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DISCRETIONARY POWERS OF ADMINISTRATIVE COURTS IN THE FIELD OF HUMAN AND CIVIL RIGHTS PROTECTION

The article considers the category of discretionary powers of administrative courts. It is noted that human rights and freedoms and their guarantees determine the content and orientation of the activities of our state, the Constitution of Ukraine not only declares the idea that a person is the highest social value of society, but emphasizes that the activities of the state guarantee protection and are aimed at the realization of its legal rights, freedoms and interests. It is stated that ensuring guarantees of man and citizen rights in relations with public administration bodies is the responsibility of any law-based state, and Ukraine is no exception. The above-mentioned necessitated the creation of administrative justice in our state, which, on the one hand, protects the rights of a person and a citizen, and on the other hand, with the help of a single judicial practice, ensures the legality of the activities of public authorities. Administrative justice is the most important procedural and legal instrument in the field of full protection of constitutional rights, freedoms and legitimate interests of man and a citizen. Methodology: The methodological basis for the article are general and special methods of legal science, in particular: the method of dialectical analysis, the method of prognostic modeling, formal and logical, normative and dogmatic, sociological methods. The results of the study: in order to resolve the issue of legislative consolidation of the concept of "discretionary powers of the administrative court", the proposal in part 1 of Art. 4 of the CAS of Ukraine "Definition of terms" a separate paragraph defines the concept of the following content: "discretionary powers of the administrative court – the rights and powers of the administrative court (first, appellate, cassation instances, Grand Chamber of the Supreme Court) granted to it by the state, enshrined in the provisions of the articles of the CAS of Ukraine, which enable the administrative court to freely act considering and deciding an administrative case, to choose between two or more legal alternatives to that, which in its opinion is more appropriate (more reasonable)".

Keywords: discretion, discretionary powers, administrative courts, human rights and freedoms.

Introduction. According to Article 3 of the Constitution of Ukraine, a person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and orientation of the activities of our state. Thus, it is advisable to focus on the fact that the Basic Law not only declares the idea that a person is the highest social value of society, but emphasizes that the activities of the state guarantee protection and are aimed at the realization of its legal rights, freedoms and interests.

Thus, according to the decision of the Constitutional Court of Ukraine dated 14.12.2011 No 19-rp/2011 human rights and freedoms and their guarantees determine the content and orientation of the state's activities (part two of Article 3 of the Constitution of Ukraine). Established by the Constitution and the laws of Ukraine, to make decisions or to perform certain actions. The person in respect of whom the power entity has decided, committed an action or inaction has the right to protection [1].

Ensuring guarantees of human and citizen rights in relations with public administration bodies is the responsibility of any rule of the law-based state, and Ukraine is no exception. The above-mentioned necessitated the creation of administrative justice in our state, which, on the one hand, protects the rights of man and citizen, and on the other hand, with the help of a single judicial practice, ensures the legality of the activities of public authorities. Thus, administrative justice is the most important procedural and legal instrument in the field of full protection of constitutional rights, freedoms and legitimate interests of a person and a citizen.

Main results. According to Article 125 of the Constitution of Ukraine, administrative courts are established and operate to protect the rights, freedoms and interests of a person in the field of public-legal relations. The purpose of the establishment of administrative courts in Ukraine is to guarantee the right of everyone to challenge in court the decisions, actions or omissions of state authorities, local governments, officials and officers, which ensures the implementation of the constitutional principle of state responsibility for its activities to a person.

The effectiveness of the mechanism for protecting human and citizen rights, including judicial protection, is a guarantee of achieving a certain social justice, the manifestation of which is to overcome the negative social consequences of violations of human and civil rights and freedoms, and the ultimate goal of which is to ensure the reality of such rights.

It is advisable to point out that the principle of the rule of law is recognized and operates in Ukraine (Article 8 of the Constitution of Ukraine), the elements of which are the principle of legal certainty and the principle of justice.

In addition, the statement of the rule of law, in accordance with the provisions of Article 1, the second sentence of part three of Article 8, Article 55 of the Basic Law, consists, in particular, in guaranteeing to everyone judicial protection of rights and freedoms, as well as in introducing a mechanism for such protection, actions or omissions of authorities, officials and officers, as well as regarding the impossibility of refusing justice (paragraph 1 of the operative part of the Decision of November 25, 1997 No 6-zp) [2], paragraph 1 of the operative part of the Decision of December 25, 1997 No 9-zp) [3].

The component of the rule of law is the prevention of abuse of authority, that is, going beyond discretion, the restriction of which makes unfair, unreasonable, arbitrary decisions impossible. That is why, due to the need to comply with the rule of law, the issue of the limits of discretionary powers and the specifics of their implementation by administrative courts in the field of protection of human and civil rights and freedoms is actualized.

As indicated in the special literature, modern socio-political phenomena, the development of information technologies, during globalization processes, pose more and more new challenges in the process of exercising the

discretionary powers of administrative courts in the field of protection of human and civil rights and freedoms [4].

The issue of discretion has been attracting the attention of both domestic scientists and practicing lawyers for many years, and at the present stage this issue is becoming increasingly relevant and debatable, since there is currently no single understanding and approach both to the content of the concept itself and to the types of discretion and its limits.

It is advisable to emphasize that for a long time the theory of discretion of the administrative court was not recognized in practice, it was criticized by legal scholars. Even at this stage, there is no unambiguous attitude to the exercise of procedural discretion in administrative proceedings. Some researchers deny the need for its existence, while others justify that procedural discretion is extremely necessary and important when judges exercise administrative proceedings [5, p. 193; 6, p. 12–16].

Moreover, this issue has repeatedly become the subject of scientific, scientific-practical research. In particular, in 2019, the discretion of administrative bodies and judicial control over its implementation became the subject of the Monitoring of Administrative Proceedings in Ukraine carried out by the EU Project "Pravo-Justice". The results of the monitoring showed that the national legislation does not have clear rules on the limits of judicial interference with the discretionary powers of administrative bodies, as well as the fact that there is no difference in the scope of the court's powers when reviewing individual and collegial decisions [7].

Traditionally, in the scientific literature, discretionary powers are divided into:

1) discretion of the administrative court during the consideration (review) of the administrative case and the adoption of a court decision;

2) discretion of the subject of public administration in resolving the subordinate issue.

The essence of the discretion of the administrative court is related to the powers of the judge to manage the judicial process, which implements the principle of independence of the judge and cannot be compared with the discretion of the subject of public administration, the application of which is checked by the court [5, p. 195].

In a democratic society, it is the court that plays a decisive role in protecting human and citizen rights to ensure the rule of law. Thus, part one of Article 55 of the Constitution of Ukraine defines the right of everyone to apply to the court if his rights or freedoms are violated, obstacles to their realization are created or there is another infringement of rights and freedoms. The specified norm obliges the courts to accept applications for consideration even if there is no special provision in the law regarding judicial protection. The court's refusal to accept claims and other applications or complaints that meet the requirements established by law is a violation of the right to judicial protection, which, according to Article 64 of the Constitution of Ukraine, cannot be limited even in conditions of martial law or a state of emergency [8].

The discretionary powers of the administrative court are based on a number of principles of their application that are quite different in their content and scope and are closely related to the defining principles of legal proceedings. One of such principles is the principle of independence of the court and judges, which has several aspects: institutional, functional and personal (independence of the judges themselves). The institutional independence of the judiciary lies primarily in the fact that it is entrusted to judges – the bearers of this power, who exercise it independently of the legislative and executive branches of power. The functional independence of the court and judges determines their impartiality, that is, the right and duty of the court and judges to make decisions independently, impartially, only on the basis of the Constitution and the law, guided by the principle of the rule of law (law principle). The personal independence of a judge is determined not only by the Constitution and the law, but also by the personality of the judge himself – the level of his competence, moral qualities, etc [8].

It is worth mentioning that in general the word *"discretion"* has been used since 1705 and is of French origin [9].

Translated from English, "discretion" – *to represent, transfer at someone's discretion, at the discretion of anyone, to act at their own discretion* [10]. "The right to decide; necessary powers". The French equivalent of "discretionnaire" – has the meaning of "discretionary", that is, "dependent on one's own discretion" [11].

According to some researchers, the French translation of discretion in the general public sense, as an activity at its own discretion, according to its own conviction, contradicts its legal content, because it is not about the uncontrolled, irresponsible work of officials, but about the implementation of the powers within the limits determined by law [12].

The legal literature stipulates that the legal concept of discretion provides for the possibility of choosing between alternative methods of action and/or inaction, "discretion" is not a duty, but the authority of a certain body [13].

As noted in scientific research, at the legislative level the concept of discretion is not enshrined. Moreover, analyzing the legal norms of the CAS of Ukraine in terms of studying the discretion of the administrative court, it can be seen that the mentioned procedural law uses other terms (value concepts), such as: "at the discretion of the court", "the court may", "the court has the right", "internal conviction", "own initiative" (part 2, 4 of Article 9; part 2 of Article 45; part 2, part 2, 3.7 art. 56; p. 3 art. 65; p. 2 art. 76; p. 3 art. 77; p. 7 art. 81; p. 1 art. 90; p. 5 art. 99; p. 5 art. 101; p. 1 art. 102; part 4 of article 103; ch. 1, 2 art. 111; part 2 of article 113; p. 2 art. 121; p. 1 art. 150; p. 1 art. 157; p. 5 art. 159; p. 6 art. 172; ch. 6 p. 209; p. 11 art. 219, ch. 1 art. 214; p. 5 art. 223; p. 1 art. 252; p. 1 art. 253; p. 4 art. 262; p. 1 art. 291 etc.).

However, according to the methodology developed by scientists, discretionary powers are understood as a set of rights and obligations of the subject at its own discretion to determine in whole or in part the type and content of the decision, the ability to choose at its own discretion one of several solutions, each of which is legitimate. At the same time, discretion is not arbitrary, it is always carried out in accordance with the law (right). Administrative courts can control both the compliance of the implementation of the discretion of the law (right) and the consistency of decisions (actions) made on the basis of discretion with the rights of man and citizen, general principles of public administration, procedural norms, circumstances of the case, available resources, etc [14].

The legal concept of "discretion" of a public administration entity is found in the Order of the Ministry of Justice of Ukraine "On Approval of the Methodology for Conducting Anti-Corruption Expertise" No 1380/5 of June 23, 2010 (the Order expired on the basis of the Order of the Ministry of Justice of Ukraine dated 24.04.2017 No 1395/5), which stipulates that **discretionary powers** – a set of rights and obligations of bodies of state power and local self-government, persons authorized to perform the functions of the state or local self-government, providing an opportunity at their own discretion to determine in whole or

in part the type and content of the management decision that is made, or the ability to choose at their own discretion one of several options for administrative decisions provided for by the regulatory legal act [15].

According to the Recommendations of the Committee of Ministers of the Council of Europe No R(80)2 on the exercise by administrative authorities of discretionary powers adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting, discretionary powers are understood as powers that an administrative body, when making decisions, can exercise with a certain freedom of discretion, that is, when such a body can choose from several legally permissible decisions that, which it considers the best in these circumstances. The peculiarity of discretionary powers, which follows from the recommendations of the Committee of Ministers of the Council of Europe No R(80)2, is the right of an administrative body at its own discretion to make one of several possible decisions, depending on certain circumstances [16].

It is advisable to point out that the Methodology of the Ministry of Justice, in contrast to the Recommendations of the Committee of Ministers of the Council of Europe No R(80)2, provides state bodies and local self-government bodies, as well as individual authorized persons with significantly wider powers, consisting in the ability, at their own discretion, to determine the type and content of a management decision fully or partially. However, such a definition, according to some researchers, is not justified, because the discretion of a state body should have limits to decisions permissible by law [17].

Moreover, according to the position contained in the page of the Cassation Administrative Court of the official website of the Supreme Court and set forth in the Scientific Opinion on the limits of discretionary powers of the subject of public administration, which in particular indicates that the subject of power is a body of state power, a body of local self-government, another entity exercising power management functions in accordance with the law, including in pursuance of delegated powers (Article 1 of the Law of Ukraine "On Information"). Thus, discretionary power may consist in choosing to act or act, and if to act, then in choosing a solution or action among the options that are directly or indirectly enshrined in the law. An important feature of this choice is that it is carried out without the need to coordinate the option of choice with anyone. To denote discretionary authority, the legislator uses, in particular, the terms "may", "has the right", "on his own initiative", "cares", "provides", "conducts activities", "establishes", "determines", "at his discretion". However, the presence of such a term in the law does not automatically indicate that the subject of power has discretionary powers [18].

Regarding the concept of discretion of the administrative court, as indicated in the separate opinion of the Judge of the Supreme Court Y.O. Bernazyuk dated April 25, 2018 in case No 826/5575/17, in accordance with the position of the Supreme Court, which was formed in the resolutions of February 13, 2018 in case No 361/7567/15-a, dated March 7, 2018 in case No 569/15527/16-a, dated March 20, 2018 in case No. 461/2579/17, dated March 20, 2018 in case No 820/4554/17, dated April 3, 2018 in case No 569/16681/16-a and of April 12, 2018, case No 826/8803/15, "discretionary powers are an opportunity to act at one's own discretion, within the limits of the law, the ability to apply the norms of the law and perform specific actions (or action) among others, each of which is separately relatively correct (legal); in accordance with the tasks of administrative proceedings defined by Article 2 of the CAS of Ukraine, the administrative court is not empowered to interfere in the free discretion of the power entity outside the scope of verification according to certain criteria; the task of justice is not to ensure the effectiveness of public administration, but to guarantee compliance with the requirements of law, otherwise the principle of separation of powers is violated; the principle of separation of powers denies granting to the administrative court administrative and discretionary powers; since the only criterion for the administration of justice is law, the task of administrative proceedings is always to control the legality; the verification of expediency does not correspond to the competence of the administrative court and goes beyond the limits of administrative proceedings; the administrative court cannot replace another body of state power and assume the authority to resolve issues that are within the competence of this body by law" [19].

According to the position of the Supreme Court of Ukraine set forth in the resolution of March 14, 2017 in case No 800/323/16, the court does not interfere and cannot interfere with the discretion (free discretion) of the power entity outside the verification according to the criteria of compliance with the decision-making (actions) provided for in part three of Article 2 of the CAS of Ukraine, replace it and assume its powers, provided by law to the relevant subject of power [20].

The criteria for judicial control over the exercise of discretionary powers are: inspections of the activities of public administration established by the CAS of Ukraine, in particular, the purpose for which discretionary authority is granted, the objectivity of the study of evidence in the case, the principle of equality before the law, impartiality; public interest, for which discretionary authority is exercised; the content of constitutional rights and freedoms of the person; the quality of presentation in the discretionary decision of the arguments, the motives for its adoption [18].

Thus, speaking of the discretionary powers of the administrative court, it should be said that this is a certain freedom (choice) of the administrative court in deciding a specific administrative case and adopting the most optimal decision within the Framework of the Constitution and the laws of Ukraine, guided and adhering to the basic principles (principles) of administrative law (Part 3 of Article 2 of the CAS of Ukraine).

At the same time, in addition to discretion, the administrative court is endowed with a certain scope of administrative powers, such as in the case when the administrative court is the administrator of public information, since the provision of such information takes place on the condition of the possibility to dispose of this information by the administrative court at its own discretion. At the same time, the administrative court is recognized as a subject of power, since according to paragraph 7 of Art. 4 of the CAS of Ukraine is enshrined by this entity – a body of state power, a body of local self-government, their official or officer, another entity in the exercise of public-power administrative functions on the basis of legislation, in particular for the performance of delegated powers, or the provision of administrative services [21, p. 328].

As some scholars rightly emphasize, during the implementation of administrative proceedings, it is important to correctly determine and correlate the discretion of the administrative court with the discretion of the subject of public administration, not to assume the assignment and exercise by the administrative court of the powers of this subject, as well as to prevent unreasonable

or excessive procedural interference in the discretion of the subject of public administration [22, p. 195].

Thus, the administrative court must at the proper level correlate procedural discretion with the discretion of public administration entities, and in turn make it impossible (exclude) the assignment and exercise of powers of public administration entities, as well as prevent unlawful interference with the discretion of such entities.

As Supreme Court Justice O. Gubska points out: "Discretionary authority may consist in choosing to act or be idle. If you act, in choosing a solution or action among the options that are directly or indirectly enshrined in the law. An important feature of this choice is that it is carried out without the need to agree with someone of the chosen option. The choice of option involves establishing the actual circumstances of the case and providing them with a legal assessment; search for an appropriate rule of law and verification of its action or resolution of the issue of applying an analogy (law); clarification of the content of the rule of law (interpretation of a legal norm); the implementation of the choice of the best solution, the commission of actions, refraining from actions. Such a right of an executive body (official) is conditioned by a certain freedom, that is, administrative discretion, in assessing, acting or refraining from actions (inaction), and if in actions, then in choosing one of the options for decisions (actions) or legal consequences. It is the choice of only one of the legitimate alternatives. The choice can be made between two or more alternatives. At the same time, the choice may be limited when all the alternatives from which to choose are exhaustively provided for by law (a closed list of alternatives). In addition, the choice can be made from an indefinite number of alternatives, that is, the choice can be unlimited (the so-called open list of alternatives)" [23].

The same position was supported by A. Barak, who at one time defined the concept of "discretion" as "the powers that the law gives to judges to make a choice of several alternatives, of which each is legal" [24, p. 10]. Thus, it can be concluded that the researchers focus not on the "freedom" of the judge to act at his own discretion, but solely on the "choice" of the judge between two or more legitimate alternatives.

There are other approaches. Thus, according to some scholars, the discretion of the court is characterized by the establishment of a clear framework within which any judge should be in the administration of justice [8]; the discretion of the administrative court is regulated by the norms of administrative procedural law and based on the norms of substantive law and actual circumstances, the ability of the administrative court, which considers and decides the case, to choose a procedural decision of its own choice [25]. Some researchers emphasize that discretionary right or discretionary power is the freedom granted to the person to act at his discretion, that is, when assessing the situation, to choose one of several options for action (or to refrain from action) or one of the options for possible solutions [26].

The analysis of the articles of the CAS of Ukraine shows that most of its articles contain precisely evaluative concepts, those that are not specified by the legislator. This is what gives the right of a judge of an administrative court to exercise procedural discretion. An example of the above, it is advisable to cite part 1 of Art. 214 of the CAS of Ukraine according to which, at the discretion of the court, juvenile witnesses and juvenile witnesses are interrogated in the presence of a teacher or parents, adoptive parents, guardians, trustees, if they are not interested in the case. The above emphasizes that procedural discretion is not only the presence of a direct reference provided for by the CAS of Ukraine ("at the discretion of the court", "the court may", "the court has the right", "internal conviction", "own initiative"), but also as the choice by the administrative court of one of the options proposed by the legislator.

At the same time, the concept of "internal persuasion" is found in the CAS of Ukraine. So, according to part 2 of Art. 76 of the CAS of Ukraine, the question of the sufficiency of evidence to establish the circumstances relevant to the case, the court decides in accordance with its internal conviction. Also, in part 1 of art. 90 of the CAS of Ukraine "the court evaluates the evidence available in the case according to its internal conviction, which is based on their direct, comprehensive, complete and objective research" [26].

Conclusions. Thus, the hosts of the judge's inner conviction should not identify it with the fact that judges evaluate the evidence and determine its sufficiency arbitrarily, or as they wish. Internal conviction is the ability of the judge to decide for himself whether there is enough evidence in the case, about their reliability to make a decision and the judge's confidence that his actions will lead to a legal decision.

The analysis gives grounds to conclude that in order to resolve the issue of legislative consolidation of the concept of "discretionary powers of the administrative court", it is reasonable to propose [27, p. 38] in part 1 of Article 4 of the CAS of Ukraine "Definition of terms" to define the concept of the following content in a separate paragraph: "discretionary powers of the administrative court – the rights and powers of the administrative court (first, appellate, cassation instances, Grand Chamber of the Supreme Court) granted to it by the state, enshrined in the provisions of the articles of the CAS of Ukraine, which enable the administrative court to freely act in considering and deciding an administrative case, to choose between two or more legal alternatives the one that, in its opinion, is more appropriate (reasonable)."

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ДИСКРЕЦІЙНІ ПОВНОВАЖЕННЯ АДМІНІСТРАТИВНИХ СУДІВ У СФЕРІ ЗАХИСТУ ПРАВ ЛЮДИНИ І ГРОМАДЯНИНА

Досліджено дискреційні повноваження адміністративних судів. Вказано, що права і свободи людини та їхні гарантії визначають зміст і спрямованість діяльності нашої держави, Конституцією України не тільки декларується ідея про те, що людина є найвищою соціальною цінністю суспільства, а й наголошується, що діяльність держави гарантує захист і спрямовується на реалізацію її законних прав, свобод та інтересів. Констатовано, що забезпечення гарантій прав людини і громадянина у відносинах з органами публічної адміністрації є обов'язком будь-якої правової держави, і Україна не є винятком. Вказане обумовило свого часу необхідність створення в нашій державі адміністративної юстиції, яка, з одного боку, захищає права людини і громадянина, а з іншого, за допомогою єдиної судової практики, забезпечує законність діяльності органів публічної влади. Адміністративна юстиція є найважливішим процесуально-правовим інструментом у сфері повноцінного захисту конституційних прав, свобод і законних інтересів людини і громадянина. Вказано, що питання дискреції протягом багатьох років привертає увагу як вітчизняних вчених, так і юристів-практиків, а на сучасному етапі ця проблематика стає все більш актуальною і дискусійною, оскільки наразі відсутнє єдине розуміння й підхід як до змісту самого поняття, так і до видів дискреції та її меж. Акцентовано увагу, що тривалий час теорія дискреції адміністративного суду не визнавалась на практиці, критикувалась вченими-правознавцями. Навіть на сьогодні відсутнє однозначне ставлення до здійснення в адміністративному судочинстві процесуального розсуду. Одні дослідники заперечують необхідність його існування, а інші обґрунтовують, що процесуальний розсуд є надзвичайно необхідним та важливим при здійсненні суддями адміністративного судочинства. Більше того вказане питання неодноразово ставало предметом наукових та науково-практичних досліджень. Методологічною основою статті є загальні та спеціальні методи юридичної науки, зокрема: метод діалектичного аналізу, метод прогностичного моделювання, формально-логічний, нормативно-догматичний, соціологічний методи. Результати дослідження: задля вирішення питання законодавчого закріплення поняття "дискреційних повноважень адміністративного суду" слушною визнано пропозицію у ч. 1 ст. 4 КАС України "Визначення термінів" окремим пунктом визначити поняття такого змісту: "дискреційні повноваження адміністративного суду – права та повноваження адміністративного суду (першої, апеляційної, касаційної інстанцій, Великої Палати Верховного Суду), надані йому державою, закріплені положеннями статей КАС України, які надають можливість адміністративному суду вільно діяти, розглядаючи та вирішуючи адміністративну справу, обирати між двома або більше законними альтернативами ту, яка на його переконання доречніша (обґрунтованіша)".

Ключові слова: дискреція, дискреційні повноваження, адміністративні суди, права і свободи людини.

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