

Administrative Law

Basic Principles of Administration

Basic principles of administration

- Administration limited by law
- Bound and discretionary administration
 - Right to information
 - Administrative offence of less importance
- The aim of basic principles of *administration*
 - Principles v. specific norms
 - Twofold function
- Open list
 - Principles of *administrative procedure*
- Prohibition of abuse of formal requirements (basic principle of administration)
- Correction of formal errors (Principle of administrative procedure)
- Comprehensive and partial principles

Principle of Legality

- Separation of powers
 - Rulemaking
 - Legislative prescription
 - Supremacy of law
- **Article 4. Legality of Administration**
- 1. Administrative bodies shall assure compliance with *laws*.
- 2. Administrative bodies shall have the powers defined by law or other legal acts as prescribed by laws.

Defining Discretionary Power

- **Article 6(1) LFAAAP**
 - Discretionary power is a **right**
 - granted to administrative body **by statute**
 - **to choose** *any* of **several possible legitimate solutions.**
- **CoE CM Recommendation No R(80)2**
 - A **power**
 - which leaves the administrative authority some **degree of latitude** as regards 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.*

Understanding Discretion

- Discretion is not arbitrariness – but it can be exercised unlawfully
- How can discretionary powers be justified?
 - Individualized & fair approach in each situation
 - Absence of discretion: inability to display **individual & fair approach**
 - Legislators cannot foresee all possible situations in the future
 - Absence of discretion: inability to quickly react to **unforeseen situations** (e.g. **disasters**)
 - Specialized, expert knowledge within ABs competence
 - Absence of discretion: inability to choose the most correct decision in accordance with the **expert knowledge** in the field relevant to the situation
 - Discretion is a legislative tool
 - Legislator would have to predict & regulate **ALL** possible situations in the statute
 - Statutes would be huge, technical, inaccessible – no guarantee that all situations covered
- Main goal of discretionary powers - **greater justice in individual situations**

Elements of Discretionary Power

- The AB is about to **exercise AA**
- There are **at least two options** for the exercise of AA
- All options are **lawful/legitimate** (within the competence of the AB)
- The AB has the **right to choose** each of the options
 - To reach the goal prescribed by law
- The right to choose was **granted by the legislator** (parliament/people)
- Typical statutory language indicating to discretionary power:
 - ...administrative body *may*...
 - In case there are legal bases established by this law for carrying out a double audit, the body authorized to conduct audits **shall be entitled** to conduct a double audit within the prescribed time period.
 - ...fine the offender from 10.000 to 20.000 AMD
 - Discretion of the legislator
 - Discretion of the Admin body
 - ...shall decide the procedure of...

● Types of Discretionary Powers

● Discretion to choose

- All options to be chosen are listed in the statutory text
- In certain situation, AB imposes fine from 10.000 to 20.000 AMD
- Reasoning of the chosen option in the AA as a safeguard

● Discretion to decide

- Legislator decides the direction/type of the AA, **AB decides the result** (must decide!)
- Options to be chosen are not clearly stated
- Statute authorizing the Government to decide the traffic rules
- Statute authorizing the National Commission on TV & Radio to decide policy of licensing
- Decision within **competence** & pursue the **aim for which discretion granted**

● Indefinite legal concepts (freedom of assessment)

- If a person has provided **exclusive services** to the RA, the President may grant citizenship
- ...a **well-established fear** of persecution...
- “If necessary”, “in case of need”, “in exceptional situations”, “in public interest”

Structure of Discretionary Powers

- Structure of a legal rule: facts (hypothesis) & consequences (disposition)
 - **IF** (the required facts are established) **THEN** (legal consequences (*may*) follow)
 - The President may grant citizenship to persons who provided exclusive services to the RA
- Facts:
 - Persons who provided exclusive services to the RA
- Consequences:
 - May be granted citizenship
- **If** the taxpayer filed the tax report in breach of the time periods prescribed by law, **then** the taxpayer shall be fined from 10000 to 20000 AMD

Examples


- The application for a license shall be dismissed if documents submitted by the applicant are defective, obviously false or distorted.
- Where the licensee commits such violations of law, licensing procedures or licensing terms and conditions that directly threaten the state and public security, ... the licensor shall have the right to prohibit immediately temporarily the performance of activities subject to licensing or individual functions of such activities, or individual operations reserved by license.

Examples

- Hearings shall not be required, if:
- a) favorable administrative act will be issued during administrative procedure, which does not interfere in the enjoyment of the rights of other persons, or the addressee of administrative act does not demand hearings be held,
- b) petition is manifestly unfounded;
- c) the administrative act is issued orally.

Examples

- Documents required to receive a license may be delivered to the authorized body in person or by mail.
- A copy of the inspection order shall be properly delivered (handed or by mail) to the head of the business entity.
- The procedure of the recovery of civil status act records is established by RA Government.
- In certain cases the Government decides the categories of citizens and certain citizens who are given deferment from military service.
- The exercise of entrepreneurial activity in case of unreliability of an entrepreneur is banned by the authorized body.

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- Errors of discretion
 - Non-application of discretion
 - Violation of the limits of discretion
 - Wrong application of discretion

Limitation of Discretionary Powers

Article 6(2) LFAAAP

- In the exercise of discretionary power administrative body shall be guided by:
 - the necessity to protect human and citizens' rights and freedoms prescribed by the Constitution of the Republic of Armenia
 - their equality
 - the principles of proportionality of administrative activity and
 - the prohibition of arbitrariness
 - as well as pursue other **goals** prescribed by law
- Other checks & limitations?
 - Reasoning of AAs (Art. 57, LFAAP)
 - The reasoning of administrative act issued as a result of exercise of discretionary power of administrative body shall indicate the **considerations** on the basis of which administrative body chose that solution
 - Reasoning of administrative acts issued by administrative body with arguments not related to the **competence** of that body shall be prohibited.
- Discretion reduced to 0

Prohibition of Arbitrariness (Art. 7)

- 1. Administrative bodies **shall be prohibited** from manifesting **unequal treatment** towards the **similar factual circumstances**, unless there is **any** ground for their differentiation.
- Administrative bodies are obliged to manifest **individualized treatment** towards essentially **different factual circumstances**.
- 2. If administrative body has exercised its discretionary power in a **particular manner**, then, **in similar cases in the future**, it is obliged to exercise the discretionary power in **the same manner**.
- Administrative body **may derogate** from that restriction if, on the grounds of **prevailing interest**, it intends to *consistently adopt this other approach to the exercise of its discretion*.

Proportionality of AA

- Administrative activity shall pursue the **aims** set by the Constitution and laws of the RA and the **means** for achieving these aims shall be **suitable, necessary** and **moderate**.
- What is the legal basis of the principle?
 - Article 78 of Constitution
- When does the principle apply?
- Does the principle apply to normative acts?
- To real acts, i.e. action & inaction?

Proportionality Elements: 1+3

- ◆ Legitimate **aims**
 - ◆ Extension of the principle of legality: check the motives of the AB (proper/improper goals)
- ◆ The **measures** to achieve these aims:
 - ◆ Suitable
 - ◆ The measures make it possible to lead to achievement of the aim: measures must be lawful
 - ◆ List all lawful means & compare for their **achievability** in relation to legitimate aim
 - ◆ **The question is:** which one of the measures best fits the achievement of the legitimate aim?
 - ◆ Necessary
 - ◆ List all lawful & suitable measures starting from less severe to more severe
 - ◆ Compare these measures for their **intrusiveness** for person in relation to legitimate aim
 - ◆ **The question is:** which suitable measure best achieves legitimate aim with minimum intrusion
- ◆ Moderate (proportionality in a narrow sense)
 - ◆ Only lawful, suitable & necessary measures can be moderate
 - ◆ Compare/analyze the private & public interests affected by each of the remaining measure
 - ◆ **The question is:** does the measure place heavier burden on persons than it is necessary to achieve the legitimate aim