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# Discretionary powers of the public administration in law application processes and its judicial control[1]

**Abstract:** The objective of this work is to demonstrate the expressions of the discretionary powers of the public administration in the process of the issuing of binding individual legal decisions and the scope in which the judicial control of the administration can verify the correctness of activities of the administration within the limits of its margin of decision.

**Keywords:** Discretionary power, judicial control of the administration, law application, law interpretation

## 1. Introductory remarks

Having in mind the need to create opportunities for public administration agencies to adapt their actions to individual situations and needs in the dynamically changing social reality, the legislator grants them a specific scope of decision-making margins, i.e. discretionary powers. At the same time, there are also other sources of such powers in the law application process, emerging irrespectively of the legislature's intention.

The objective of this publication is to show the expressions of the actual discretionary powers of the public administration in law application processes, i.e. the processes of the issuing of binding legal decisions shaping, in a dominant manner, the rights and obligations of an individual as well as the degree to which they are or can be subjected to the control of an independent court. This approach differs from the one presented in the literature so far for two principal reasons: (1) it refers to the search for sources of the actual scope of the margin of decision and

1 This paper emerged in connection with the realisation of a research project financed from the funds of the National Centre of Science granted pursuant to the decision number DEC-2013/11/N/HS5/04212. entitled: "The influence of judicial decisions on the discretionary power of public administration in the law application processes" ["Wpływ orzeczeń sądowych na dyskrecjonalną władzę administracji publicznej w procesach stosowania prawa"]. Deliberations contained in this publication were described more extensively in the monograph: A. Szot, *Swoboda decyzyjna w stosowaniu prawa przez administrację publiczną*, Lublin 2016.

not only that part of it that results from the contents of legal norms, and (2) it is analysed in an comprehensive manner with regard to particular phases of the law's application process while most of the research conducted so far concentrated on some of them only. The continental legal culture is at the background of the analysis and, for the sake of the greater clarity of the discussion, references are made to solutions existing in the Polish legal order.

The descriptive model of the law application process in its administrative type does not principally differ from the court model of law application. From the decision-making perspective[2], it covers lines of reasoning of an entity applying the law, each of them ending with the making of a fragmentary decision, pursued to issue the final decision with the specified content. The process consists of two main phases, i.e. preparatory phase during which the decision maker ascertains the facts and the legal status of the case and the principal phase directly leading to the formulation of the final decision, covering the qualification of facts from the perspective of the reconstructed normative basis for a decision and the determination of consequences of such a qualification. In the case of the administrative type of law application, one more stage that chronologically precedes all the lines of reasoning mentioned above has to be included in the said model. It is the pre-decision phase, when a decision is made to commence the law application process, i.e. its existence is determined.

The discretionary power of a public administration body in the process of law application can be understood as an actual possibility for the administering entity to select one of the alternative, legally permissible, contents of fragmentary decisions being a part of that process that, in the agency's opinion, are supposed to lead to the issue of the final decision most comprehensively attaining the assumed goal in line with the adopted administrative policy, within the limits determined by the law in force.

## 2. Discretionary powers of the administration – different perspectives

The discretionary powers of the administration can be analysed from two different perspectives, i.e. from a dynamic perspective (related to the decision-making process i.e. ordered sequence of actions) or a static perspective (covering the

2 See A. Korybski, L. Leszczyński, *Decision making approach in a study of the enactment and application of law: A pragmatic context of legal theory*, [in:] *Legal Theory and Philosophy of Law: Toward Contemporary Challenges*, eds. A. Bator, Z. Pulka, Warszawa 2013, p. 156–181.

analysis of sources of discretionary power from the point of view of the scope and type of discretion available to the decision maker).[3]

The static perspective refers to the search for sources of the discretionary power at different stages of the law's application process and, in particular, focuses (from the perspective of jurisprudence) on the study of binding legal norms. However, it should be noted that, in addition to freedoms resulting from the conscious decision of the legislature, other sources can also exist in the decision-making processes. The Polish theory of law makes a distinction between "explicit freedoms" and "hidden freedoms". The first group of freedoms is linked to the legislature's deliberate use in the law-making processes of constructions granting a certain range of margin of decision to entities applying the law (e.g. general clauses).The second group of freedoms is a consequence of specific processes of creation and application of the law and the editing of legal provisions and their interpretation. Freedoms deliberately created by the legislature are part of a specific concept of the law making policy implemented with the use of appropriate technical and legal means.[4] L. Leszczyński mentions the following legislative measures modelling the conscious scope of the margin of decision: the way in which legal provisions are formulated and normative acts are constructed (e.g. the use of vague concepts, avoidance of legal definitions, constructing framework legal acts), creation of extra-legal references via which the legal system opens to extra-legal criteria and the use of the administrative discretionary authority concept in the administrative law.[5] The author distinguishes the following sources of decision-making freedoms independent of the legislature's will: the social context of the law (expressed as a possibility for a decision-making entity to extend the application of a legal norm to include situations not foreseen by the legislature and in the use of social values), characteristics of the legal language and characteristics of the law application process (resulting from reductionist reasoning taken up in the course of the process or free evaluation of evidence).[6] Therefore, an in-depth analysis of this issue requires the grasping of the complexity of the reasoning at each stage of that process, considering both those sources of freedom that were generated deliberately and those sources that are modelled independently from the legislature's intention.

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3 M. Król, *Pojęcie luzu normatywnego stosowania prawa*, "Państwo i Prawo" 1979, No. 6, p. 62.

4 L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa,* Zakamycze 2001, p. 43.

5 Ibid., p. 43–45.

6 Ibid., p. 41–43.

The scope of the decision-making discretion available to the entity applying the law is determined by the contents of legal norms; it also results from the specificity and complexity of decision-making processes and the social reality in which such processes take place and in which the administering entities operate. This fact authorises an important thesis: that there are no decision-making processes in which the entity applying the law would have not even the minimum degree of freedom (scope of discretion).

In turn, the dynamic perspective on decision-making freedoms assumes that the final decision is reached via the gradual elimination and ruling out of abstractly defined alternative choices.[7] The elimination of individual potential choices takes place in stages as the facts of the case are learned and as their complete establishment approaches.

The understanding of the discretionary power mentioned at the beginning as an actual possibility of choice (irrespectively of its source) as one of the alternatives for the applying entity corresponds with the concept of the discretionary power used in the Anglo-Saxon literature when referring to the public administration.[8]

Two approaches to the discretionary power can be observed in European law: the narrower one (in principle, identifying that power with the possibility to choose the settlement method) and the wider one (including decision-making freedoms accompanying different stages of law application). However, the wide definition of the discretionary power that means: "all ways in which the law grants the flexibility right to an agency applying the law, leaves a certain degree of the decision-making power to it, both intentionally and unintentionally" prevails in this law and in the judgements of the Court of Justice of the European Union and the European Court of Human Rights.[9]

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7 Ibid. p. 63.

8 See, among other things, D. J. Galligan, *Discretionary powers – a Legal Study of Official Discretion,* Oxford 1986, passim; Ch. C. Eriksen, *The European Constitution, Welfare State and Democracy. The four freedoms vs. national administrative discretionary authority*, Routledge 2011, passim; Ch. C. Eriksen, *The Expansion of International Law and the Use of National Administrative discretionary authority: The Impact on Administrative Battlefields,* New York 2013, passim; G. E. Treves, *Administrative discretionary authority and judicial control*, "The Modern Law Review" 1947, vol. 10, p. 276–291.

9 More in: M. Jaśkowska, *Uznanie administracyjne a inne formy władzy dyskrecjonalnej administracji publicznej*, [in:] *System prawa administracyjnego*, vol. 1: *Instytucje prawa administracyjnego*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2010, p. 292–298 and the case law cited there.

One example of a narrow approach to the discretionary power is the Recommendation of the Committee of Ministers of the Council of Europe of 11.03.1980 concerning the exercise of discretionary power by administrative authorities[10] that defines discretionary power as a power which leaves an administrative authority some degree of latitude as regards to the decision to be taken, enabling it to choose, from among several legally admissible decisions, the one which it finds to be the most appropriate.

The above-mentioned definition can be interpreted as referring to the reasoning of the entity applying the law at the last stage of the process, i.e. the margin of decision formulation. Therefore, it will be identical with the concept of the "administrative discretionary authority approval" – the possibility of choice from among two or more legally admissible and legally equivalent contents of the final decision in the law application process. It also seems that a different understanding is possible.

If we adopt the decision-making perspective of the law application as the starting point we will observe that the process consists of a range of lines of reasoning, each of them ending with the issue of a decision: a fragmentary decision. Therefore, the definition of the discretionary power introduced in the above-mentioned Recommendation can be applied to each expression of freedom at all stages of the process and is equivalent to the concept of the decision-making freedom proposed above. There is no doubt that the adoption of this reasoning has one advantage: it expands the scope of provisions of the Recommendation to include all lines of reasoning pursued by administering agencies in the law application process.

Irrespectively of whether the decision-making latitude is intentional or not, the agency applying the law cannot choose a fragmentary decision going beyond the legal framework of its operation. Therefore, there is no unbounded margin of decision or "discretion"[11].

Discretionary power is an actual freedom, i.e. it covers both freedom in the legal sense and unintentional discretionary powers. The legal existence of the margin of decision is implied, in particular, by the legislature's purpose principles and technical legal barriers resulting from the imperfection of the legislative technique.[12]

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10 Recommendation No R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities.

11 The concept of "discretion" was used in the 1980ies. More in: Z. Duniewska, *Istota i granice dyskrecjonalnej władzy administracyjnej w świetle standardów europejskich*, "Studia Prawno-Ekonomiczne" 1999, R. LIX, p. 12.

12 Ibid., p. 13.

## 3. Discretionary powers of the administration in the law application process

The margin of decision refers to all lines of reasoning pursued by the entity applying the law. At the same time, it should be analysed for each of them separately due to their complexity in individual phases of the process. Therefore, we can talk about the margin of decision as regards the making of a decision to initiate the law application process, freedom related to the determination of facts and interpretation of the law and, finally, freedom as regards the qualification of facts in any particular case, determination of consequences of such a qualification and justification of the decision.

### (a) Initiation of the law application process

The decision to initiate the process aimed at the issue of an individual and authoritative resolution by an administrative agency with regard to an entity is first on the list of fragmentary decisions on which the entire procedure depends. Discretionary power as a part of the pre-decision phase depends on whether the legislature, in the laws in force, links the appearance of a specific fact (e.g. the submission of an application for an administrative decision within the limits of the entity's legal interest) to the obligation to examine the case, or rather leaves it to the discretion of the entity applying the law.

Such a situation of co-existence of a legal norm and a fact can be defined as a decision-making situation, i.e. the moment when the problem to be solved by the agency arises. Its occurrence causes the preliminary reflection of the decision-maker regarding the subject of the case, the decision-makers' potential competence as regards dealing with the case and the initial determination of the procedure and possible resolutions. It can also result in the making of a decision to initiate the law application process and pass to the complete determination of facts of the case and the reconstruction of the normative basis for the decision and, after that, the issue of a final decision. However, the administering agency deals with a potential administrative case up to that point.

In addition to cases of the explicit undertaking of an agency to take action, situations worth noting are those in which further proceedings will depend on that agency's decision (made within the limits of its discretionary power).The administering entity will be free to make a decision to commence the decision-making process, among others, when the legislature entrusts specific tasks to it but does not indicate the method of their execution. In such a situation, the agency is obliged to choose the action that attains the determined goal as fully as possible considering

the complex conditions in which it operates and means it has at its disposal. Such actions can include the issue of a decision to apply the law (one or more decisions) subject to the fact that it is a legally admissible action, i.e. there is a competence norm in the legal system that authorises the agency to act in this manner.

### (b) Determination of facts of the case

The determination of facts of the case takes place in conjunction with the validation and interpretation reasoning, which allows the entity to specify the range of facts to be proven in the case. The rules of the substantive law in force specify the catalogue of facts of the case that have to be determined prior to the issue of a decision regarding a specific case. The margin of any decision of administrative agencies regarding the determination of facts related to the case depends on how strongly that process is determined by the legal norms. They can indicate facts that have to be determined in a more or less detailed manner, or they can impose an obligation on the agency to carry out specific evidence (e.g. site visit, the hearing of a party).

The more casuistic the legal regulation, the narrower the scope of discretionary power of the administration, which has to act in line with the pattern of behaviour contained in the legal norm. Of course, it does not mean that a more general legal norm entails greater freedom for the agency, as the facts determined at least to a degree that is "sufficient" to make a decision is the basis for each law application process and there is always a legal norm or a legal principle putting the decision-maker under the obligation to determine the facts as comprehensively as possible (for example, art.7 of the Polish Code of Administrative Procedures at the same time being a legal principle provides that ["in the course of] the procedure, public administration agencies […]take all action *ex officio* or at the request of parties as necessary to determine the facts accurately […]").

However, irrespectively of the scope of determination with the contents of legal norms, it is worth noting that certain facts that the administrative agency will strive to determine are specified in the evaluative form in the law in force, while individual facts and the entire evidence material is subject to the decision-makers' evaluation. The first of these issues is a consequence of the necessity to determine the facts expressed by the legislature in a manner that requires certain evaluations, which entails the need for more complex efforts (than in the case of facts expressed descriptively) in order to ascertain their existence; it will entail the establishment of the occurrence of a certain fact and, after that, its evaluation.[13]

13 More in: J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1988, p. 190–192. More extensively about assessment expressions in the interpretation and application of the

The latter of the said issues, i.e. the evaluation of facts and of the entire evidence material refers to the evaluation of the reliability and sufficiency of evidence in order to demonstrate a specific circumstance and, after that (at the stage of the final qualification of facts), to evaluate the sufficiency of determined facts (collected evidence) in order to issue a law application decision.

### (c) Determination of the legal basis of the decision

The margin of decision being a part of the determination of the legal status of the case refers to two lines of reasoning in this phase of the law application process, i.e. validation reasoning and derivative reasoning. The former is related to the determination of the source of a legal norm while the latter is related to the reconstruction of legal content from that source. When analysing these issues, one has to find out to what degree the decision-makers are obliged to consider specific sources in the law application process, and to what degree it has freedom in this area; whether it can refuse to apply a source whose validity it ascertained and, finally, how it should carry out the normative reconstruction process and what it can or should do in the event of an ambiguity of meaning, establishment of the existence of a conflict or a loophole in the law. Due to drafting constraints of this publication, it shall be limited to just a few most important issues here.

At the stage of the validation reasoning, the margin of decision depends on the "characteristics of the validity criteria and on the adopted law validity concept".[14] As regards the legal regulations being the basic source of the law in the continental legal culture, it is the reference to their thetic justification. In turn, the use of other law application decisions (precedents) or non-legal criteria as validation arguments in the interpretation process requires the use of arguments whose nature is functional and axiological. The scope of the discretionary power of the administration at the validation stage also depends on the type of the reconstructed legal norm (competence, procedural or material norms).

The margin of decision of the administering entity at the stage of the reconstruction of a norm from legal regulations has to be viewed from two perspectives,

administrative law: L. Leszczyński, *Interpretacyjna rola kryteriów otwartych i innych decyzji stosowania prawa*, [in:] *System prawa administracyjnego*, vol. 4: *Wykładnia w prawie administracyjnym*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, p. 340–345. See also the SAC judgement of 10.07.2012, II OSK 694/11, CBOSA; SAC judgement of 14.06.2011, II OSK 1092/10, CBOSA.

14 J. Wróblewski, *Decyzja sądowa a koncepcja systemu prawa,* "Acta Universitatis Lodziensis, Zeszyty Naukowe UŁ Nauki Humanistyczno-Społeczne" 1978, issue 28.

i.e. the freedom of choice of interpretation rules and the method of its execution as well as the freedom to depart from the literal content of a regulation. The former is linked directly to the reconstruction of the normative basis for a decision and refers to each law application process. The entity applying the law will encounter the latter after the end of the reconstruction process if interpretation results obtained with the use of different interpretation rules diverge.

### (d) Qualification of facts and determination of legal consequences

The issue of a final decision and the end of the law application process is preceded by the qualification of all the collected facts from the perspective of the interpreted normative basis for a decision. The qualification involves "checking" whether both factual backgrounds, i.e. the factual background of the case and an abstract background covered in the norm overlap with each other.

Therefore, the statement that components of the determined factual background fill the scope of legal norm requires a "comparison" of the actual fact with a fact stated abstractly, which can frequently entail significant difficulties.[15] For example, difficulties can result from the method of creation of legal regulations and edition of the legal text when the legislature departs from the creation of legal definitions or uses general clauses. An imprecise specification of concepts related to facts of the case in a legal norm, frequently expressed in an assessing manner, entails the granting of a certain discretionary power to the agency applying the law in connection with their qualification.[16]

The end of the fact qualification process from the perspective of the qualification norm leads to the stage of formulation of the final decision. Referring to the concept of J. Wróblewski, we can distinguish – with certain remarks – two types of situations involving the legal determination of the content of such a decision in the law application process by legal norms. On the one hand, these are cases in which the ascertainment of specific facts of the case, by the agency, results in the issue of a single-content decision. On the other hand, there are situations in which the legislature leaves a certain margin of decision in the form of the possibility to choose alternative contents of the final decision.[17]

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15 See L. Leszczyński, *Zagadnienia teorii stosowania prawa…*, p. 73.

16 See B. Wojciechowski, *Model zakresu swobody interpretacyjnej prawa administracyjnego*, [in:] *System prawa administracyjnego,* vol. 4: *Wykładnia w prawie administracyjnym,* op. cit., p. 452.

17 More in: J. Wróblewski, *Sądowe stosowanie prawa*, op. cit., p. 240–242.

The former situation arises if consequences of the occurrence of facts of the case are determined in an unambiguous, categorical and unconditional manner. In such a situation, the decision-maker has no possibility of evaluation of the grounds for the issue of a decision with the defined content. In such a situation, if the legal norm unambiguously determines legal consequences of a fact, the resolution of the case is fully determined by that norm.[18] In the Polish doctrine, such situations are called "constrained decisions" in contrast to decisions with regard to which the agency has a certain degree of discretion.

The latter situation occurs if the legal norm grants some discretion to the decision-makers, involving the opportunity to choose from among various consequences. As J. Wróblewski stressed, that latitude is subsequently constrained by consequence choice directives[19] that constrain, in a varied manner, the freedom that the legislature initially granted to the decision-maker in the norm granting the right to issue such a decision. The Polish doctrine of the administrative law uses the concept of the "administrative discretionary authority" to describe such cases, indicating that the difference between decisions based on discretion and constrained decisions, is of a different method of formation of the substantive legal basis.[20]

### (e) Justification of the final decision

The justification of the law application decision in the physical and procedural sense appears chronologically after its issue; however, it is essentially "constructed" by the administering entity throughout the entire process.[21]

The margin of decision related to the justification of decisions has to be viewed from two perspectives, i.e. determination of whether an agency is obliged to issue the justification in a formal sense or whether it belongs to its discretionary power and, secondly, the specification of the content of the justification itself or the freedom to choose arguments.

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18 See ibid., p. 215.

19 Ibid., p. 241–242.

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

21 More in: L. Leszczyński, *Zagadnienia teorii stosowania prawa…*, p. 77. A similar approach to the process of "generation" of the statement of reasons is presented by J. Zimmermann (*Polska jurysdykcja administracyjna*, Warszawa 1996, p. 133) who writes that the justification of a decision "should not be an action that, in the course of jurisdiction activities, occupies a separate, closed section of time after the formulation of the administrative settlement. The justification cannot be «made» as an addition to the finished settlement […]".

The legislature determines the range of freedom of the administering agency deciding to "express" the statement of reasons for the final decision. The binding art.107 of the Polish Code of Administrative Procedures explicitly indicates cases in which this obligation is imposed on the entity applying the law and when the entity can abstain from it.[22]

In turn, the entity has more margin of decision at the stage of the determination of the justification's content, i.e. the choice of arguments to be included in it. However, this freedom is not unlimited. The administering entity is bound by legal norms and the axiology expressed in legal principles.

## 4. Judicial control of the administration vs. its discretionary power

The control exercised by the courts over the administration is mostly the control of its activities in compliance with the law. The verification of the way in which the agency uses its margin of decision at this stage of the decision to commence the law application process entails two key problems: whether the agency took action in a situation in which it was obliged to do so and whether it exceeded the limits of its authority (whether it acted within the legally determined limits).

In cases initiated *ex officio* in connection with the reaction to the factual background, the scope of the verification will mostly depend on the degree to which the agency is bound with the occurrence of specific facts. If the legislature links the occurrence of such a fact with the consequence in the form of the obligatory initiation of the formal administrative procedure, the control will involve checking whether the agency correctly "reacts" to the occurrence. In that case, the evaluation of compliance with the law of the action taken by the administering agency will be of primary importance. If the legal norms impose the obligation on the agency to behave in a specific manner at the moment of learning about the occurrence of a relevant fact, the failure to comply with this obligation shall equal the violation of the legal norms. The inactivity of the public administration agency can constitute the grounds for a complaint to an administrative court in the Polish legal system.

22 "Art. 107. (…)§ 4. It is possible to depart from the justification of a decision if it fully accepts the claim of a party; however, this possibility does not apply to decisions disposing of disputable interests of parties and decisions issued as a result of an appeal. § 5. An agency can also abstain from the justification of a decision if the existing statutory regulations provide for the possibility to abstain from or limit the justification in the context of the interest of the State security or public order."

At the same time, situations in which the initiation of the law application process depends only on the agency's decision and, as such, is not subjected to the verification from the perspective of the legality criterion remain beyond the scope of the evaluation by the court and thereby also outside the scope of the possibility of a complaint to a court for the agency's failure to act. However, a situation seems possible in which a citizen invokes the proportionality principle and submits a court complaint against the decision made against that citizen if the agency had a different (non-authoritative) opportunity to resolve the case (attain the assumed goal).

Verification of the reasoning of the administration agency leading to the cognition of facts of the case refers to checking how the agency ascertained these facts, and whether the collected material is complete and was correctly evaluated. Finally, the way in which facts are "highlighted" in the justification of a decision is subjected to an evaluation. Therefore, it is checked as to whether the administering agency determined the factual background with the use of legally permissible measures, in line with the procedure in force, including the instigation of all measures of inquiry required under the law and determined all facts of the case, in particular, the facts that it was obliged to determine under the legal norms and, finally, whether its evaluation of individual facts and the entire material collected was correct and whether it stated the reasons for its decision in line with code requirements.

The legal status of an administrative case and the method of its determination by the administering agency, in particular, the final result in the form of a normative base for a decision and the compliance of the agency's actions with it is the key concern of the court verifying the activities of the public administration. The related reasoning will be reduced to the confrontation of results of the agency's interpretation with a specific norm, i.e. results of the interpretation received by the court. Such confrontation leads to a conclusion regarding the compliance or divergence of these two components and the conclusion involves the evaluation of the correctness of the validation and derivation reasoning.

According to the said art.107 of the Polish Code of Administrative Procedures, the content of an administrative decision should contain, among other things, an indication of the legal basis for an action and the statement of legal reasons. It entails the need to refer to the content of legal regulations in a decision and "explain their meaning" to the addressee. Of course, a separate issue is whether the agency in its justification of the decision demonstrates all validation and derivation arguments that actually influenced the final normative decision, or whether all the

arguments it refers to reflect its actual reasoning or some of them are mentioned as a "decoration" only.

The verification of the reasoning aimed at the determination of the legal background of the case consists of the verification of the interpretation reasoning with regard to the determination of the authority of the agency to resolve the case, procedural actions to be taken in the course of the process, as well as the material aspects of the process and the final decision. The court shall verify both the selection of appropriate sources of the law and the determination of their validity and applicability[23] as well as the correctness of the determination of the contents of the legal norms. It means that the reconstruction process and its final effect in the form of a norm to be applied will be examined.

As regards the final decision formulation stage, the judicial control over the activities of the administration being a part of the administrative discretionary authority is particularly interesting. The fact that a decision is based on a norm authorising the administrative discretionary authority, does not rule out such control; however, it entails the limitation of its scope. If such a norm grants the possibility to choose legal consequences to the entity then each choice within the limits of its discretion is legal and cannot be undermined by the court. The court examines the decision's compliance with the law but does not examine its fairness or efficacy.[24] Therefore, the control over such decisions does not involve the examination of the content of the resolution itself but rather of the way in which the agency reached a specific resolution and whether that resolution is "within the limits" defined by the law.

This control is reduced to the verification of whether the issue of a decision was preceded by a correctly executed procedure, in particular, whether all necessary steps were taken to accurately clarify the factual background and whether the legal background of the case was correctly determined. When doing that, the court cannot limit itself to the acknowledgement of the existence of the legal basis for the issue of a decision based on discretion only; it also has to check whether the agency considered all regulations (legal norms) potentially applicable to the case.[25]

The justification is a component of the decision based on administrative discretionary authority that should be analysed in depth by the administrative court. A correctly constructed statement of reasons makes it possible to check whether the administrative agency executed the procedure correctly (correctly determined

23 Among other things, see SAC judgement of 13.12.2007, I FSK 114/07, CBOSA.

24 See the SAC judgement of 10.07.2009, I OSK 1293/08, CBOSA.

25 See the judgement issued by the SAC in Warsaw on 26.05.1981, SA 810/81, CBOSA; SAC in Warsaw judgement of 11.02.1981, SA 233/81, CBOSA.

the factual and legal background). However, its control should not be limited to checking whether the justification contains all the components specified in the regulations "surface structure"; it should also verify whether the justification follows the principle of persuasion and the principle of promotion of the citizens' confidence in the agencies "deep structure". In particular, a negative resolution should be justified persuasively and clearly when it comes to facts and the law, so that there is no doubt that all circumstances of the case were deeply considered and evaluated and that the final resolution is their logical consequence[26].

As mentioned above, the judicial review also includes checking whether the application of the administrative discretionary authority was admissible in a specific case. If the answer to this question is positive, the court shall focus (considering matters discussed above) on checking whether the administrative agency exceeded the limits of discretion. The court should examine whether the decision (or, specifically, its resolution) is within the limits specified in the law. If the legislature leaves freedom for the agency issuing a decision to choose consequences only a particularly material (glaring) violation of the said framework of such discretion will constitute a violation of the law.[27]

## 5. Conclusions

Summing up, it is worthwhile to repeat the thesis formulated at the beginning: that there are no law application processes where a public administration agency has not at least a minimum degree of discretionary power. This situation also results from the occurrence of such expressions of the margin of decision – in addition to deliberately created sources of decision-making latitude – that are not captured by the will and knowledge of the legislature. In connection with this fact, one can ask whether a certain scope of activity of the public administration fails to be captured by legal regulations and whether this situation can lead (in extreme cases) to their arbitrariness to the detriment of an individual.

It seems that such a situation should not occur in a system with effective mechanisms of verification of decisions made by the administration, applied by independent courts (those not involved with the activities of the administration). The judicial review of the administration directs (more or less directly) the reasoning of the public administration agency being a part of its discretionary power and, in civil law culture countries, court awards even become a factor influencing the way in which such power is exercised.

26 See the Kielce VAC judgement of 19.03.2009, I SA/Ke 57/09, CBOSA.

27 See the SAC judgement of 7.11.2008, II GSK 455/08, CBOSA.

At the same time, the judicial review is not unlimited. Compliance with the law (legality) is its basic and, in principle, the only criterion. In general, a court will check whether an agency acts in line with the law in the course of the law application process and whether it exceeds the limits defined by the law. Therefore, the issue of the judicial review of administrative decisions taking place on the basis of some different criteria is still current. For example, the advisability or rationality of a decision could be the basis for such a review. Additionally, it is worthwhile to note the "legality of purpose" structure existing in the Polish legal regime, which assumes that the action of an agency has to be not only compliant with the literal wording of a regulation but also with the purpose for which it was established.[28] In this sense, the incompatibility of a decision with such a purpose can be considered the taking of action in violation of legal norms.

28 More in: W. Jakimowicz, *Zewnętrzne granice uznania administracyjnego*, "Państwo i Prawo" 2010, issue 5, p. 52.