CONTROL OF DECISIONS BASED ON ADMINISTRATIVE DISCRETION[1]

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I. Introductory notes

Nowadays, administrative decision is one of the basic forms of measures applied by administrative authorities, which individually settles particular legal situations of specific entities. It can be defined as a declaration of will of a competent administrative authority, made as a result of the application of a norm of substantive administrative law or more precisely norm of procedural law to the facts established in the mode, form and structure regulated by the procedural law, served on the party in order to produce legal effects in the sphere of substantive law relationships (the decision settling the case as to its merits in whole or in part) or in the sphere of procedural relations (the decision which resolves the case in the given instance in a different manner)[2]. The activity of an authority can be thus considered decision, which is primarily a manifestation of its will based on universally binding rules of administrative law, which resolves the case of a particular individual (natural or legal person) in the proceedings defined in the rules of procedure.

Dividing administrative decisions (with regard to degree to which they are determined by the norm), one can classify them (with a great deal of simplification) as rule- bound and free acts. Considering the decisions based on administrative discretion and rule-bound decisions, the distinction will lie in a different way of modelling the substantive basis[3].

The concept of administrative discretion is inherent to the operation of administration and decision-making. In order to have a better grasp of the issue discused it

1 The term "administrative discretion" is used in this paper in its strict sense. It is understood as a possibility to choose legal effects of an administrative act. Sometimes it is also called "administrative approval" or "administrative recognition". One should also remember that term "administrative discretion" has also a broader meaning which can as well (beside it strict meaning) be understood as a competence to identify the legal basis of the decision or / and their interpretation.

2 C.f. E. Ochendowski, *Postępowanie administracyjne i postępowanie przed sądem administracyjnym*, Toruń 1996, p. 87 "The decision is a declaration of will of the state administration authority, a declaration of will on behalf of the state. The decision is a qualified administrative act (every decision is an admin¬istrative act, but not every administrative act is a decision...). The decision - as an administrative act - is a unilateral act, an absolute settlement of the case...";

3 M. Mincer, *Uznanie administracyjne,* Toruń 1983, p. 152.

it is worth to refer to its origins. At the beginning discretion was treated as the sphere of activity of administration unrestricted by law. It was believed that the areas not regulated by law fell within the scope of discretion, and once such areas were encountered, administrative bodies could work without the need to invoke any legal basis[4]. Over time, the scope of discretion became gradually reduced, inter alia, by the attempts to establish internal boundaries to discretion or by emergence of the idea of the rule of law. Today the concept of discretion concerns only the content of the decision 'losing' that element of its structure which accounts for whether the decision should be adopted or not[5].

In the view of the doctrine, there are perspectives on administrative discretion: the narrow perspective, supporters of which notice its exercise only at the stage of formulation of legal consequences of a specific, actual state of affairs established in the proceedings, and therefore at the final stage of the process of application of law, as well as the broad perspective, according to which administrative discretion is also related to the interpretation of vague concepts[6]. If we take into a consideration the first of the above meanings, we can see that in the case of administrative discretion an authority can, after an act of subsumption, which consists in comparing the actual and legal state of affairs, choose the optimal solution with the vie w to the adopted point of view.

Chronologically speaking, the choice is made at the final stages of the decisionmaking process. It cannot be mistaken for free evaluation of evidence or freedom of interpretation[7]. The legislators usage of non-definite expressions in the legal rules indeed provides the administrative body with some degree of the decision-making freedom. However, it does not provide the basis to resolve a case on discretionary grounds when it comes to the choice of the settlement[8]. Interpretation of vague concepts is connected with the necessity to provide an explanation of such a concept, which, in turn, takes place at earlier stages of the process of application of law. However, the fact that such operations take place at various stages of the decision-making process does not mean that they are not linked to one another. Many a time, the formula authorizing administrative discretion is supplemented by conditions set out in the form of vague concepts and the exercise of discretion is practically dependent on their interpretation[9]. The phenomenon of delimitating administrative discretion by use of these concepts may apply on such occasions. Bearing in mind the above relations as well as the complexity of the process of law application, it is difficult, in practice, to distinguish between administrative discretion and discretion of an action of administration based on other sources of the decision-making freedom.

4 J. Zimmermann, *Prawo administracyjne,* Kantor Wydawniczy Zakamycze 2005, p. 365.

5 L. Leszczyński, *Zagadnienia teorii stosowania prawa - doktryna i tezy orzecznictwa,* Kantor Wydawniczy Zakamycze 2004, p. 45.

6 For morę see A. Ostrowska, *Teoretycznoprawne aspekty uznania administracyjnego,* [in:] *Wykładnia prawa - odrębności w wybranych gałęziach prawa,* L. Leszczyński (pod red.), Lublin 2006, p. 21.

7 J. Zimmermann, *op. cit.,* p. 364.

8 A. Ostrowska, *op. cit.,* p. 23.

9 J. Zimmermann, *op. cit.,* p. 369.

To sum up the above considerations, one can conclude that administrative discretion (in the meaning used in this paper) is understood as a possibility to choose legal effects of an administrative act. In other words it is a right of an administrative body to take discretionary actions[10]. It consists in granting the administrative authority the possibility to choose among two or more solutions permissible by the law and legally equal. Such a situation occurs when the legal norm does not directly determine the legal effect of applying a legal provision, but it clearly leaves the choice of such an effect to the administration. However, this choice is not unrestricted. Rather than that, the choice is limited by the legislator within the same norm leaving it to discretion[10] and it depends on the specific state of affairs. One should also bear in mind that there is no such thing as act based on full discretion of an administrative body. We can only estimate which elements of the act are left to discretion[11].

Considering the issue of control of administrative discretion it is also worth mentioning the characteristic features of so-called administrative type of application of law. Independence cannot be attributed to administrative bodies (unlike courts). They are hierarchically and politically subordinated to other authorities, and their position can be in a sense defined, particularly in the context of organizational functions, by reference to accomplishment of the objectives and directives of state government authorities. As a result, sometimes very direct, structural and functional "closeness of connections" between administrative bodies and entities representing political power[12]. Consequently, considering the policy currently carried out, the administrative authority will be interested in the content of the decision it takes. By contrast, its relationship with the addressees of these decisions is characterized by superiority of the administrative body.

The role and importance of public administration in the contemporary processes of administering specific areas of reality, as well as specific features of the process of law application of the administrative type give rise to intense reflection over the issue of control of the decisions based on administrative discretion. The control which is exercised by different entities, taking into consideration various criteria. The control which, on the one hand, is supposed to protect the citizen against the arbitrariness and discretion in the functioning of administrative authorities, is on the other hand to ensure the effective and efficient achievement of tasks and objectives confered on administrative bodies.

II. Judicial review

One of the basic foundations of the concept of rule of law is to ensure the legality of public administration and to protect the individual against such acts and ac-

10 C.f. B. Wojciechowski, *Dyskrecjonalność sędziowska – stadium teoretycznoprawne*, Toruń 20014, p.89.

11 J. Zimmermann, *ibidem*, p. 364.

12 M. Mincer, *op. cit.*, p. 143.

13 A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa,* Lublin 2007, p. 150.

ivities which could violate that law. Therefore, as it has been mentioned beforehand, the problem of control of decisions based on administrative discretion is particularly important and up-to-date. Depending on specific legislation, it can be exercised by different entities.

Control of the administration exercised by courts primarily signifies the control of legality of actions of administrative bodies. The fact that a given decision was based on a norm which gives rise to administrative discretion does not exclude that control, but it does entail certain restriction of its scope. If such a norm is provides the authority with a possibility to choose among legal effects, then every choice which falls within the framework of the discretion is consistent with law and cannot be questioned by the court. The court examines the consistence of the decision with law only, it does not examine its validity.

Control of such decisions does not therefore consist in examining the content of the discretion itself, but how the authority has reached a specific solution and whether it falls within the legally defined limits. At first it comes down to examining whether the decision-making was preceded by a procedure properly carried through, in accordance with specific provisions of the administrative procedure as well as general principles of conduct[13]. The court monitors in particular whether all necessary steps were undertaken in the course of that procedure in order to explain thoroughly the actual state of affairs. In this respect, the way in which all the relevant facts are collected and assessed is subject to control. The evidence in a particular case should be thoroughly collected and then properly analyzed. The administrative authority should consider all the circumstances which may affect the choice of a possible resolution. It is also obliged to address all the proposals and objections raised by the party. Then the results of the procedure should be evaluated in terms of free evaluation of evidence, on the basis of knowledge and principles of life experience, drawing logically justified conclusions from the collected evidence[14]. The court should also make sure whether in the course of the proceedings the authority has established all the facts necessary to confirm the existence or non-existence of statutory grounds for adopting a decision based on administrative discretion, that is whether on the basis of certain regulations it was permissible to arrive at such a decision in a given case.

The court should also carefully examine the establishment of legal circumstances on the part of an anadministrative body. At the same time, it cannot restrict itself only to mere aknowledgement of the existence of such basis, but the court must also heck whether the administrative body took into account all legal provisions that may be applicable in the case[15].

Administrative discretion does not allow the administrative body for a free choice of legal effects. The scope of the discretion is limited by general rules of administra-

14 C.f. the Judgment of the Supreme Court of Administration of 11.09.1996, SA/Ka 1543/95.

15 C.f. the Judgment of the Regional Court of Administration in Rzeszów of 06.04.2009, I SA/Rz 788/08.

16 See the Judgment of the Supreme Court of Administration of 26.05.1981, SA 810/81; the Judgment of the Supreme Court of Administration of 11.02.1981, SA 233/81.

tive procedure. The administrative authority which acts within the framework of administrative discretion is obliged to take the aforementioned rules into consideration in the course of the proceedings (and therefore also at the stage of selection of legal effects). In practice the discretion of action of the authority is very often restricted and burdened with additional responsibilities. For example, one can refer to art. 7 of Polish Code of Administrative Procedure[16], which states that " in the course of the proceedings public administrative bodies safeguard the rule of law and undertake any steps necessary for a thorough explanation of the actual state of affairs and to resolve the issue, bearing in mind the public interest and the legitimate interest of citizens"[17]. A number of issues which administrative authority may encounter while resolving a case, emerge on the basis of the cited provision. Generally speaking, one may conclude that, beside a precise statement of the facts of the case (as it has already been mentioned), the authority will also have to specify, each time, what the public interest and the legitimate interest of the citizen are, and then determine their mutual relations. On, the basis of the discussed provicion the jurisdiction of Polish Administrative Courts developed a general rule according to which the administrative authority should resolve the matter in a manner consistent with the legitimate interest of the citizen unless the public interest should interfere with it, or unless the public interest reaches beyond the powers of the administrative authority which stem from the granted measures and competences[18]. However, it should be noted that an administrative action should not be automatic, and the decision depends on the individual characteristics of the actual state of affairs of the particular case. It is also worth mentioning that these general principles of administrative procedure may be even more deep-seated in the constitutional principles. Apart from the need to take the aforementioned rules into account, the decision adopted within the framework of administrative discretion is subject to full-scale control on the part of a court as far as its compliance with the rules of procedure is concerned.

Reasons are a very important part of any administrative decision. They should also undergo a thorough analysis on the part of the court. Properly constructed justification will render it possible to verify whether the administrative authority carried on the procedure correctly (whether it has properly established the legal and factual grounds). However, its control should not be restricted to examining whether the reasons of the decision includee all the elements specified in the provisions of law, but

17 The Law of 14 June 1960 the Code of Administrative Procedure (J.L. 1960 No 30 pos. 186).

18 By the way, one can indicate that a possibility to apply the criteria set out in Article 7 CAP (or other) in the case of the "rule-bound" decisions may make themselves another interesting issue.

19 See e.g. the Judgment of the Supreme Court of Administration of 11.06.1981, SA 820/81; the Judgment of the Regional Court of Administration in Rzeszów of 14.03.2009,1 SA/Rz 789/08; the Judgment of the Regional Court of Administration in Opole of 12.03.2009, II SA/Op 21/09; the Judgment of the Supreme Court of Administration of 19.12.2009, I OSK 169/08; the Judgment of the Supreme Court of Administration of 10.12.2008,1 OSK 1547/07; the Judgment of the Supreme Court of Administration of 14.10.2008,1 OSK 1632/07; the Judgment of the Supreme Court of Administration of 8.05.2008,1 OSK 1175/07; the Judgment of the Supreme Court of Administration of 31.03.2008,1 OSK 853/07; the Judgment of the Supreme Court of Administration of 19.06.2007,1 OSK 1464/06.

also whether it does satisfy the principle of persuasion. Particularly negative resolution should be convincingly and clearly substantiated as far as both the facts and legal basis are concerned, so that no doubts arise if all the circumstances of the case have been thoroughly considered and evaluated, and the final resolution makes their logical consequence[19].

As it has been mentioned before, the fact of verification whether the use of administrative discretion in a particular case was acceptable at all is also subject to the judicial control[20]. If the answer to this question is positive, the court should then focus (certainly having in mind the issues discussed above) on examining whether the administrative body did not exceed the limits of the administrative discretion. The limits are defined by binding legal rules, both the special and general principles already discussed. The court should examine whether the decision (in particular its settlement) falls within the limits set out by law. If the law-maker leaves the freedom to choose legal effects to the authority which issues the decision, only particularly serious (gross) breach of the framework of that administrative discretion will be synonymous with the violation of the law[21].

Judicial administrative control may also be extended in order to study whether the directives of choice of effects are observed. The choice of the option to resolve the case in the framework of administrative discretion cannot be arbitrary. If the target is directly guided by law, and the body applying this law fails to undertake actions aimed to achieve this target, it can be concluded that the body acts against the law, or even without a legal basis. Such actions, therefore, are subject to judicial review. However, the review is not about (in spite of appearances) control of purposefulness, but control of legality, since the act is never verified in terms of extralegal objectives, but in terms of the objective which is clearly specified in the provision of law which constitutes its basis. If such an act does not allow to accomplish the objective expressed in its legal basis, it is not only futile, but also illegal[22].

Another current problem is the possibility of judicial administrative control of decisions based on the administrative discretion from the point of view of criteria other than legality[23]. For example, the validity or rationality of such decisions could provide

20 See the Judgment of the Regional Court of Administration in Kielce of 19.03.2009, I SA/Ke 57/09.

21 Issuing a decision based on administrative discretion is not possible without statutory authorization. Ihe authorization must be explicit. Both the presumption of the discretion and the application of analogy in reference to the regulations which authorize the discretion (especially by means of extension to the detriment of an individual) are out of question here. - for more see E. Smoktunowicz, *Analogia w prawie administracyjnym,* Warszawa 1970, p.142.

22 C.f. the Judgment of the Supreme Court of Administration of 7.11.2008, II GSK 455/08.

23 C.f. the Judgment of the Supreme Court of Administration of 3.01.1995, SA/Kr 2937/94, OSP 1996, No 2, pos.25.

24 For example J. Orłowski claims that purposefulness is a characteristic of the decisions based on administrative discretion and it can next to legality constitute the criterion of the external control of administrative discretion, for more see J. Orłowski, *Uznanie administracyjne w prawie podatkowym*, Gdańsk 2005, p. 158.

an additional basis for such control. However, one should consider whether it would not be too far-reaching an interference on the part of the court into the activity of administrative bodies and management of a particular sphere of reality. At the same time, probably due to such type of control, the processes of administering would become more rational and just while respecting the rights and liberties of an individual.

III. Internal (instance) control

Two-staged administrative procedure provides a standard which arises from the principle of the rule of law. The substance of instance (internal) control is to exercise it by the entities located structurally within public administration. Therefore, administration controls itself and as a result control operations undertaken in this area also make a sort of administering procedure[25].

One can therefore say that administrative discretion falls within the sphere of the activity of an appellate body (administrative body of second instance). It can choose the most appropriate option of resolving the case. This body is primarily an authority controling the decision content, so the appeal causes to re-decide the substantive matter. The appellate body is not bound by the choice made by the body of first instance. So if it comes to the conclusion that the choice of the solution made in first instance was not proper, new resolution should ensue in accordance with the appelate authority's own belief.

This means also the full control of the appeal body over decisions of the first instance body based on administrative discretion. In reference to control of legality, considerations taken along the discussion of judicial administrative control remain up- to-date. At the same time, in addition to the criterion of legality, the decisions issued by the authority of the first instance will be subject to control in terms of validity and purposefulness of choice of the solution.

Internal control, in relation to the decisions based on the administrative discretion, should take into account the specifity of the discretion itself. On the one hand, higher administrative authorities, within the framework of organizational or official subordination, may, by issuing guidelines, instructions and orders, affect the scope of application of norms authorising subordinate bodies to adopt decisions based ** on administrative discretion. On the other hand, the legislator, by creating the power to invoke discretion, places it at the level where there seem to be the best circumstances for proper assessment of the situation and the choice of the most purposeful solution suited to the conditions. Therefore, it assumes a certain degree of independence of the lower authorities.

It seems thus that a compromise between the objectives of the norm-provider and the guidelines of administration policy must be achieved. Implementation of this policy cannot lead to elimination of autonomy of the lower authority[26]. Therefore, the higher authority should not, in principle, annul the decision which, to its judgement,

25 J. Zimmermann. *op. cit.*, p. 502.
26 M. Mincer, *op. cit.*, p. 145.

is not wrong or futile. However, one should note that properly exercised instance control can enhance the value of uniformity and certainty of the application of law, and thus increase the confidence of citizens towards authorities of the state. It can also positively affect the implementation of specific tasks assigned by legally binding norms to public administration. Therefore, instance control should be conducted conscientiously and carefully in reference to the decisions based on administrative discretion.

We should note that administrative law is a very extensive and heterogeneous branch of law. The scope of the situations in which it may be allowed to avail of administrative discretion may depend on the sphere of reality regulated by its particular sub- branches. As a consequence, the scope of cases which fall within the instance control in reference to the decisions based on that kind of discretion may vary.

The possibility to deal with the case anew and to carry on the procedure once again constitutes an unquestionable advantage of internal control of the decisions based on administrative discretion. This may allow a possible "correction" of errors committed by the first instance body. It can also control the validity and purposefulness of issuing a particular decision, which could positively influence the processes of administration and, by providing uniformity of application of law, intensify the confidence of citizens towards the state and its authorities. In addition (in some cases) this procedure will be much quicker as compared to judicial administrative procedure.

Internal control is not, however, devoid of certain drawbacks. As it has been mentioned at the beginning, control operations constitute a part of the process of administration. One should however note that the administration body (as opposed to the court) is interested in the content of decisions it adopts. As a result, this may lead to a lack of objectivism on the part of the second instance authority. What may happen furthermore is the predominance of purposeful elements over the legality of administrative decisions.

IV. Conclusions

It appears that administrative discretion is an institution necessary to enable proper administration of specific areas of reality by different administrative bodies. It gives the general possibility of making the most appropriate decision in the specific conditions of the case, taking into consideration different criteria. It is an element of discretion power of administration which facilitates the conformity of decision making process with the actual, specific case.

At the same time we can consider the problem of compliance of the construction of administrative discretion with the concept of rule of law. According to the latter, all actions of a public administration authority have to be based on particular legal provisions. Those actions have to be undertaken within law and in order to enact those legal provisions. However it appears that administrative discretion understood as the possibility to choose legal effects of the actual state is not only compatible with the concept of rule of law but also necessary in contemporary, dynamically changing reality. That is why also mechanisms of controlling administrative acts based on administrative discretion are so important and indispensible an issue.