SPECIFIC FEATURES OF THE DISCRETIONARY POWERS OF ADMINISTRATIVE BODIES: THE POSSIBILITY OF DISPUTING THE PERFORMANCE OF THE DISCRETIONARY POWERS BY CLAIM

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DOI: https://doi.org/10.71404/NP.2025.3.22

Discretionary powers constitute an essential component of administrative law, granting administrative bodies a certain degree of freedom in decision-making. However, this freedom can sometimes result in unlawful or abusive exercise of authority, leading to violations of the rights and interests of affected parties. The existence and effectiveness of legal remedies in the exercise of discretionary powers under the administrative law of the Republic of Azerbaijan hold significant importance.

This article examines the legislative regulation of discretionary powers, the prevention of their abuse, and the challenges faced by administrative courts when reviewing the exercise of discretionary authority. Additionally, based on various legal theories and international practices, the article proposes recommendations for limiting discretionary powers and improving legal protection mechanisms within the administrative law framework of the Republic of Azerbaijan.

Keywords: claim for performance of obligation, discretionary power, administrative body, administrative court, public law

Determining the boundaries and control over the exercise of discretionary powers of administrative bodies is one of the widely discussed issues in administrative procedural law. In some cases, interested parties who believe that administrative bodies have not properly exercised their discretionary powers challenge the fulfillment of this obligation in court through a claim.

The powers exercised by administrative bodies can be divided into two types based on the nature of the directive. The first type relates to what in German is called gebundene Verwaltung, or «bound administration». In this case, when the conditions set by law are met, the administrative body is obliged to make a specific decision (Maurer, 2009, p. 135).

In other cases, the law grants the administrative body the freedom to decide whether to act or not, or to choose one of the available solutions. In this case, the administrative body's discretionary powers exist. The second group of powers under German legislation, called nichtgebundene Verwaltung, or «unbound administration», is normatively related to these discretionary powers.

The discretionary power of an administrative body may manifest in various forms. For example, the discretionary power concerning whether or not to make a decision is called «discretionary power concerning the decision». In German legislation, this power is called Entschließungsermessen. For instance, according to Article 5.8 of the «Regulations on the Recognition of Higher Education Qualifications of Foreign States», when a significant difference is detected between the qualification submitted by the applicant for recognition and the corresponding qualification existing in the Republic of Azerbaijan, or when the qualification does not exist in Azerbaijan, a decision may be made regarding partial, conditional, or alternative recognition. This is established as the administrative body's discretionary power (Regulations on the

Recognition of Higher Education Qualifications of Foreign States, 2023).

This example corresponds to the Entschließungsermessen, or «discretionary power concerning the decision», reflected in German legislation. For example, according to Article 52 of the Tax Code of the Republic of Azerbaijan, the tax authority has discretionary power to choose the type of inspection, and under Article 50.2 of the Tax Code, it has discretionary power to decide on conducting an operative tax inspection based on one of the listed grounds (The Tax Code of the Republic of Azerbaijan, 2000).

The second group of powers relates to the discretionary powers of an administrative body concerning the possibility of choice. In some cases, the legislation grants the administrative body the right to choose one of the available options. In German legislation, this is called «Auswahlermessen». For example, Article 83.3 of the Law of the Republic of Azerbaijan «On Administrative Proceedings» provides that the compulsory execution of an administrative act, which obliges the debtor to perform certain actions, tolerate certain actions, or refrain from certain actions, can be ensured by the administrative body selecting one of the compulsory enforcement measures -such as execution of the action envisaged by the administrative act at the expense of the debtor (interested party) by another person or administrative body, fines, or direct coercion (Law of the Republic of Azerbaijan on Administrative Proceedings, 2005). Based on the content of this provision, it can be stated that choosing one of the compulsory enforcement measures prescribed by law is a discretionary power of the administrative body. Thus, «discretionary power of choice» means granting the administrative body the right to select an option in order to achieve a specific goal (Maurer, 2009, p. 136). This power may manifest itself as the administrative body deciding whether or not to perform a certain factual action or choosing one among several possibilities.

It should be noted that depending on whether the specific discretionary power is granted to the administrative body by law, that power must be exercised within the limits prescribed by law (Detterbeck, 2009, p. 108).

In German administrative law, the concept of «gesetzesfreie Verwaltung» (administration free from law) is sometimes used. In such cases, when exercising discretionary power, the administrative body may not be subject to specific legal rules but must still be guided by the general principles of law (Maurer, 2009, p. 136).

One characteristic feature of discretionary power is that the conditions for performing the factual action are determined by law, but the final result-whether the administrative body performs the action or chooses one of the available options - is left to the discretion of the administrative body.

Granting discretionary power to administrative bodies by legislation has both positive and negative aspects. The positive aspect is that it provides the administrative body with the opportunity to find an effective solution tailored to a specific situation. Indeed, legislation cannot regulate all the details related to the activities of administrative bodies. In such cases, by exercising discretionary powers within the limits permitted by legislation, the need for detailed regulation is also eliminated. However, Loeser argues that discretionary power can be characterized as a «renunciation of the rule of law» (Loeser, 1994, pp. 496-498). One of the features characterizing the rule of law is the predictability of administrative activity in advance. However, discretionary power deprives citizens of the possibility to determine which factual action the administrative body will perform. Therefore, from the perspective of the principles of the rule of law, when exercising discretionary powers, administrative bodies should not exceed the limits allowed by legislation.

Discretionary power can be established in legislation in different ways:

1. In the first case, the existence of discretionary power is explicitly stated in the legislation. This is rarely seen in legislation.

2. In the second case, the existence of discretionary power is established through expressions in legislation implying the granting of such power to the administrative body. For example, the use of phrases such as «may», «is authorized to», or «can adopt» implies the existence of discretionary power. For instance, Article 38.3 of the Tax Code of the Republic

of Azerbaijan grants discretionary power to the tax authority, providing for the possibility of an unscheduled tax audit in the circumstances specified in the provision (Tax Code of the Republic of Azerbaijan, 2000). From the content of this norm, the existence of the administrative body's discretionary power is understood from the expression «may be conducted».

3. In the third case, the existence of discretionary power of the administrative body is understood from the content of the provision. For example, according to Article 17 of the Law of the Republic of Azerbaijan «On Citizenship of the Republic of Azerbaijan», if a person applying for renunciation of Azerbaijani citizenship has outstanding obligations towards the state or property obligations related to the interests of legal and natural persons in the Republic of Azerbaijan, the application for renunciation of citizenship may be rejected (On Citizenship of the Republic of Azerbaijan, 2001). Based on the content of this provision, it is understood that the administrative body holds discretionary power to reject the application for renunciation of citizenship if the applicant has outstanding obligations towards the state or property obligations related to the interests of legal and natural persons in the Republic of Azerbaijan (On Citizenship of the Republic of Azerbaijan, 1998).

4. The fourth case mainly concerns situations where the administrative body's decision-making or factual actions relate to one of the mandatory conditions stipulated in legislation. For example, according to Article 18 of the Law of the Republic of Azerbaijan «On Military Duty and Military Service», a deferment from conscription for the term of active military service may be granted by the district, city, or city district conscription commission decision on the grounds specified in this article. In other words, a deferment from military service may only be granted in cases prescribed by law, and the administrative body may make a decision based on its «mandatory discretionary power» (Law of the Republic of Azerbaijan On Military Duty and Military Service, 2014).

Limits of discretionary powers

The fact that an administrative body has discretionary authority does not mean it has the freedom to act as it wishes. The exercise of discretionary authority is limited by the principles of the rule of law. According to Article 14 of the Administrative Procedure Law of the Republic of Azerbaijan, an administrative body is obliged to exercise its discretionary powers within the limits established by law (within the powers granted to it by law). Decisions aimed at unjustifiably restricting the rights and freedoms of individuals or legal entities cannot be adopted when exercising discretionary powers.

As can be seen from the above, discretionary authority does not mean complete freedom of action or acting arbitrarily for the administrative body. That is, discretionary authority is not «free», but must be exercised «in accordance with the authority» based on the law. Discretionary authority must be exercised in line with the purpose of the given authority, and the administrative body must observe the legal limits of this authority. If the administrative body fails to comply with these provisions established by law, it exercises the discretionary authority «defectively», thus acting unlawfully. It is within the competence of the court to check whether the legal limits of discretionary authority have been respected.

According to Article 40 of the German Act on the Activity of Administrative Authorities, the administrative body must use its discretionary authority in accordance with its purpose and must not exceed the limits of its powers. If the administrative body exceeds these limits, its discretionary authority will be exercised unlawfully (Administrative Procedure Act of the Federal Republic of Germany, 1976).

According to Article 74 of the Administrative Procedural Code of the Republic of Azerbaijan, when an administrative body acts based on discretionary authority, the court also examines whether the administrative act, the refusal to adopt an administrative act, or the inactivity of the administrative body in adopting the administrative act violates the legal limits of discretionary authority or if discretionary power has not been exercised according to its purpose. A similar provision is regulated in Paragraph 1 of Article 114 of the German Administrative Courts Act. According to this provision, when an administrative body is

granted the authority to act at its discretion, the administrative court examines the legality of the administrative act, refusal, or inactivity in terms of exceeding the limits established by law or misuse of the authority (The Administrative Court Procedure Act of the Federal Republic of Germany, 1960).

This raises the question of in which cases an administrative body may use its discretionary authority contrary to legal requirements.

1. Exceeding discretionary authority**.** This situation, called «Ermessensüberschreitung» in German administrative procedural law, occurs when the administrative body takes action not envisaged by the norm granting it discretionary power. If the legislation grants the administrative bodies the authority to act or make decisions within certain limits, then any action or decision different from those limits is considered an exceeding of discretionary authority by the administrative body. In this case, the principle of proportionality is violated by the administrative body. For example, according to Article 25.2 of the Republic of Azerbaijan's «Civil Service Law», if a civil servant violates the requirements set out in Articles 18, 20, or 25.11 of the same Law, one of the disciplinary sanctions envisaged in that article shall be applied to them. If a disciplinary sanction not provided for in this article is applied by the state body, or if a sanction different from the prescribed limits is applied, then the discretionary authority has been exceeded (The Republic of Azerbaijan's Civil Service Law, 2000).

2. Misuse of discretionary authority. This concept, known as «Ermessensfehlgebrauch» in German administrative law, means that the administrative body uses discretionary power in a manner inconsistent with the purpose for which the authority was granted. This happens when the administrative body does not sufficiently consider the purpose of the law granting it discretionary authority. For example, applying the disciplinary sanction specified in Article 25.2.6 of the «Civil Service Law» to a civil servant who committed a first minor violation would not correspond to the purpose of Article 25.2 of the same Law.

3. Failure to exercise discretionary authority**.** Known as «Ermessensunterschreitung» in German administrative law, this situation refers to the avoidance by the administrative body of exercising the discretionary authority granted to it by law. For instance, according to Article 68.1 of the Republic of Azerbaijan's «Administrative Procedure Law», a legally unfavorable administrative act may be fully or partially repealed by the authority that adopted it, except in cases where such repeal is directly prohibited by law. Interpreting the law restrictively and the administrative body only carrying out the full repeal of legally unfavorable administrative acts in all cases would be considered a failure to exercise discretionary authority. A similar norm is reflected in Article 48 of the German «Act on the Activity of Administrative Authorities», which provides that unlawful administrative acts, even after gaining legally binding force, may be fully or partially repealed (The Republic of Azerbaijan's Administrative Procedure Law, 2005).

4. Exercise of discretionary authority contrary to general legal principles**.** In this case, even if the administrative body exercises discretionary authority, general legal principles are not observed. For example, an administrative body exercising discretionary authority in a way that violates the principle of equality contrary to existing practice.

Abuse of Discretionary Power and Legal Remedie

In the event of the unlawful use of discretionary power, various legal remedies have been envisaged in the administrative law of the Republic of Azerbaijan to protect the interests of the concerned party whose rights have been violated. The principle guiding the exercise of discretionary power is that interested parties have rights regarding the lawful exercise of such discretionary authority (Detterbeck, 2009, p. 116). Any action taken as a result of the unlawful use of discretionary power is also considered unlawful (Pietzcker, 1982, p.108).

The contestation of an administrative act adopted as a result of the exercise of discretionary power is possible through a claim of contestation. If the exercise of discretionary power by an administrative body requires taking a factual action, then the court may be

approached with a claim for the enforcement of the obligation. Naturally, this second case is less common in practice.

One of the most debated issues regarding discretionary power is the delegation of such authority to administrative bodies through the use of «vague concepts» in legislation. Known in German administrative law as «Unbestimmter Rechtsbegriff,» these concepts include terms like «public interest», «significant reason», «needs», «necessity», «public morality» etc., the meanings of which carry some controversial character. Such concepts in legislation can be interpreted in various ways. For example, according to Article 30.2 of the Law of the Republic of Azerbaijan «On Civil Service» if necessary for service, the head of the state body may exceptionally increase working hours without additional pay up to 5 hours per month. The norm grants the authority to increase working hours when «necessary». However, the legislator has not defined what situations qualify as «necessary».

The main controversy arising from the norms that contain such vague concepts and confer discretionary power on administrative bodies concerns whether administrative courts will review the exercise of that discretion, and if so, to what extent.

Different opinions exist in the literature on this matter. One theory is the «freedom of assessment of the administrative body». Proposed by Bachoff in 1955, this theory grants the administrative body freedom in interpreting «vague concepts». According to this view, the administrative body may make evaluations from various perspectives, and it cannot be argued that a «vague concept» has only one fixed meaning. Proponents of this theory argue that the administrative body, being experienced in applying the law, should be granted limited judicial review. The administrative court should only verify whether the administrative body acted within the limits of its authority.

The other theory, called «normative authorization», holds that the limits of the discretionary power granted to the administrative body through vague concepts must be defined clearly, and fidelity to the legislative text must be maintained. According to this theory, when a vague concept is used to confer discretionary power, the law must explicitly specify the scope of that power.

Agreeing fully with either theory is not accepted from the perspective of the administrative procedural legislation of the Republic of Azerbaijan. To prevent abuse by administrative bodies, it is considered more appropriate that legislation confers discretionary powers with precise and unambiguous concepts. Additionally, the boundary between the «freedom of assessment» and «discretionary authority» of administrative bodies should be clearly defined. Furthermore, administrative bodies should not engage in expansive interpretation of vague concepts; even if the law uses ambiguous terms, the outcome should be unambiguous. Administrative courts also have broad authority to review the outcomes (Pienie, 2008, p.55).

In German administrative law, the «System der Fehlerkontrolle» (error control system) has been developed regarding judicial supervision over the discretionary power granted to administrative bodies through vague concepts. This system defines the following criteria for judicial review of discretionary power:

1. First, it must be clarified whether a «vague concept» exists.
2. It must be determined whether the administrative body, when exercising discretionary power, has adhered to general legal principles.
3. It must be verified whether the administrative body has complied with procedural rules.

Conclusion

The lack of detailed regulation in legislation of the discretionary powers of administrative bodies often results in the overstepping of their authority, which in turn leads to the violation of the rights and interests of the concerned parties. When interested parties challenge the discretionary powers of administrative bodies in court, a key problem arises from the limited authority of administrative courts to «review» these powers. In many countries with Romano-German legal systems, the established rule is that administrative courts cannot replace administrative bodies in making decisions

related to their discretionary powers. In such cases, when disputing factual actions taken by administrative bodies, it becomes difficult to determine the extent to which the responsible body has «exceeded its authority». To prevent such situations, the research conducted has led to the following conclusions and proposals:

1. To prevent abuse by administrative bodies, it is considered more appropriate for legislation to grant discretionary powers with clear and unambiguous terms. Moreover, a clear boundary should be established between the administrative body's «freedom of assessment» and its «discretionary power». Regarding the interpretation of «indeterminate» concepts, administrative bodies should not resort to expansive interpretations. It is believed that when drafting norms related to administrative bodies' powers, the use of «indeterminate» concepts should be avoided. This is because, in countries with Romano-German legal systems, courts are the bodies applying the law. Avoiding «indeterminate» concepts in legislation will prevent both restrictive and expansive interpretations.

2. The research has determined that if the legislation grants administrative bodies the authority to act or make decisions within certain limits, then any action or decision that deviates from these limits constitutes an abuse of discretionary power by the administrative body. In such cases, the principle of proportionality is violated. However, in some instances, legislation does not specify limits on the exercise of discretionary powers by administrative bodies. In these cases, administrative courts often determine whether the discretionary power was exceeded based on similar decisions and the principle of equality. To prevent this situation, the norm defining the discretionary power of the administrative body should also specify the procedure and limits for its exercise.

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