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ADMINISTRATIVE DISCRETION IN STATES OF FULL DEMOCRACY AND HYBRID REGIME (ON EXAMPLE OF GERMANY AND UKRAINE)

ABSTRACT

The urgency of the study is stipulated by the need to clarify the features of administrative discretion in states with different democracy indices (different political regimes) and to describe the verification of compliance with the limits of discretion. The purpose of the article is to make clear the correlation between the understanding and administrative discretion boundaries and the type of a state according to the level of democracy development. The research is based on the democracy index, determined annually by the Economist Intelligence Unit, according to which states are divided into four types: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes. A comparative method, which was used to compare the perception of administrative discretion in Germany and Ukraine as typical states of full democracies and hybrid regimes, is the basis of the research. The article clarifies that administrative discretion should be understood as a way of exercising the powers of administrative authorities, which involves choosing one of several possible options for behavior in a specific case and is carried out in compliance with the rule of law, human rights, principles of administrative procedures, and the purpose of powers; it is substantiated that in the states of hybrid regimes the institution of administrative discretion is poorly developed, there are no clear criteria for the discretion boundaries, the issue of judicial control over decisions made with the use of discretion is uncertain; there is excessive bureaucracy. The materials of the article can be used for administrative discretion scientific research, and algorithms for

checking compliance with discretionary limits. The main provisions of the article can become guidelines for hybrid regime states to improve legislation in the area of discretion implementation.

KEYWORDS: administrative authority, democracy index, human rights, legal positivism, political regime, powers, rule of law.

1. Introduction

In a democratic state, public authority functions on the basis of its division into legislative, executive and judicial. This principle is a means of preventing the usurpation of power, and limiting the state bodies' arbitrariness. The executive power, as well as the judiciary, is separated from the sphere of law-making. The executive power is entrusted with the task of implementing the breves of the legislation obliging the relevant agencies to act within the limits of their powers. At the same time, the rule of law conditions public authorities to act proceeding from the human rights' and human dignity's priority. Legislation, not violating human rights, does not become a regulator of social relations: in a democratic state, public authorities cannot adopt legislation that will violate human rights, and if such a law is adopted, the authorities cannot refer to it as a basis for violating human rights (such the law must either be repealed by parliament or declared unconstitutional by a constitutional review body).

Herewith, as it is known, legislation is quite abstract (especially modern legislation): the legal norm provides for a model of behavior, it cannot cover the variety of human behavior manifestations. Under the conditions of bureaucratization of the administrative sphere, it can cause obstacles to the human rights' implementation. Therefore, the following situation is created: if a public servant takes legal norms literally, regardless of the human rights priori-

ty, then law might not be implemented (which may later be recognized by the court as a violation of a specific right and cause appropriate consequences of general and individual nature, including fair satisfaction payment); if a public servant neglects the requirements of legal norms, guided by "noble" intentions, this creates a threat to law and order, leads to arbitrariness in the public authorities' activities, and encroaches on the values of a democratic society.

Thus, the abovementioned points to the permanent urgency of such an issue as administrative discretion. Judicial Discretion is a quite studied legal phenomenon. In this context, it is worth mentioning the paper of A. Barak (1989), in which the author - the head of the Supreme Court of Israel – basing on his own experience, examines the problem of the judge's choice of behavior when two different decisions-making are possible in a case. However, a public servant of an executive authority has completely different powers than a judge, and he usually does not possess a legal education.

Administrative discretion became the subject of scientists' attention, including in the conditions of the rule of law. J. Heath (2020) notes the incorrectness of legislative and judicial strategies regarding the reduction of administrative discretion. The author considers the rule of law as a means of improving administrative discretion and preventing abuse of power. Peculiarities of administrative discretion were the subject of research by V. Omelyan, (2019), who claims that administrative discretion is a legal fiction and requires normative regulation and she defines administrative discretion as an opportunity of public administration subjects objectively conditioned by the circumstances of the case, that is enshrined in legal norms , to independently assess the actual circumstances of the case with subsequent selection of the optimal model of one's own behavior from several alternative options.

The study by A. Konstant (2016), in which the author criticizes the position of the Constitutional Court regarding discretionary powers and the assessment of broad discretion, is quite original. Partial aspects of discretion in the

state authorities' activities to ensure children's rights were studied by O. Kovalova et al. (2019). D. Golovin et al (2022) covered the possibility of using discretion by pre-trial investigation agencies. The authors focused attention on the specifics of solving specific issues in the relevant field, without generalizing the provisions regarding the discretion of state authorities.

It should be added that administrative discretion is constantly in the center of scientists' attention. Let's recall the research of H.J. Laski (1923), in which he came to the following conclusion: "For only by making discretion effectively responsible can we hope to give the modem state the instruments of which it stands in sore need", back in 1923. G. E. Treves (1947) compared administrative discretion in the English and French systems of law, challenging the established view of the favorable conditions for this discretion in the English system. Sunkin M. (1983) studied discretion in public law. Administrative discretion in private and public law became the subject of knowledge by T. Daintith (2005).

Thus, the general understanding of administrative discretion, its application in certain areas of public administration is the subject of scientists' permanent attention. However, to date, there has been no comparison of general approaches to administrative discretion in states with different indices of democracy. State authorities should act only within the limits of their powers. At the same time, administrative discretion, allowing public administration authorities to apply abstract legal prescriptions in order to settle specific cases, is a component of these powers. Therefore, administrative discretion in a certain way determines the limits of the public authorities' powers. Thereafterfore, in our opinion, it is crucial to compare the perception of administrative discretion in states with a full-fledged democracy and states with a transitional (hybrid) regime.

An additional factor determining the topicality of the study are the following circumstances that stipulate the wide application of administrative discretion by public administration authorities:

- in the conditions of the COVID-19 pandemic, in order to prevent the disease of the population, public authorities significantly restricted human rights. Herewith, in a number of states, such restrictions were introduced not by the parliament, but by the executive bodies of the state power, and sometimes such restrictions were excessive. And in authoritarian regimes, the measures restricting human rights were used to further strengthening of the public authorities' repressive actions. Human Rights Watch, the international non-governmental organization, reported at its official web portal that "For authoritarian-minded leaders, the coronavirus crisis is offering a convenient pretext to silence critics and consolidate power. ... The health crisis will inevitably subside, but autocratic governments' dangerous expansion of power may be one of the pandemic's most enduring legacies" (Roth, 2020). "Under such conditions, the lack of a clear algorithm for the use of public administration tools is absolute and leads to the fact that the most important management decisions are made on the basis of administrative discretion" (Kivalov, 2020);
- due to the armed aggression of Russia, millions of Ukrainians sought temporary protection in the European Union states. At the same time, there were actually no procedures for providing such shelter, which became a challenge for public administration authorities.

2. Methodological Framework

The study is based on the democracy index, determined annually by the Economist Intelligence Unit. This index is calculated based on 60 indicators grouped into 5 categories (2 categories are related to the subject of our knowledge – civil liberties, functioning of government). The democracy index con-

stitutes the average value of these categories. According to the obtained value, states are divided into four types: full democracies, flawed democracies, hybrid regimes, authoritarian regimes.

To achieve the goal of the study, we chose states that, according to the democracy rating, belong to full democracies and hybrid regimes. Full democracies and flawed democracies differ little from each other (in the context of our study), which will not allow us to see clear differences in the understanding of administrative discretion. Authoritarian regimes are based on dictatorship, they are characterized by the violation of human rights, restrictions on civil liberties, the judicial system is dependent on the state leadership, there is excessive bureaucracy, etc. Therefore, administrative discretion is also limited in these states, and this fact determined our choice of two types of states - full democracies and hybrid regimes. Germany, which has long been characterized as "full democracies", plays a system-forming role in understanding law of the states that make up the Romano-Germanic legal system, and plays an important role in the European Union, was chosen as a state of the first type.

Ukraine is chosen as a "hybrid regimes" state. This choice is based on the binary characteristics of administrative management in this state. On the one hand, even today one can feel the long time that Ukraine had been part of the Soviet state (significant bureaucracy, the priority of the "letter of the law" over human rights, politicization of management decisions, etc.; this is confirmed by a significant number of appeals from persons under the jurisdiction of Ukraine to the European Court of Human Rights and the results of consideration of applications. On the other hand, it is the declaration of the European choice (the Constitution of Ukraine (1996) states the following: "confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine") and the desire to become a member of the European Union. In addition, on June 23, the European Council (2022) decided to grant Ukraine the status of a candidate for EU member-

ship. In addition, according to the results of the democracy index, Ukraine belongs precisely to the states with hybrid regimes for a long time.

A comparative method, which was used to compare the perception of administrative discretion in Germany and Ukraine as typical states of full democracies and hybrid regimes, is the basis of this study. The study of the perception of administrative discretion within the boundaries of an individual state was carried out with the help of content analysis, which ensured the possibility of distinguishing the features of the subject of knowledge under different regimes.

The purpose of the study determines the structure of the study: first, we focus on the general understanding of administrative discretion allowing us to determine the object of knowledge and subsequent comparison; secondly, we will cover the requirements for administrative discretion in Germany; thirdly, we will explain the perception of administrative discretion in Ukraine (at the same time, we will focus on similarities or differences in the perception of discretion in Germany and Ukraine); fourth, the final conclusions of the comparison of the requirements for administrative discretion in the two states and the determination of the general criteria for the administrative discretion application will be set forth in the conclusions.

3. Results and discussion

Administrative discretion should be understood as a way of exercising of the administrative authorities' powers, which involves choosing one of several possible options for behavior in a specific case and is carried out in compliance with the rule of law, human rights, principles of administrative procedures, and the purpose of powers. It is mandatory to justify the decision made with the use of discretionary powers. Failure to use discretionary powers or making unfair, unfounded decisions should be qualified as illegal activity (inaction) of an administrative authority. Such activity should be subject to judicial control.

Verification of the legality of the decision made by the administrative authority must establish the following: a) whether the administrative authority had discretionary powers in the case under consideration; b) whether the exercise of discretionary powers in the case under consideration is subject to judicial review; c) whether the administrative authority acted in accordance with the purpose of the powers; d) whether the principle of the rule of law has been observed by the administrative authority; e) whether human rights haven't been violated by the administrative authority; f) whether the administrative authority followed other principles of administrative procedures.

The above provisions are implemented in full democracies, where the legal system is based on the natural understanding of law, on the recognition of the state's duty to ensure human rights (the fulfillment of this duty is associated with the granting of powers to public authorities); on the legality of the administrative authorities' activity; on the possibility of judicial control over the administrative authorities' decisions. In the states of hybrid regimes, the institution of administrative discretion is poorly developed, there are no clear criteria for the limits of discretion, the issue of judicial control over decisions made using discretion is unclear; there is excessive bureaucracy. The issue of discretion application is regulated by subordinate legal acts. This is a consequence of legal positivism prevalence.

3.1. Administrative discretion definition

Usually, the term "discretion" is associated with the ability to independently choose a variant of one's own behavior. At the same time, administrative discretion reflects the way of exercising the powers by the public authority. Under the rule of law, a number of requirements, one of which is the requirement of legality, towards the public authorities' activities, including public administration authorities' activities, are raised. The activities of public administration authorities should be carried out strictly within the limits fixed by law. It

is the law that empowers these bodies to act accordingly and it is the law that determines the limits of the powers.

We focus on that that is generally unconsidered by scientists. Thus, it is quite often noted that administrative discretion is the powers of an administrative authority however, this cannot be agreed with based on the following. It is hardly possible to imagine enshrining in the legislation a norm that will directly indicate that "a public administration authority is granted the right to exercise administrative discretion".

Usually, fixing of discretionary powers is carried out indirectly. Thus, the legislation may contain a list of possible actions of public administration authorities, without determining (or partially determining) the grounds for such actions. It can also be a fixation of evaluative concepts (which are determined by law nature). Moreover, we can note that the field of law is related to evaluative concepts. Quite rightly, D. Priel (2010) points out the established opinion among scientists that the theory of law is evaluative, and it requires making judgments about the importance of something or someone. We would like to add that we agree with this author about the incorrectness of the opinion about law moral neutrality (some aspects of this provision will be revealed below). In the same context, we cannot but mention the study of J. L. Slosser (2019) on the use of metaphors as a reasoning factor in the European Court of Human Rights activities. "The act of metaphorical framing by the Court on evaluative judgment is quite clear, at least in terms of viewing it from the standpoint of justificatory hindsight" (Slosser, 2019).

The issue of administrative discretion limits deserves special attention. The answer to this question, in our opinion, is related to the attitude towards administrative discretion. Scientists perceiving administrative discretion as an extreme measure, as an exception to the general process of exercise of powers by a public administration authority, assert the position of the need for clear normative regulation of the of administrative discretion limits. Such under-

standing of administrative discretion is mostly characteristic of states with a non-democratic political regime. Thus, "The trend of detailed regulation of the administrative procedures, which leads to an excessive reduction in the scope of discretionary powers of public administration, continues to actively gain momentum in our country" – indicates M. Allars (2000), characterizing the state of legal regulation in Russia. Attempts to regulate administrative discretion in detail are, in our opinion, a mistaken means of human rights assertion. Moreover, on the contrary, the presence of a large number of by-laws and regulations deprives public administration authorities of the opportunity to act effectively, and leads to excessive bureaucracy becoming a factor in the improper human rights' implementation. In addition, such excessive regulation does not take into account the nature of legal norms constituting standards, a generalized model of behavior, which cannot fully cover the multifaceted manifestations of human activity, and encroach on the freedom of human activity to some extent.

In contrast to technical norms fixing the appropriate way of human behavior with equipment, legal norms are not instructions for using technical means, in many cases they cannot provide for a single variant of behavior that is anticipated in legislation in advance. Making a decision in a case involves the public administration authority's activity to assess the actual circumstances of the case, which introduces an element of subjectivity into the public authority's activity, which cannot be eliminated purely by the subordinate legal acts adoption. At the same time, the legislation can determine the limits of discretion of the public administration authority (moreover, these limits should be determined in the legislation, in particular by means of the principles, administrative process basic provisions, etc.).

That is why scientists, perceiving administrative discretion as a phenomenon inseparable from administrative activity, focus on those factors that determine the administrative discretion limits (which prevent the transformation of

administrative discretion into the arbitrariness of public administration authorities). After all, it is quite obvious that administrative discretion cannot be exercised arbitrarily. This understanding of administrative discretion is mostly characteristic of states with a democratic political regime. In this regard, we can note that administrative discretion is not an arbitrary exercise of powers by a public administration authority, administrative discretion has limits, and therefore, control can be carried out to see if these limits have not been violated. Therefore, it is impossible to perceive administrative discretion as such an activity that is not amenable to control and is arbitrary.

In our opinion, decision validity assessment (which, in turn, requires the public administration authority to provide the rationale for the decision) is one of means of monitoring compliance with the limits of administrative discretion. Especially in case when human rights are restrained because of the decision. The justification of the decision is a means of legitimizing the public administration authority's actions. Let us point out that this topic is quite relevant and requires specific studies, which have hardly been conducted, in contrast to studies of court decisions legitimation, which are also insufficiently researched. "Studies examining the effect of argumentation in judicial opinions are limited but generally suggest that furnishing a monolith of reasons does not have persuasive power" (Scurich, 2018). Although one cannot fully agree with the specified author regarding the non-persuasiveness of the argument, especially in the aspect of monitoring compliance with the administrative discretion limits.

In democratic societies, the means of determining the administrative discretion limits are legislation, principles of law, and deontological requirements for the public servants' activities, etc. First of all, let's refer to the rule of law. According to the Venice Commission (2011), reflected in the Report on the Rule of Law, the rule of law is a complex phenomenon including the following characteristics:

- legality;

- legal certainty;
- prohibition of arbitrariness;
- access to justice;
- observance of human rights;
- equality and non-discrimination.

As we can see, all components of the rule of law are directly related to the public authorities' functioning in general and subjects of public administration in particular. At the same time, the thesis of D. Dedov (2014) that the doctrine of the rule of law plays an important role in ensuring human rights is also correct. X. Zhang (2018), comparing judicial control with administrative discretion, points out that the rule of law has several meanings, one of which implies that public administration should be carried out within the limits of rules and principles that limit discretionary powers.

The Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) emphasizes the rule of law as a common axiological heritage of European states. This prescription directs subjects of the application of legal norms to implement the requirements of the rule of law in their activities. In this aspect, it is worth agreeing with S. Kirste (2014) that the rule of law and a law-based state have a common goal: limiting public power. The provisions of these doctrines are implemented in a democratic society. Let us refer to the European Court of Human Rights (2000) statement "the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention". Let us add that although the European Court of Human Rights tries not to define concepts (including the rule of law and democracy), however, the analysis of its decisions allows us to distinguish the characteristics of a democratic society, in particular, freedom, liberalism, tolerance, equality, pluralism, creation conditions for a person self-realization (Jacobs et al, 1996).

In the context of the subject of our research, we can note such an element of the rule of law as equality and discrimination prohibition, which is understood as the prohibition of different treatment of persons who are in similar circumstances (Relating to Certain Aspects of the Laws…, 1968) and the prohibition of the same treatment of persons who are in different circumstances (Case of the Former King of Greece and Others…, 2000). It is quite obvious that this principle contains requirements for subjects of public administration, including regarding decision-making with administrative discretion use. Public authorities are obliged to balance the interests of different individuals and groups, acting impartially, realizing the values of pluralism as the basis of democracy (Iemets et al., 2020).

In our opinion, the limits of administrative discretion are also requirements related to good governance (the doctrine of proper governance includes the rule of law). For example, the European Court of Human Rights (2009) in the case of Moskal v. Poland referred to the principle of good governance noting the need for public authorities to 1) carefully clarify issues that are important to a person, 2) act in a timely and consistent manner.

The decision of the European Court of Human Rights in the case of Rysovskyy v. Ukraine (2011) is an additional argument of our attitude towards good government as administrative discretion boundaries: "In particular, it is incumbent on the public authorities to put in place internal procedures which enhance the transparency and clarity of their operations, minimize the risk of mistakes. ... the "good governance" principle may not only impose on the authorities an obligation to act promptly in correcting their mistake, but also necessitate the payment of adequate compensation or another type of appropriate reparation to its former good-faith holder".

Let us add that such components of good governance as Transparency, Responsiveness, Consensus orientation, Equity, Effectiveness and efficiency, Accountability, as well as the rule of law, mentioned above, are the factors that

determine the of administrative discretion limits. Ethical requirements for the public servants' activities are also factors that indirectly affect the activities of public administration authorities in the context of the administrative discretion application. Codes of ethics are considered as a means of perceiving certain moral principles and requirements, ensure the efficiency of public administration, and contribute to a positive image making. Therefore, it is rightly noted that "In recent times, the issue of ethics and accountability has been of great interest to scholars, human resources (HRs) practitioners, and the governments especially in this era of globalization and sustainability" (Ukeje et al., 2020).

Thus, discretion is a means of exercising the powers of public administration authorities. Administrative discretion should not be perceived as arbitrariness of public administration authorities. There are a number of doctrines, principles, and provisions in law determining the administrative discretion boundaries and allowing checking an administrative act as to exceeding the powers of an administrative authority.

3.2 Administrative discretion in the states of full democracy (on the example of the Federal Republic of Germany).

Let us note that this part of the study is largely descriptive, however, this description is the result of a generalization of scientific literature and German legislation and allows to form a general idea of administrative discretion in Germany (which is the basis for further comparison). In the Federal Republic of Germany, discretion is usually interpreted as a term of public law that refers to a situation where the administration, considering a case, can choose between different options for behavior, for example, when promulgating an administrative act. Herewith, two types of discretion are distinguished:

1) discretionary right – covers cases when the administration intends to take certain measures or not to take such measures;

2) the right to discretion – covers cases that refer to specific permissible measures that the administration intends to take (Krumme, 2018).

Although it is worth pointing out that German scientists pay little attention to administrative discretion definition, however, they focus on the applied aspects of the administrative discretion exercise, how to improve the legal doctrine in terms of the administrative powers perception, explaining the features of this legal institution in conditions of a supranational, transnational or international administrative system, as well as clarifying the administrative discretion boundaries at the national, European and international levels (Wendel, 2019).

The analysis of German legal literature allows us to draw a conclusion about a somewhat formalized approach of the German legislator to the administrative discretion legal regulation (as well as the public administration authorities' activities in general). In our opinion, this fact additionally confirms such a feature of the continental legal system as the presence of developed legislation and the significant role of laws in social relations regulating. In Germany, as long ago as the beginning of the second half of the 20th century, the Law on Administrative Procedures (Bundestag, 1976) codifying the administrative and procedural norms existing at that time, unifying the activities of public administration bodies, and establishing uniform rules for all administrative procedures, was adopted. Let us emphasize that, given that the German legal literature is mainly focused on the interpretation of statutory provisions on administrative discretion, we will also focus on the Administrative Procedures Act provisions' analysis (Bundestag, 1976).

Federal law clearly delineates when discretion can be exercised at the initial stage of an administrative procedure and when it cannot. Thus, when an administrative authority is required by law to act upon a demand or only upon an application (and the demand or application has not been submitted), an official cannot initiate an administrative procedure at his own discretion. In the same context, one cannot but mention the norms enshrined in § 47 of the Law on Administrative Procedures (Bundestag, 1976), according to which a deci-

sion of an administrative authority, which can only be adopted as a legally binding decision, cannot be interpreted as discretionary decision.

Therefore, we can see a systematic perception of various types of administrative acts, in particular, in the context of the possibility or impossibility of using administrative discretion during their adoption. A systematic interpretation of the above legal norms allows us to conclude that the administrative authority cannot exercise its discretion only in certain cases defined by law. On the positive side, it should be noted the possibility of automated promulgation of an administrative act has been established in the legislation, if the law does not provide for the possibility of administrative discretion in the case. In addition, it is appropriate to note the legislative prescription on the assessment of evidence by the administrative authority at its own discretion. The above fully confirms our conclusion about administrative discretion as a means for the administrative authority to exercise its powers. Public administration authorities will not be able to fulfill their powers without the possibility of administrative discretion using.

It is appropriate to emphasize that one of the paragraphs of the Law on Administrative Procedures is directly devoted to discretion. Thus, according to §40 of the Law on Administrative Procedures (Bundestag, 1976) if an administrative authority is empowered to act in its own discretion, it must act in accordance with the purpose of the powers and also must observe the statutory determined limitations of the discretion. According to German scientists, the application of discretionary powers by an administrative authority is carried out in a specific case, and the use of "general discretion" is not allowed (Raschauer, 2011).

As we can see, the given legislative prescription does not establish the administrative discretion definition, does not contain a list of cases when it is allowed to use discretion, does not indicate the list of administrative discretion boundaries. At the same time, the entire norm is limited to one sentence, whi-

ch gives a rather abstract idea of administrative discretion. This norm acquires a specific meaning through the practice of national courts, legal doctrine and the activities of the administrative authorities themselves.

However, such brevity of the prescription does not prevent administrative authorities from applying it effectively, preventing arbitrariness. One of the factors for the correct application of the given prescription is the requirement fixed in §39 of the Law on Administrative Procedures (Bundestag, 1976), obliging administrative authorities to justify a written or electronic administrative act. Herewith, the requirements for such a justification are established by law: it is necessary to specify the factual circumstances that influenced the decision-making, the legal grounds, as well as those provisions (principles) that were taken into account by the administrative authority. In addition, the legislation contains an exceptional list of cases when justification of an administrative act is not required.

The above provisions are fully consistent with the above description of administrative discretion and justification as a means of legitimizing an administrative decision and a basis for control over compliance by a public administration authority with the limits of powers. In our opinion, special attention needs to be paid to the clarification of the legislative requirement regarding compliance with the purpose of powers (in states with a democratic political regime and a non-democratic political regime, there are significant differences in the understanding of the concept of the administrative authorities' powers).

Let us emphasize that in the German scientific literature almost no attention is paid to the theoretical aspects of determining the powers of public administration authorities. As an exception, let's mention the paper of L. Goldschmidt (2020), devoted to explaining the nature of the powers of the state body, as well as the paper of H. Renner (2021), the subject of which is discretion in administrative proceedings.

At the same time, the analysis of legal scientific literature allows us to draw the following conclusion regarding the understanding of the powers of state administration authorities. The state is a form of society organization, which is entrusted with a number of tasks. State authorities are created to fulfill these tasks. In conditions of a democratic society, when the activity of state authorities is limited by human rights, the public authority, in order to fulfill its tasks, is given the opportunity to take actions, including those that restrict human rights. The term "power" is used in jurisprudence to denote such a possibility of public authorities.

However, it is a mistake to perceive powers as rights. The powers of the authority are both the rights and the duties at the same time (in addition, the emphasis should be shifted to the duty: exercising its powers, the administrative authority fulfills the tasks assigned to it by society). The powers exist in order to ensure human rights, therefore, if the exercise of powers causes a disproportionate restriction of human rights, the activity of the administrative authority cannot be recognized as legitimate in this case. In this context, the activities of public authorities in countering the Covid-19 pandemic, when excesses of powers were allowed, is quite significant. In this aspect, let us recall the Amnesty International Report 2021/22 (2022), which draws attention to the following: "Authoritarianism was on the march in Europe and Central Asia in 2021.A number of states demonstrated an unprecedented brazenness in their disregard for human rights, which threatened to make human rights commitments a dead letter and turn regional organizations into meaningless forums for empty "dialogue". In some countries such tendencies were evidenced in continuing state overreach...".

For example, we will also indicate the following. Amnesty International (2022) notes that in 55% of states public authorities used excessive or unnecessary force against demonstrators, and arrested human rights defenders. "Following the global Pegasus investigations, the German government admitted to

the purchase and use of NSO Group's Pegasus spyware" (Amnesty International, 2022). This kind of espionage contributes to human rights violations around the world. Therefore, administrative authorities cannot violate the purpose of their powers – human rights ensuring when making decisions. Human rights limitation can occur only in compliance with three grounds: legality, legitimate purpose, necessity of such limitation in a democratic society.

If the public administration authority is not guided by the purpose of the discretionary power, then such actions should be interpreted as the abuse of the discretionary powers. Let us add that the requirement to act in accordance with the purpose of the powers obliges administrative authorities to be guided by the principles of administrative procedures. These principles determine the limits of powers, requirements for the content of administrative activities, etc.

At the same time, let's emphasize that when an administrative authority does not use the discretionary powers granted to it by law, this can be qualified as a failure to fulfill its powers and entail (depending on the circumstances of the case) bringing the official to legal responsibility. So, if a policeman, in the presence of legal grounds for the use of weapons, does not use them, which entailed serious consequences, then it is appropriate to consider the issue of the policeman's inaction and bring him to justice. A policeman cannot justify his inaction by the fact that using a weapon is his right, not his duty. The power to use weapons is also given to the police in order to use weapons by the policeman in cases defined by law. This provision fully applies to administrative procedures.

Thus, although the German law contains a norm that enshrines the institution of administrative discretion, however, the law does not define the concept of discretion; it only specifies how to use discretion. Accordingly, the administrative authority is empowered to independently decide which decision to make in the presence of several decision options:

first, to act or not to act;

secondly, if to act, then in what way (who are the addressees of the action, means of action, what measures to take, etc.).

In our opinion, this allows us to distinguish administrative discretion from legal interpretation, which is carried out in the presence of an undefined legal concept. In the latter case, such methods of legal interpretation as grammatical, systematic, historical, and teleological should be used. Interpretation is one of the methods of rationally reaching a consensus in law, a means of determining the meaning of legal terms that is, obtaining the ideas of facts, values and obligations. It is a legal methodology that describes an intellectual path to a correct understanding of a text (Nestler, 2018).

The analysis of the scientific literature also allows us to draw a conclusion about the following difference between administrative discretion and legal interpretation: in case of discretion application judicial control is carried out regarding the legality of the decision (whether the administrative authority did not exceed the limits of its discretion); and in other case, the court checks all the aspects of the decision.

3.3 Administrative discretion in the states of hybrid regimes (on the example of Ukraine)

It should be noted that the institution of administrative discretion is relatively new to the Ukrainian legal system. During the period when Ukraine was part of the Soviet state, the concept of discretion was practically not used, and there were no scientific papers in which this issue was systematically covered. And this is an additional argument for the hypothesis of our study about the difference in administrative activity in democratic states and states with a non-democratic political regime.

In contrast to Germany, the main issues, covered in scientific literature, is understanding of administrative discretion in Ukraine. Scientists analyze the features of this phenomenon quite deeply and try to formulate the authors' de-

finitions. Generalization of these scientific papers allows us to combine them into the following groups.

The first group consists of scientific papers in which administrative discretion is understood as a choice made by a public administration authority in the process of creative activity during the exercise of powers (Hrin, 2019).

The second group consists of papers in which discretion is interpreted as a specific type of an administrative authority's activity, when this body independently resolves issues on the basis of analytical, creative, intellectual work (Semenii, 2016).

The third group consists of scientific papers in which administrative discretion is understood as a measure of freedom of an administrative authority official (Omelian, 2017).

The analysis of these papers allows us to draw a conclusion about the emphasis of scientists on understanding of discretion as creative activity, intellectual activity, analytical activity, etc., which indicates excessive dogmatization. This approach is not characteristic of German scientists who pay attention to the essential signs of discretion. Herewith, it is usually about administrative discretion as the right of an administrative authority to act strictly within the limits fixed by law. We emphasize that the right of an administrative authority is perceived as a possible behavior of an official, that is, that is carried out by the will of the official himself (if the person wishes, he exercises this right, if he does not wish, he does not exercise it). In this there is also a significant difference between the German and Ukrainian perception of the rights of public authorities, as well as powers. In Ukrainian legal doctrine, the powers of public authorities are understood as a set of rights and duties. Thus, for example, when defining the powers of the police, V. Mayorov (2020) indicates that "it is a set of rights and obligations enshrined in law, which are established for the performance of a specific task (field of activity) and/or the performance of certain actions or making administrative (procedural, etc.) decisions". In addi-

tion, rights are understood as the possible behavior of administrative authorities (which is implemented at the will of the administrative authority) enshrined in the law, and duties – as the proper behavior of the administrative authority. This understanding of powers is also reflected in the decisions of the Ukrainian courts.

In our opinion, this interpretation of powers is erroneous, based on the nature of public power, which is created to perform a number of tasks set before it by society, and not to choose whether to act or not to act. The powers of public authorities are derived from the power of the people. The people authorize the government to implement public interests, create conditions for free development of a human personality. Therefore, the rights of public authorities are their duties simultaneously. Human rights and the rights of a public authority are fundamentally different legal phenomena. At the same time, in the Ukrainian legal discourse, they are quite often perceived as one and the same phenomenon, and differ only in the bearer: in the first case, this is a person, in the second, this is a public authority.

Let us add that this understanding of powers as rights and duties (as possible and appropriate behavior) of public authorities is characteristic of states with a non-democratic political regime, where the public authority is the primary one, it makes legal norms, grants rights to a person (possible behavior of a person) and duties (proper behavior of a person). And here, legal normativism is the basis of jurisprudence. In contrast to Germany, the Law "On Administrative Procedure" was adopted only in 2022 (it will enter into force only at the end of 2023) in Ukraine. This Law (2022) provides a definition of an administrative authority's discretionary power: "discretionary power is the power granted to an administrative authority by law to choose one of the possible decision options in accordance with the law and the purpose for which such power is granted".

The given definition generally corresponds to the interpretation of administrative discretion in the European legal discourse. First, it is about the possibility of the administrative authority to choose one of several possible options for action. Secondly, the limit of discretion is indicated - the purpose of the power. Thirdly, the legitimate nature of discretion is noted.

However, in our opinion, this law has certain shortcomings. Thus, first of all, there is no article directly related to administrative discretion. Secondly, the analysis of the text of the law allows us to draw a conclusion about the establishment of "general discretion" ("an administrative authority initiates administrative proceedings on its own initiative at its own discretion, except in the case when, according to the law, the administrative authority is obliged to initiate and start administrative proceedings" (Verkhovna Rada of Ukraine, 2022)). And this does not meet the European standards of public authorities' activities, as it creates conditions for abuse of power, and is a factor of possible arbitrariness. Thirdly, it is not clear what the legislator meant by stating that an administrative act adopted by an authority that used discretionary powers is illegal. If a discretionary power is provided by law, how can the exercise of that power be illegal? It would be appropriate to point out that an administrative act, adopted exceeding the limits of discretion, is illegal.

Currently, the only act that regulates administrative discretion is the Methodology of Anti-Corruption Expertise, approved by the Order of the Ministry of Justice of Ukraine dated April 24, 2017 No. 1395/5. According to this legal act, "discretionary powers are a set of rights and responsibilities of state authorities and local self-government, and persons authorized to perform the functions of the state or local self-government, which provide the opportunity to determine at their own discretion in whole or in part the type and content of an administrative decision, which is adopted, or the possibility of choosing at one's own discretion of one of the several options for manage-

ment decisions provided for by the normative legal act, the draft normative legal act" (Methodology of anti-corruption examination No. 1395, 2017).

The analysis of this definition indicates the application of the "general discretion" concept (the shortcomings of which we indicated above) and the interpretation of the powers of administrative authorities as a set of rights and obligations (which was also emphasized above). Let us add that this interpretation of discretion really leads to the arbitrariness of public authorities and cannot be positively perceived in a democratic society. Especially in conditions when judicial practice indicates the limitation of judicial control over the verification of compliance with the discretionary powers limits. At the same time, for example, the Supreme Court (2022) refers to the practice of the European Court of Human Rights, however, without naming specific decisions: "Regarding the possibility of courts to evaluate the acts and actions of state authorities during their exercise of discretionary powers, the ECHR in its decisions made a legal conclusion that judicial review is restrained in such cases".

Let us note that the general results of the national courts practice's analysis regarding the control of discretionary powers are reflected in the Report "Discretion of Administrative Bodies and Judicial Control" (Zeller et al, 2021), prepared within the framework of Project PRAVO-Justice. In this document, it is stated, in particular, that the issue of control limits over the correctness of administrative discretion application is the most difficult for judicial practice.

4. Conclusion

Thus, administrative discretion is a way of exercising powers by an administrative authority. Discretion ensures the effectiveness of the administrative authority's powers exercise, the adoption of balanced and fair decisions taking into account the peculiarities of a specific case, contributing human rights implementation. Discretion involves the administrative authority choosing one of the possible decision options in a specific case. In order to prevent the arbitrariness of public administration authorities, the following should be fixed in the

legislation: a) discretion exercise limits (as well as the very possibility of exercising discretion); b) judicial control over the legality of a decision made by an administrative authority using discretion.

In German legislation, administrative discretion was enshrined as long ago as the beginning of the second half of the 20th century. The long existence of the institution of discretion made it possible to develop means of control over the legality of the use of discretion based on the democratic society values. In the states of full democracies, the ability of administrative authorities to use discretion as a means of exercising their powers is enshrined in law. Moreover, the administrative authority is obliged to use discretionary powers (in cases defined by law) to resolve the case. The rights of the administrative authority are at the same time its responsibilities; therefore, a failure to exercise discretion is an illegal inaction.

Herewith, the following are recognized as the limits of discretion: the values of a democratic society – human rights, the rule of law; principles of administrative authorities' activity; the administrative authorities' powers purpose. One of the means that provides the possibility of judicial control is the legal requirement to justify the decision made by the administrative authority. In Ukraine, administrative discretion is not regulated at the legislative level. The definition and individual aspects of discretion exercise are determined by a subordinate legal act. During the period when Ukraine was part of the Soviet state, the institution of discretion was not applied practically. Judiciary practice on discretionary control is vague. The adoption of the law on administrative services containing norms on discretion, and study of discretion by lawyers is determined mainly by the European vector of Ukraine's development and the desire to harmonize its national legislation with the European Union standards.

This understanding of administrative discretion is characteristic of hybrid regime states, which is determined by the following factors. The basis of law system is legal normativism, according to which public authorities are reco-

gnized as the subject of law-making. They define their powers themselves, that are perceived as rights (the ability to act as they wish) and duties (the need to act in a certain way). Therefore, administrative discretion is practically not considered; it is identical to the rights of an administrative authority. Accordingly, the criteria for judicial control over the discretionary powers use, the limits of discretion, etc., have not been developed.

5. References

Allars, M. (2000). The Rights of Citizens and the Limits of Administrative Discretion: The Contribution of Sir Anthony Mason to Administrative Law. *Federal Law Review*, *28*(2), 187–211. Retrieved from: https://doi.org/10.22145/flr.28.2.3

Amnesty International Report 2021/22 (2022). The State of the World`s Human Rights. Amnesty International Retrieved from: https://www.amnesty.org/en/wp-content/uploads/2022/03/POL1048702022ENGLISH.pdf

Barak, A. & Kaufmann, Y. (1989). *Judicial Discretion*. New Hawen and London: Yale University Press. 312 p.

Bundestag (1976). *Law on Administrative Procedures*. Retrieved from: https://www.gesetze-im-internet.de/vwvfg/index.html#BJNR012530976BJNE006002301

Case of Moskal v. Poland (2009). Application no. 10373/05. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-94009

Case of Rysovskyy v. Ukraine (2011). Application no. 29979/04. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-107088

Case of the Former King of Greece and Others v. Greece (2000). Application no. 25701/94. Retrieved from: https://hudoc.echr.coe.int/eng?i=001-59051

Case of Thlimmenos v. Greece (2000). Application no. 34369/97. Retrieved from: https://hudoc.echr.coe.int/eng?i=001-58561

Constitution of Ukraine No. 254k / 96-VR (1996). Verkhovna Rada of Ukraine. Retrieved from: https://zakon.rada.gov.ua/laws/show/ 254к/96-вр#Text

Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Council of Europe.

Daintith, T. (2005). Contractual Discretion and Administrative Discretion: A Unified Analysis. *The Modern Law Review, 68*(4). Retrieved from: https://doi.org/10.1111/j.1468-2230.2005.00551.x

Dedov, D. (2014). The Rule of Law and Legal State Doctrines as a Methodology of the Philosophy of Law. *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, *38*. Cham: Springer. Retrieved from: https://doi.org/10.1007/978-3-319-05585-5_5

European Council conclusions on Ukraine, the membership applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and external relations (2022). European Council. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/

Goldschmidt, L. (2020). II. Nature and Scope of State Administrative Powers. *Band 1 (pp. 371-386)*. Berlin, Boston: De Gruyter. Retrieved from: https://doi.org/10.1515/9783112378700-013

Golovin, D., Nazymko, Y., Koropatov, O. & Korniienko, M. (2022). Electronic Evidence in Proving Crimes of Drugs and Psychotropic Substances Turnover. *Access to Justice in Eastern Europe*, *2*(14), 156–166. Retrieved from: https://doi.org/10.33327/AJEE-18-5.2-n000217

Heath, J. (2020). Administrative Discretion and the Rule of Law. *The Machinery of Government: Public Administration and the Liberal State*. New York: Oxford Academic. Retrieved from: https://doi.org/10.1093/oso/9780197509616.003.0006

Hrin, *A. A. (2019). Executive Authorities' of Ukraine Discretionary Powers and Their Implementation*. Kyiv. 256 p.

Iemets, L. O., Pyshna, A. H. & Hridina, K.V. (2020). Right to freedom of expression in conditions of information technologies development. *Revista Gênero & Direito's Edition*, *9*(4), 1031–1045.

In The New York Review of Books Retrieved from: https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power

Jacobs, F. G. & White, R. C. A. (1996). *The European Convention on Human Rights. 2nd Edition*. Oxford. 534 p.

Kirste, S. (2014). Philosophical foundations of the principle of the legal state (rechtsstaat) and the rule of law. *The Legal Doctrines of the Rule of Law and the Legal State (pp. 29–43)*. Cham: Springer. Retrieved from: https://doi.org/10.1007/978-3-319-05585-5_3

Kivalov, S. V. (2020). Application of administrative discretion in conditions of counteraction the spread of the covid-19 pandemic. *Public administration under modern conditions: concept, features, challenges (pp. 1–15)*. Riga: Izdevniecība "Baltija Publishing". Retrieved from: https://doi.org/10.30525/978-9934-588-67-9.1

Konstant, A. (2016). Rights, administrative discretion and Dawood. *South African Journal on Human Rights, 32*(1), 106–129. Retrieved from: https://doi.org/10.1080/02587203.2016.1162441

Kovalova, O., Korniienko & M., Postol, O. (2019). Ensuring of child's dignity as a principle of modern education: administrative and legal aspects. *Asia Life Sciences Supplement, 21*(2), 341–359.

Krumme, J.-H. (2018). *Discretion*. Retrieved from: https://wirtschaft-slexikon.gabler.de/definition/ermessen-32994/version-256523

Laski, H. J. (1923). The growth of administrative discretion. *The Journal of Public Adminibration, 1*(2), 92-100.

Mayorov, V. (2020). To the issue of connecting the concepts of "competence" and "authorization" of the National police of Ukraine. *Law and State Administration*, *1*(1), 85–89. Retrieved from: https://doi.org/10.32840/pdu.2020.1-1.13

Methodology of anti-corruption examination No. 1395/5 (2017). Ministry of Justice of Ukraine

Nestler, N. (2018). Criminal offences interpretation: interpretation ways and methodology. juristische ausbildung. *Juristische Ausbildung*, 6, 568–576. Retrieved from: https://doi.org/10.1515/jura-2018-0122

Omelian, O.V. (2018). The essence of administrative discretion in the activity of public administration. *Administrative Law and Process*, *2*(21), 23–33. Retrieved from: https://doi.org/10.17721/2227-796X.2018.2.03

On Administrative Proceedings. No. 2073-IX (2022). Verkhovna Rada of Ukraine. Retrieved from: https://zakon.rada.gov.ua/laws/show/2073-20#Text

Priel, D. (2010). Description and evaluation in jurisprudence. *Law and Philosophy, 29*(6), 633–667. Retrieved from: https://doi.org/10.1007/s10982-010-9081-y

Raschauer, B. (2009). *General Administrative Law*. Springer: Vienna, 485 p. Retrieved from: https://doi.org/10.1007/978-3-211-99262-3

Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium (Merits) (1968). Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64. Retrieved from: https://hudoc.echr.coe.int/eng?i=001-57525

Renner, H. (2021). *Discretion provided in Administrative Jurisprudence and in Administratice Court Proceedings. Legal Research*. München: GRIN Verlag.

Report on the Rule of Law (2011). Adopted by the Venice Commission at its 86th plenary session. European commission for democracy through law. Retrieved from: http://www.venice.coe.int/docs/2011/CDL-AD%282011%29003rev-e.pdf.

Resolution of June 16, 2022 in the case No. 9901/57/19 (2022). Retrieved from: https://reyestr.court.gov.ua/Review/105168221

Roth, K. (2020). How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power. In Human rights watch. Retrieved from: https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power

Scurich, N. (2018). Styles of argumentation in judicial opinions (legitimating judicial decisions). *Annual Review of Law and Social Science*, 14, 205–218. Retrieved from: https://doi.org/10.1146/annurev-lawsocsci-101317-031050

Semenii O. M. (2016). The problem of abuse of administrative discretion in the activity of public administration: foreign experience analysis and generalization. *Law and Society*, 3, 132–136.

Slosser, J. L. (2019). Components of legal concepts: quality of law, evaluative judgement, and metaphorical framing of Article 8 ECHR. *European Law Journal*, *25*(6), 593–607. Retrieved from: http://dx.doi.org/10.1111/eulj.12347

Sunkin, M. (1983). Judicial review: rights and discretion in public law. *The Modern Law Review, 46* (5), 645–653.

Treves, G. E. (1947). Administrative discretion and judicial control. *The Modern Law Review*, *10*(3), 276–291.

Ukeje, I.O., Onele, J.C., Okezie, B.N., Ekwunife, R.A., Ogbonnaya, C.E. & Nwangbo, S.O. (2020). Public service ethics and accountability. In: Farazmand, A. (eds) *Global Encyclopedia of Public Administration, Public Policy, and Governance*, 1–12. Retrieved from: https://doi.org/10.1007/978-3-319-31816-5_4173-1

Wendel, M. (2019). *Administrative Discretion as a Multi-Level Problem*. Tübingen: Mohr Siebeck, XXIX, 511 p. Retrieved from: http://dx.doi.org/10.1628/978-3-16-156688-2

Zeller, E., Kuybida, R. & Melnyk, R. (2021). *Report "Discretion oj Administrative Bodies and Judicial Control"*. Retrieved from:

https://www.pravojustice.eu/storage/app/uploads/public/602/690/8dd/6026908dd95a1826017060.pdf

Zhang, X. (2018). *Towards the Rule of Law: Judicial Control of Administrative Discretion in a Comparative Context*. Retrieved from: http://dx.doi.org/10.2139/ssrn.3286207