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Discretion and Legislation on Administrative Procedures: the Experience of Germany

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The article analyzes the issues of the density of judicial control over forms of administrative discretion in Germany. Special attention is paid to the problems of discretion mistakes (non-use of discretion, breach of margin of appreciation, incorrect application of discretion), on the basis of analysis of certain decisions of the Federal Administrative Court of Germany. There are given conclusions on the fundamental applicability of the German experience for the developing of legal orders.

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When verifying the legitimacy of administrative acts, an important role is played by the verification of application of discretionary powers, as well as the so-called vague legal concepts.

According to the principle of a constitutional state, one must proceed from the premise that all burdensome administrative acts should be based on a legal norm. However, this norm should be interpreted so that it can then be sub-summed, that is, to bring the circumstances of a case under this norm. Sometimes this can be difficult, in particular when the norm contains vague legal concepts.

Let us give the following example. According to paragraph 35 of the Law on Trade (German "Gewerbeordnung")[30], the exercise of entrepreneurial activity in case of unreliability of an entrepreneur is banned. In this case, the concept of unreliability requires interpretation. The Federal Administrative Court defines it in the permanent judicial practice as follows: the entrepreneur is unreliable if "by the general impression of his behavior and reputation does not guarantee enough that in the future he will carry out his business activities properly".[31]

At that, the interpretation of vague legal concepts follows the classical criteria of interpretation, which were actually composed by Friedrich Carl von Savigny[32]:

- grammatical interpretation;
- systematic interpretation;
- historical interpretation;
- teleological interpretation.

If the grammatical interpretation considers a text, the systematic interpretation examines the interrelations of the norm, in which the interpreted norm is. Often, being based on the norms that are before or after the interpreted norm, one can draw conclusions about the understanding of the norm. Here, basic principles, which may be set out at the beginning of the law, may also play a role. The historical interpretation wonders about the history of the origin of a norm, and, in particular, about the will of the legislator. The teleological interpretation wonders about the meaning and tasks of a norm, that is, first of all, about the goals that must be achieved with the help of the norm. If these methods lead to unambiguous or even contradictory results, the priority is usually given to the teleological interpretation.

The interpretation of vague legal concepts, as a rule, can be verified by the court in full. Therefore, the court in principle may always come to the conclusion that a norm must be understood in a different way than an administrative authority assumed it in its decision. There are exceptions to this rule related to the availability to an administrative authority of the right to a range of assessments. The latter cannot be verified by the court in full; in accordance with the practice of the Federal Administrative Court, verifications are permissible only in exceptional cases, if this is justified by the special grounds.[33] Such situations include the following cases:

[30] https://www.gesetze-im-internet.de/gewo/__35.html
[31] Compare, for example, the Decision of the Federal Administrative Court of March 9, 1994, case number 1 B 33.94.
[32] Friedrich Carl von Savigny, System of Today's Roman Law, p. 213.
[33] The Decision of the Federal Administrative Court 100, 221, 225.

- examination decisions and decisions similar to examination ones, due to the uniqueness of a specific evaluation situation at the time of examination[34];
- attestation of public servants[35];
- decisions of an evaluation nature on the part of commissions that do not depend on prescriptions and consist of experts and/or representatives of interests[36];
- predictive and evaluative decisions of an economic and political nature.[37]

Nevertheless, the recognition in these cases of an administrative body's right to a range of assessments does not mean that these cases are not generally subject to judicial review. This is possible, however, in a limited scope. Courts have the right to check such decisions only for the presence of external, formal errors, or errors that go beyond the provided range of assessment in the sense and purposes of its provision. For a group of cases associated with examination decisions, this means that the examination decisions can in any case be verified by the court for the following:

whether the substantial procedural requirements have been upheld (for example, during a group examination within one hour, one of the candidates received only one minute, when another was given the opportunity to speak for 30 minutes);

whether an administrative body proceeded from the true circumstances of a case (including whether the results of previous examinations were correctly taken into account);

whether the generally recognized evaluation criteria have been upheld (in particular, an opinion expressed in the literature or in the case law during the examination cannot be assessed as false or incorrect);

whether the decision is far from considerations not relevant to the case (for example, the most beautiful student receives a higher rating than the most ugly).

The same applies to other cases of groups associated with the assessment range. In the case of doubt, the range of assessment, taking into account the right to judicial protection in ac-

[34] Decision of the Federal Administrative Court 84, 34 – legal state examination; the Decision of the Federal Administrative Court 8, 272 – transfer to the next grade of school.
[35] The Decision of the Federal Administrative Court 97, 128, 129 – official appraisal of a civil servant by its superior.
[36] The Decision of the Federal Administrative Court 91, 211, 215 – the classification of products that demoralize minors, by the Federal censorship institution(Bundesprüfstelle).
[37] The Decision of the Federal Administrative Court 97, 203 – the need for military flights at low altitudes; the Decision of the Federal Administrative Court 82, 296, 299 – an estimate of the maximum number of licenses for a taxi in order to ensure the functioning of taxi business.

cordance with article 19 part 4 of the Basic Law of Germany should always be narrowly interpreted in the light of the principle of a constitutional state.

The phenomenon of discretion errors deserves special attention.

If the legislation grants discretion to an administrative body, the decision of the administrative body has to be also checked for the correct application of this discretion. According to paragraph 40 of the Federal Law of FRG of 1976 on Administrative Procedures (hereinafter referred to as the LAP of Germany), when an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary powers. Essential aspects, which an administrative authority should follow when applying discretion, in accordance with paragraph 39 part 1 sentence 3 of the LAP of Germany, should also be included in the justification of an administrative act. The correct application of discretion by an administrative authority can be rechecked by itself or by a higher administrative authority in the case of pre-trial appeal. The administrative authority or the higher administrative authority may, in particular, assess the appropriateness of decisions in a different way and thereby make other decisions, even if there is no doubt about the legitimacy of the original decision. In principle, this does not raise any legal problems with respect to the protection of trust, since the applicant himself by way of filing a claim prevents the entry of the administrative act into legal force, thereby impeding more difficult revocability.

A more complicated situation arises in the case of a judicial appeal against an administrative act, since the courts, by virtue of the principle of separation of powers guaranteed in the Constitution through the principle of a lawful state, have the right to verify only the legality (but not expediency) of actions by the executive branch. Therefore, as part of a process in an administrative court, the verification of discretionary decisions, in accordance with paragraph 114 sentence 1 of the Administrative Procedural Code of Germany, is limited to whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment. This specifically means that only a requirement to verify the existence of the following discretion errors can be made in the court.

1. Non-application of discretion.

If the law grants an administrative body the right to exercise discretion, it also means the duty to apply this discretion. Therefore, if the administrative body does not consider the possibility of discretion (because it does not at all realize that the law provides it discretion or because, although it realizes this, but mistakenly assumes that it does not need to apply the discretion), here already an error of discretion takes place. In case of doubt, the administrative body must prove that it has applied discretion.[38] For example, the law provides the administrative authority discretion regarding the question of how to act to prevent danger. Non-application of discretion takes place if the administrative body does not understand the provided discretion at all and proceeds from a binding decision ("whenever there is a danger, it must act"), and also in the case when the public administration only abstractly allows discretion, in a particular case based on erroneous conviction that such is reduced to zero.

2. Violation of the limits of discretion (the principle of proportionality).

The application of discretion implies compliance by an administrative body with the limits of discretion established by law (paragraph 40 of the LAP of Germany). They follow from the Constitution and the legal principles enshrined in it (and also in other normative acts), including the principle of proportionality arising from the principle of a constitutional state.

So, in accordance with the Regulations on State Fees (German "Gebührenordnung") there is set an administrative fee of "up to 50 euros" for a document. If the administrative authority sets 60 euros, this is a violation of the limits of discretion.

This type of discretion error also occurs when the administrative authority choses another legal consequence than provided for in the law, either violates the principle of protection of trust, or violates fundamental rights. All these situations have a common thing that the administrative body chooses a legal consequence that is unlawful, and therefore due to the binding of the executive power by law it cannot be chosen. The principle of proportionality as an integral part of the principle of a constitutional state is also enshrined in constitutional law. No decision, including a discretionary one can be disproportionate to the purpose of a statutory legal norm.[39] In this case, the proportionality can be verified as follows:

[38] Bulletin of German Administrative Law, 1983. p. 998.
[39] The Decision of the Federal Administrative Court 65, 178.

- the existence of a legitimate goal;
- suitability;
- necessity;
- proportionality in the narrow sense.

In accordance with the proportionality test, first of all, the goal that the administrative body pursues with the measure taken should be legitimate. This takes place when it corresponds to the sense and purpose of discretion provision on the part of the legislator. The administrative body has no right to pursue other goals with its measure. If it still does this, then the measure is illegal for this reason.

For example, in accordance with the legislation on the police, in the framework of general hazard prevention, check of the identity can be conducted. If, in connection with a demonstration in which violent acts are committed, it is possible to establish the identity of persons, then the police, in choosing the persons whose identity it intends to establish, must proceed from the purpose of granting this discretion. This goal is undoubtedly in the rapid, safe, effective prevention of danger. If a policeman first establishes the identity of a beautiful blonde B, because he wants to see her privately again, instead of taking action against a less attractive but violent offender O, then this measure is illegal because the private goal, which is pursued by a policeman, is not in any connection to the purpose of providing the discretion (prevention of danger).

If an administrative body pursues a legitimate goal by its measure, the measure taken should also be suitable for achieving this goal. As suitable in this case are all those measures by which the latter can be achieved. So, if a young man M is stealing cherries from a tree in the neighbor land plot, then an aiming shot of a policeman P, who wounds the hand of the young man, is suitable to keep him from continuing the theft of cherry.

At the same time the suitable measures should also be necessary to achieve the goal pursued. This means that there should not be any milder means that would equally reliably achieve this goal. A softer means is always when it interferes less with the rights of a person affected. In the above case of the cherry theft, depending on the situation, a whistle or strictly verbal warning from the police officer may be sufficient to deter the young person from continuing the theft. Since these means will infringe upon the rights of the young person to a lesser degree than

a shot from the police officer's weapon, which can lead to serious negative health consequences, the shot, although it would be suitable, is not necessary.

It is important, however, that the need remains if the softer means exist, but they will not lead to success equally reliably. That is, if in our example it is known that children regularly steal cherries in the given place and a whistle or warn cannot scare them off and if there are no milder means, then a shot from a weapon may also be necessary in this sense. In principle, there is also a rule according to which the law should not give way to lawlessness. In particular, in cases of prevention of danger, administrative authorities have the right to choose means suitable for safe and reliable, quick and effective averting danger.

The measure is proportional (in the narrow sense, that is, proportionally) always in cases where the pursued goal in its importance is not disproportionate to the degree of intervention.[40] The relevance of this idea, in a specific case, shall be determined by weighing. If, in the case of the cherry thief a whistle and a stern cry of the policeman make it impossible to keep the young man from stealing the cherry and there are no other softer means, then a shot from a service weapon would be necessary to prevent further infringement of the property right. At the same time, such a shot would ultimately be disproportionate, since the aim pursued with its use (combat against the infringement of property rights) in its significance would be disproportionate to the degree of intervention. If the policeman kills the young man, the danger to property will be reliably prevented, but the degree of infringement of the legal good of life would be so intense that it would not be proportionate to the protected legal good. In other words: the life of a person, which in this case would be completely or significantly impaired with high probability, is more significant than the relatively less significant violation of the right of property in the form of theft of several cherries.

Disproportionate decisions are unlawful. In this way they automatically lead also to the presence of an error of discretion, since disproportionate and thus wrong measures are not included in the number of measures envisaged for an administrative body's discretion. Due to its connectedness with law (article 20 part 3 of the Basic Law of Germany), it has the right to act only lawfully.

[40] The Decision of the Federal Administrative Court 50, 217, 227.

3. Wrong application of discretion.

This is the case when an administrative body applies the discretion granted to it by law not in the sense of the law, i.e. not in accordance with its purposes and regulations.[41] This may happen in the form that an administrative authority takes into account not all aspects that meet the purpose of a power (discretion deficiency) or in the form that other aspects that do not meet the objectives of the power (considerations not related to the matter of discretion) are taken into account.[42]

Discretion deficiency always occurs when an administrative body has not studied the merits of a case in full and therefore does not have all the relevant facts to make a decision. The same applies, of course, to cases when the basis for a discretionary decision was based on facts that in fact do not exist in this form, that is, when the administrative authority has studied the circumstances not completely or negligently.

Considerations are improper if they take into account aspects of a legal or factual nature that are at odds with the sense and purpose of the norm giving discretion, or contrary to other norms or general principles of law.[43] So, if two girls are quarrelling loudly at night in front of a house, and the residents call the police to stop the night disturbance of public order, then the police has the discretion both in terms of the applicable means and with regard to the choice of the addressee. If it decides to simply divide women from each other, then this measure would be legitimate and justified. But if the police decides to take one of the girls with them to the police station, guided by the criterion of appearance, then there is a discretion error. Outward appearance of the addressee as a criterion neither meets the goal of the given discretion (the goal is a quick and reliable prevention of danger, in this case to ensure the health of residents in the form of provision the peace of the night), nor the general criteria of law. Here we talk more about the case of arbitrariness and thus the contradiction with the general criteria of law (prohibition of arbitrariness for state actions).

Thus, the issues of implementing discretion are one of the most important in modern public law. The experience of German legal system is progressive because it relies on the synthesis

[41] See: *Erichsen / Ehlers*, General Administrative Law, paragraph 11, marginal note 61.
[42] See: *Kopp / Ramsauer*, Administrative Procedures Act, paragraph 40, marginal note 88
[43] The Decision of the Federal Administrative Court 82, 257; See also: *Kopp / Ramsauer*, Administrative Procedures Act, paragraph 40, marginal note 90 with further references to sources.

of doctrine, judicial practice and the will of the legislator. At that, rather laconic provisions of the Administrative Procedure Act of the Federal Republic of Germany are constantly being clarified by the administrative courts. The concept of discretion errors can represent an independent interest for various legal orders, including in the post-Soviet space.