex of all discretionary administrative acts – the British law, unlike German one, does not distinguish separate forms of discretion. At the same time there are three main areas of social relations, in which such powers can be manifested, in the scientific literature. The first group is education, social welfare, planning, and immigration law. The second is the so-called "implied discretionary powers", expressed in such concepts as, for example, "public interest". Finally, the third group of discretionary powers is formed of "the royal prerogative" – unformalized sphere, which includes the powers traditionally exercised by the British Monarch. Although judicial control is also slowly spreading on them, there are still issues seized from the jurisdiction of courts (declaring war and concluding peace, international relations, management and deployment of armed forces, appointment and dismissal of Ministers, dissolution of Parliament). Finally, some authors distinguish an additional group – "common law discretionary powers", to which they attribute the powers to conclude contracts. However, the existence of the latter is debatable [11].

Grounds for reconsideration of discretionary acts at first glance in the most general terms correlate with the discretion errors distinguished by German doctrine and practice – failure to apply discretion and abuse of discretion. The density of the judicial control, according to M. Kunnecke, is less intense than in Germany (especially when compared to the in-depth verification of indefinite legal concepts). British courts orient on relatively obvious errors (including of procedural nature) of administrative bodies, recognizing the known independence of the latter. Exactly such a relatively cautious approach well correlates with the practice of the ECHR [3], what eventually puts, according to metaphorical expression aforementioned author, the German legal system in splendid isolation on this issue [11, 122].

It seems here we would complete the analysis of the British experience. But this hypothesis concerning finality of findings seems erroneous. The fact of the matter is that, when talking about the legality as a key requirement to the forms of managerial actions, the Anglo-Saxon tradition does not necessarily imply compliance of an administrative act with law norms contained in a legal act of greater legal force. Often such normative acts in principle do not exist. But even in case of

adoption of a normative act, as is known, a huge role in determining their "actual content" will be played by other legal instruments. And first of all – court decisions. Known gaps of legislation and empiricism of case-law system, in our opinion, have become the legal reasons, which have led to the emergence of new, totally unusual for classical traditions of continental Europe, grounds for reconsideration the decisions of administrative bodies. First of all, of course, it is about the irrationality and unreasonableness of administrative acts.

A vital role for the development of these requirements to administrative acts was played by the case of Wednesbery, which John Laws poetically named the legal equivalent of Beethoven's Fifth Symphony that not by choice had become a hackneyed (vulgarized) [13, 185]. The circumstances of the case are such. Movie company "Associated Provincial Picture Houses Ltd" in 1947 received from an authorized corporation (Wednesbery Corporation) the license for movie screenings in the city of Wednesbury with the restriction in the form of ban on visits of Sunday cinema show for persons under the age of 15. The movie company found this ban as an unacceptable going of the corporation beyond its powers and contested it in court. The Court after verification of facts and the current legislation (including the Cinematography Act of 1909, Act on Sunday Entertainments of 1932) did not revealed direct violations, recognized a certain scope of discretionary powers of licensing bodies and decided that it could not cancel the decision of the defendant simply because he was not agree with it. However, Lord Greene formulated the rule, according to which the court might intervene if a taken decision was so unreasonable that no one intelligent power would ever adopted it.

This decision was in many ways a turning point in the evolution of the judicial control over administrative acts in the UK. It is the violation of the requirement of reasonableness is a "core" of such group of errors (violations) as "discretion abuse" [11, 92-110]. However, we cannot fail to agree with John Alder, who marks: the very concept of "unreasonableness" is so vague that virtually invites a judge to represent its subjective vision of due in the assessment of decisions [7, 382]. Moreover, the requirement of reasonableness (already very indefinite) is constantly changing, especially in the direction of expansion. Thus, in the case of CCSU v. Council of Civil Service Unions [14] Lord Diplok decided: the Court will intervene only if an act does not have reasonable grounds or is so outrageous in denial of universally recognized moral principles (emphasis added) that no sane person, who applies its mind to the resolving of issue, would take such a decision. The scope of this principle is outlined primarily by rights of powerless subjects; for example, in political matters such a basis for reconsideration is applied only in exceptional

cases [7, 382-383]. Finally, the principle of reasonableness in recent years enters in some competition with the principle of proportionality receiving increasing dissemination after the ratification of the European Convention on Human Rights, [11, 95-105]. However, as noted by Lord Slynn in the case of R. v. Secretary of State [15], the difference between these principles in practice is not as great as it might seem; "the principles of proportionality and reasonableness should not be held in different compartments". Researcher D. Los agrees with the judge and emphasizes: the principle of Wednesbery has evolved up to position of one of the basic principles of modern administrative law of England [13, 186].

So, the absence of not only specific administrative procedures, but often of corresponding substantive legal norms coupled with certain legal traditions have led to the fact that British courts when assessing administrative acts become able to directly apply the principle of fairness. Requirement of legality so evolved that became dependent on the principle of appropriateness. Actually this gave to courts immense powers in determining the grounds for reconsideration of administrative acts (and indirectly – the density of judicial control itself). In this situation, administrative discretion is largely replaced by judicial discretion. That does not always have a positive effect on defendant, as well as on claimants. Extension of the jurisdiction of courts happens without forming of strict rules on the right to judicial protection. So, according to "the principle of fairness" (do not confuse with the requirement of reasonableness), the court itself shall determine in each case the presence or absence of general principles, including the right to court hearing. Thus, the applicant quite unexpectedly for itself can face a situation where he cannot appeal administrative act that violates its legal status [7, 389-390].

In conclusion we note: administrative procedures have not managed to sufficiently link truly complex administrative decisions, especially in the area of discretionary powers. The principle of legality, which reached its apogee in their face, has the known limits of its penetration. In this situation courts play an increasingly important role in various European legal orders. Judicial practice all larger modifies legal norms. And its general direction lays in a gradual, but steady expansion of the subject of judicial control; transition from verification of "pure" legitimacy to other principles of administrative law and administrative procedures – appropriateness, reasonableness, and soundness. This judicial practice is not always uniform: pushing on some fronts (as, for example, in the case of indefinite legal concepts in German administrative law), on the other fronts, it retreats (planning area). At that, courts tend to be "shy" to directly talk about the appropriateness of an administrative act (exception, but a vivid exception is the United Kingdom).

In adopting its decisions, they continue to put on them the customary clothes of legality. But the essence does not change because of such terminological masking. Today the compliance with mere administrative procedures and other normative requirements is not always enough for the proper legal existence of an administrative act. Increasingly, its suitability becomes a subject of much more multifaceted judicial verification.

References:

1. *Administrative Law of Foreign Countries: Textbook* [Administrativnoe pravo zarubezhnykh stran: Uchebnik]. Under edition of A. N. Kozyrin and M. A. Shtatina, Moscow: Spark, 2003.
2. *Administrative Procedural Law of Germany – Verwaltungsrechtsshutz in Deutsch-land: Law on Administrative Proceedings; Law on Administrative-judicial Process; Legislation on the execution of administrative decisions* [Administrativno-protsessual'noe pravo Germanii – Verwaltungsrechtsshutz in Deutsch-land: Zakon ob administrativnom proiz-vodstve; Zakon ob administrativno-sudebnom protsesse; Zakonodatel'stvo ob ispolnenii administrativnykh reshenii]. Translation from German, V. Bergman, Moscow: 2007.
3. Case Upjohn Ltd v. The Licensing Authority Established by the Medicines Act 1968 and others ((Case c-120/97) January 21, 1999).
4. Elistratov A. I. *Basic Principles of Administrative Law* [Osnovnye nachala administrativnogo prava]. 2nd revised and enlarged edition, Moscow: G. A. Leman and S. I. Sakharov, 1917.
5. Kudryashova E. V. Innovation Sciences of Administrative Law in the Field of Adoption of Decisions on Risks Management (through the example of planning) [Innovatsii nauki administrativnogo prava v oblasti prinyatiya reshenii po upravleniyu riskami (na primere planirovaniya)]. *Innovatsii v nauke i praktike administrativnogo prava: sbornik nauchnykh trudov, posvyashchennyi pamyati Yu. M. Kozlova* (VI Kozlovskie chteniya) – *Innovations in Science and Practice of Administrative Law: collection of scientific papers dedicated to the memory M. Kozlov* (VI Kozlov's Readings), Editor-in-chief E. P. Andryukhina, Moscow: publishing house of Kutafin Moscow State Law Academy (MSLA), 2013.
6. Rikhter I., Shuppert G.F. *Judicial Practice on Administrative Law: Study Guide* [Sudebnaya praktika po administrativnomu pravu: Uchebnoe posobie]. Translation from German, Moscow: 2000.
7. Alder J. *General Principles of Constitutional and Administrative Law*. Fourth Edition, 2002.

8. Barnes J. Towards a Third Generation of Administrative Procedure. *Comparative Administrative Law*, S. Rose-Ackerman, P. L. Lindseh, Northampton: 2010.

9. Cane P. *An Introduction to Administrative Law*, 1996.

10. Duguit L. *Transformations* [Les transformations].

11. Kunnecke M. *Tradition and Change in Administrative Law. An Anglo-German Comparison*, 2007.

12. Redecker K. / von H. J. Oertzen. – Verwaltungsgerichtsordnung [Court of Administrative Procedure]. 1997.

13. *Sir John Laws in Forsyth and Hare, The Golden Metwand and the Crooked Cord*, 1998.

14. (1984) 3 All ER 935, HL.

15. (2001) 2 All ER 929 at 976.

16. (1988) 81 BVerwGE (Compilation of Decisions of the Federal Administrative Court (Germany)) 12.

17. BVerfGE (Compilation of Decisions of the Federal Constitutional Court (Germany)) 83, 130.

18. BVerfGE (Compilation of Decisions of the Federal Constitutional Court (Germany)) 84, 34.