
AMERICAN UNIVERSITY OF ARMENIA
ՀԱՅԱՍՏԱՆԻ ԱՄԵՐԻԿՅԱՆ ՀԱՄԱԼՍԱՐԱՆ

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LL.M. Program

ԻՐԱՎԱԳԻՏՈՒԹՅԱՆ ՄԱԳԻՍՏՐՈՍԻ ԾՐԱԳԻՐ

What are the limits of judicial review of discretionary powers exercised by administrative bodies considering the need to strike an equitable balance between the principle of separation of powers and the necessity to ensure the effective application of limitations of discretionary powers?

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Yerevan, Armenia 2020

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LIST OF ABBREVIATIONS

AC – Administrative Court

APA – Administrative Procedure Act [1]

CAO – Code of Administrative Offences[2]

CAP – Code of Administrative Procedure[3]

CIA – Central Intelligence Service

COC – Court of Cassation

COE – Council of Europe

ConC – Constitutional Court

[1] *5 U.S. Code, 1946,* https://www.archives.gov/federal-register/laws/administrative-procedure
[2] https://www.arlis.am/DocumentView.aspx?docid=73129
[3] *HO-139-N (adopted: 5 December 2013, entry into force: 7 January 2014),* https://www.arlis.am/DocumentView.aspx?docid=87705

ECHR – European Convention on Human Rights[4]

ECtHR – European Court of Human Rights

JC – RA Judicial Code[5]

LFAAP – RA Law on the Fundamentals of Administration and Administrative Procedure [6]

NSA – National Security Act[7]

RA – The Republic of Armenia

U.S. – The United States of America

INTRODUCTION

One cannot envision administration without discretionary power. Discretion is the 'heart' of administration. The main aim of it is to ensure effective realization of laws and other legal acts. But like any power, discretionary power also has a tendency to be abused or used for reasons other than it is prescribed. This inevitably triggers violations of private rights and freedoms. Thus, in any rule-of-law state the discretionary power cannot have an absolute nature and, hence, has legal grounds for limitation. However, along with its limitations, discretionary power may still be abused, which becomes a basis for judicial supervision. The issue of the scope of judicial review is faced present here as judiciary may in its turn exceed permitted limits of review. The latter would be incompatible with the principle of separation of powers. Therefore, there is a need to strike an equitable balance between the principle of separation of powers and effective judicial protection while checking the legality of an exercised discretion.

This Paper aims to study and reveal (I) the legal grounds for limitation of discretionary power, their significance and features in terms of governing lawfulness of discretion, (II) in

[4] https://www.echr.coe.int/Documents/Convention_ENG.pdf
[5] https://www.arlis.am/documentview.aspx?docID=119531
[6] HO-41-N (adopted: 14 February 2004, entry into force: 16 March 2004), https://www.arlis.am/DocumentView.aspx?DocID=75264
[7] https://www.cia.gov/library/readingroom/docs/1947-07-26.pdf

which cases the addressee(s) of an exercised discretion may seek for judicial review, i.e. the circumstances that serve as a basis for taking an exercised discretion into proceedings, (III) the boundaries of judicial review of administrative discretion dependent upon its type in the context of separation of powers.

The Paper explores national law and judicial practice. In particular, relevant laws are examined and interpreted. As a result, some deficiencies of legal regulations are pointed out. Since Armenian legal literature lacks profound analyses on administrative law and procedure, it additionally refers to the foreign one, especially the American literature, to cover relevant aspects. Moreover, the respective legal questions are discussed in the light of both Armenian and U.S. jurisdictions. Afterwards, comparative analyses are drawn between these two legal systems which promotes comprehensive perception of issues. Furthermore, the question of applicability of U.S. legal approaches in Armenian legal system is discussed. Since this paper is designed not only to reveal issues, but also to contribute to the improvement of the relevant laws, some recommendations for legislative reforms are presented in the end.

CHAPTER 1: Limitation of Administrative Discretionary Power

§1. Introduction to the concept of discretionary power

In any legal state public authority is exercised based on the principle of separation and balance of powers. State powers are divided into three branches: legislative, executive and judicial. Each branch has its own responsibilities and powers. The function of the legislative is to pass laws. The executive carries out laws. The judiciary determines whether the law is correctly administered.

Nonetheless, the legislature is not able to regulate all possible legal relations and situations comprehensively. For this reason, the executive is conferred a function to further regulate different spheres of public life in detail. Due to constitutional and legislative legal status the executive is flexible enough to react to every situation promptly. The executive represented by administrative authority is in a better position to cope with public legal relations as it composes diversified agencies which deal with day-to-day matters they are specialized in. This

makes administrative authorities operative and susceptible to easy-changing and evolving public relations. Ultimately, administrative authorities perform their functions in pursuance of law. To this end, administrative authorities are vested with certain types of powers. All powers of administrative authorities may be divided into two broad categories: discretionary powers and binding powers (or duties)[8]. Of those two powers the former is subject of our discussion.

The term 'discretionary power' means a power which leaves an 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.[9] According to article 6(1) of the LFAAP, *discretionary power is a right conferred to an administrative body by law to choose one of several possible lawful solutions.* From the legal definitions emanates that (I) discretionary power is right, subject of which are administrative authorities, (II) that right is to be prescribed by law, (III) the right assumes choice of one of several possible solutions, (IV) the chosen solution/decision should be lawful and appropriate for the relevant factual circumstances.

Proper application of discretionary power requires consideration of it with respect to the legal norms conferring discretion. Especially it is necessary for law-enforcement bodies to understand in which part of the general structure of legal norms conferred discretion refers. Legal norms as a rule have two-component structure: (I) elements constituting facts and (II) legal consequences. Very often undefined open legal concepts can be found in the first part of a legal norm. Example of such concepts are 'public welfare', 'public interest', 'need', 'public need', 'public safety', 'public order', 'reliability', 'urgency', 'unreasonable', 'morality' etc. In this respect administrative authorities have only margin of appreciation, not law-enforcing freedom.[10] Whereas the real discretionary power is manifested in the second part of a legal norm, i.e. application of certain legal effects relevant in a particular situation.

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[8] *Wade, W., Forsyth, C. Administrative Law (10th ed., Oxford University Press, 2004), at 311*

[9] *Committee of Minister of the Council of Europe, Exercise of Discretionary Powers by Administrative Authorities (Recommendation No. R (80)2, 11 March 1980),* § 1

[10] Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Ռայմերս, Վ., Ռուբել, Ռ. *(խմբ.* Ռայմերս, Ռ. և Պողոսյան, Վ.*)* ՀՀ ընդհանուր վարչական իրավունք*:* Ուսումնական ձեռնարկ *(*Բավիղ, *2011), at 204*

Sometimes besides applying legal consequences specified in a legal norm, administrative authorities are to interpret constituent elements of facts and undefined legal concepts within their perception. In those cases, administrative authorities acquire margin of appreciation, which should not be confused with discretionary power.[11] However, it is relevant to be noted that diverse interpretation of undefined open legal concepts may entail different outcome with respect to possible legal consequences. That said, by and large an application of certain legal consequences is dependent upon the concrete interpretation of legal concepts, when the latter are not enough precise. In this sense margin of appreciation may closely approach to discretion, but they are not identical in their essence. Therefore, there is a strong interrelationship between margin of appreciation granted to authorities in the determination of facts and undefined legal concepts on the one hand, and discretionary power in the application of legal consequences on the other hand.

§1.1. The Nature and types of discretionary power

The concept of discretion is not a uniform one. Rather, it contains three different forms of discretion which require some explanation. These forms of discretion can be localized in different parts of authorizing statutes.[12] Depending upon its form the nature and content of discretionary power varies differently. All forms of discretion may be found in Armenian legislation.

When discretionary power regulates the issue as to how administrative authorities should perform their course of conduct having discretion to choose one of among two or more decisions, then we deal with classic form of discretion so called 'discretion of choice'. For instance, under article 200 of CAO of RA, *border zone entry rules, as well as violation of the rules of residence or the place of registration entails warning or penalty*. That said, in all cases when administrative authorities establish violation of border zone entry rules or rules of residence or the place of registration, they will have an opportunity to exercise one of the legal consequences described in the second part of the legal norm, i.e. either to warn or to penalize the offender.

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[11] *Id. at 208*

[12] *Kunnecke, M., Tradition and Change in Administrative Law: An Anglo-German Comparison (Springer, 2007), at 78*

Another form of discretion is generally classified as 'discretion to decide'. It regulates the issue of action or inaction of administrative authorities. In this case administrative authorities may act or abstain from acting in a way. In other words, administrative authorities have the power to apply one and only legal consequence or not to apply it. As a vivid example of this type of discretion may serve article 38(2)(c) of the LFAAP. According to it, *during administrative proceeding hearings shall not be required, if the administrative act is issued orally*. So it is under the domain of administrative authorities' discretion to hold or not to hold hearings when administrative act is issued orally. In this case an application of legal effects may be conditioned only by the will of administrative authorities.[13]

Third and the most widespread form of discretion is the one that assumes application of only one type of legal consequence in its nature, but different in its intensity. Administrative authorities are granted with clearly defined latitude of appreciation to opt more severe or less severe legal consequence. They are quite common particularly in the sphere of administrative offences, when the sanction of such offences stipulates only fines with different gravity. Article 206.9 of COA of RA prescribes that *final judgment, award or other judicial act (...) within the time specified by these acts, and the dates are not determined by those measures within one month after the entry into force, intentional non-compliance by citizens shall be punished by a fine of fifty to one hundred times of the minimum salary prescribed by law.*[14] It follows that if competent administrative authorities successfully prove intentional non-compliance to final acts delivered by judiciary, then it must impose a fine on the citizen. However, the legislator has not determined the exact amount of the fine for such offence. The latter only prescribed the lower and upper limits.[15] Accordingly, within the context of discretion administrative authorities have available fifty solutions to choose at their disposal.

Thus in Armenian administrative law three types of discretionary power exist. Each one has its own feature with respect to diversity of possible lawful solutions and limits of the power. Administrative authorities have relatively more legitimate solutions within their competence to

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[13] Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Ռայմերս, Վ., Ռուբել, Ռ., *supra note 10*

[14] *For the purposes of this and analogous legislation, minimum salary has been fixed at 1000 AMD*

[15] *Arman Zrvandyan, Study on the Reviewing Powers of the Administrative Jurisdictions of the Republic of Armenia in Asylum Cases (Yerevan, 2015), § 31*

apply under 'discretion of choice', which means that this type of discretion is inclusive enough in terms of considering expediency of a solution pursuant to the particular situation. 'Discretion to decide' implies too wide scope of freedom to act or refrain from acting, which promotes flexibility and effectiveness of administrative authorities. The last type of discretion especially refers to sanctions of administrative offences. It gives administrative authorities a defined margin in choosing severity of a legal consequence. This is particularly aimed at ensuring fairness intrinsic to the relevant factual circumstances.

§2. Conditions governing lawfulness of discretionary power

Now when the content of the concept of discretion and its forms are revealed, it is necessary to address the issue of how administrative authorities should realize the discretionary power conferred to them by law. The discretionary power is not absolute one. It is subject to legitimate limitations to escape potential abuses, since where discretion exists, there the arbitrariness is likely to be manifested. The notion of absolute or unfettered discretion is rejected, statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in in the right and proper way which Parliament when conferring it is presumed to have intended.[16]

The legal grounds limiting discretionary power may be found in the law. Particularly, according to article 6(2) of the LFAAP, *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 administration and prohibition of arbitrariness, as well as pursue other goals prescribed by law*.

RA is a member of Council of Europe. Committee of Ministers of COE has touched upon this issue and set forth several principles to be guided by member states in their law and administrative practice. Of course, those principles have recommendatory nature, but the practice shows that the Recommendation[17] is a valuable guideline and states strongly consider them in

[16] *Wade, W., Forsyth, C., supra note 8, at 296*

[17] *Committee of Minister of the Council of Europe, Exercise of Discretionary Powers by Administrative Authorities (Recommendation No. R (80)2, 11 March 1980*

their law-adoption and law-enforcement process. It recommends the governments of member states that their administrative authorities when exercising a discretionary power, *inter alia*: (I) does not pursue a purpose other than that for which the power has been conferred, (II) observes objectivity and impartiality, takes into account only the factors that are relevant to the particular case, (III) observes the principle of equality before the law by avoiding unfair discrimination, (IV) maintains proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues, (V) takes its decision within a time which is reasonable having regard to the matter at stake, (VI) applies any general administrative guideline in a consistent manner while at the same time taking account of the particular circumstances of each case.[18]

Expressing the above-mentioned articles and principles in a sentence, it may be stated that in the exercise of discretionary power administrative authorities are fettered with the basic human rights and constitutional principles (This is rather localized expression of article 3 of Constitution of RA[19]). The most important grounds for limitation of discretionary power are discussed further.

§2.1. The aim prescribed by law as a ground affecting lawfulness of discretionary power

The legal basis of discretionary power is the law. Law outlines the boundaries (diapason of discretionary power) within which the discretion ought to be implemented.[20] A law which confers a discretion indicates the scope of that discretion. Administrative agencies will abuse their power, if they exceed the scope of discretion conferred them by the authorizing law. To this end, the primary precondition governing lawfulness of discretionary power is the maintenance of the aim outlined by law.

According to the first sentence of article 8 of the LFAAP, *administration shall pursue the aims set by the Constitution and laws of the RA*. Here the legislator gave special importance to the question of the aims to be pursued by administration. Consequently, article 8 of the LFAAP

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[18] *Id. at 6-7*

[19] *Under article 3(2) of RA Constitution, the public power shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law.*

[20] Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Ռայմերս, Վ., Ռուբել, Ռ., *supra note 10, at 211.*

generally and article 6(2) of the LFAAP particularly requires that when exercising discretionary power administrative authorities should pursue only such goals for which the power has been conferred. The identic legal content has the first principle of Recommendation pointed out above stating that *they should not pursue a purpose other than that for which the power has been conferred.*

So administrative authorities are restricted with the goals envisaged in the law authorizing discretion. Furthermore, the goal of such law is to be ascertained in every concrete case for the effective and lawful performance of discretionary power. This is designed to guarantee another constitutional norm- the principle of lawfulness.[21]

§2.2. The principle of proportionality as a ground affecting lawfulness of discretionary power

The principle of proportionality ordains that administrative measures must not be more drastic than is necessary for attaining the desired result.[22] From article 6(2) of the LFAAP follows that the principle of proportionality is considered as one of the legal grounds limiting discretionary power. This principle enjoys both constitutional and legislative status being enshrined respectively in article 8 of the LFAAP and article 78 of RA Constitution. According to the second sentence of article 8 of the LFAAP, *the means for achieving aims set by the Constitution and laws shall be useful, necessary and moderate*. Like other basic principles in administrative law, this one is also specified version of a particular constitutional principle with the same title.[23]

This principle is widely applied by the ECtHR as a mechanism for assessing justification of interference to the rights guaranteed by ECHR. In assessing the proportionality of a particular measure, the ECtHR considers whether there is an alternative means for protecting the relevant public interest without an interference or by means which are less intrusive.[24] In a number of its

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[21] *Under article 6(1) of RA Constitution, State and local self-government bodies and officials shall be entitled to perform only such actions for which they are authorized under the Constitution or laws.*

[22] *Wade, W., Forsyth, supra note 8, at 305*

[23] *Under article 78 of RA Constitution titled 'Principle of Proportionality, the means chosen for restricting basic rights and freedoms must be suitable and necessary for achievement of the objective prescribed by the Constitution. The means chosen for restriction must be commensurate to the significance of the basic right or freedom being restricted.*

[24] *Leach, P., Taking a case to the European Court of Human Rights, 4th edition, 2018, at 402*

judgments the ECtHR has consistently established that "in determining whether the impugned measures were 'necessary in a democratic society', the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.[25]

Actually, each element constituting principle of proportionality is a separate criterion of a test of proportionality. The presence of each element is necessary, and all of them altogether are sufficient to certify maintenance of proportionality. First, the element of usefulness means that the pursued legitimate aim can be achieved by the exercised measure. Secondly, the element of necessity requires that amongst available useful measures less intrusive one be exercised. Finally, the concerned measure should be moderate, i.e. the severity of a measure should not be unequal or disproportionate to the legal value of interfered right or freedom.

In fact, the principle of proportionality is a key factor affecting lawfulness of discretionary power. It virtually restrains the 'reigns' of such power. Administrative authorities should strictly follow this principle while exercising discretionary power. Even if one element of proportionality is disregarded, legal opportunity arises for instituting administrative or judicial review of administrative action or inaction in the context of proportionality.

§2.3. Prohibition of arbitrariness as a ground affecting lawfulness of discretionary power

Prohibition of arbitrariness is another ground that defines lawfulness of discretionary power. According article 7(1) of the LFAAP, *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*. This ground emanates from article 28 of RA Constitution, which guarantees general equality before the law.[26] The legal requirement of this norm is that essentially similar circumstances should be treated equally, whereas essentially different circumstances should be treated unequally. In other words, throughout administrative course similar cases must earn uniform reaction and dissimilar cases must earn differentiated reaction.

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[25] *Case of Z v. Finland, Application no. 22009/93, ECHR Judgment 25 February 1997, § 94*
[26] *Under article 28 of RA Constitution, everyone shall be equal before the law.*

Article 7(2) of the LFAAP provides that *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.* In essence, this article bounds administrative authorities with their prior practice with respect to the exercise of discretionary power. That said, initially formed course of conduct predetermines future application of discretionary power towards the similar factual circumstances. This legislative requirement is of great value in terms of legal certainty because individuals can foresee consequences of their actions due to it. However, there is an exception from this rule in all cases, when deviation from preexisting practice is conditioned by the necessity for adopting new approach to the exercise of discretionary power henceforward.

Prohibition of arbitrariness guarantees that administrative authorities will not employ selective and double-standard approaches merely referring to the law granting discretionary power. In this regard it is an important legal barrier against potential arbitrary and capricious behavior of administrative authorities over similarly situated subjects. Thus this ground is called to exclude discrimination and ensure equality before the law. As it constitutes legality of discretionary power by virtue of article 6(2) of the LFAAP, the lawfulness of an exercised discretion may be assessed from this aspect as well.

§2.4. Other grounds affecting lawfulness of discretionary power under U.S. jurisdiction

Under U.S. jurisdiction legal grounds and conditions governing lawfulness of discretionary power do not have direct statutory bases. Rather, they have appeared within case law. In *Boulis v. MMI*[27] case the Supreme Court held that discretionary power, among other things, ought to be exercised (I) in good faith, (II) uninfluenced by irrelevant considerations, (III) reasonably.

Contrary to the natural sense of 'in good faith', it imputes no moral obliquity. In this context it means merely 'for legitimate reasons'.[28] Namely, the implementation of discretionary power should not encompass invalid context/background such as vengeance, threat, personal gain or other fraudulent reason.

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[27] *Boulis v. MMI, S.C.R. 875, 26 D.L.R. (3d) 216 (1974)*
[28] *Wade, W., Forsyth, supra note 8, § 352*

The precondition of 'relevant consideration' requires that before exercising discretionary power, all the circumstances that have relevance in a concrete case are to be taken into account. Accordingly, considerations that are irrelevant should be disregarded since they may divert administrative authorities from the direction of a right decision. Moreover, the same problem arises in cases when manifestly excessive and or manifestly inadequate weight is given to a relevant consideration. Administrative authorities must fairly and adequately consider factors necessarily relevant, and omit any reason for their decision which is not a legal one.[29] Otherwise in the eye of law they would exercise their discretion unlawfully.

By and large discretion is subjective phenomenon. Even in certain cases (discretion of choice) it may closely approach to absolute subjectivism. But law does not tolerate notions such as 'subjective' or 'absolute'. They are restrained with the legal concept of 'reasonableness'. Discretionary power is to be exercised within the limits of reasonableness. A decision is reasonable when it rests upon rational grounds. In *Roberts v. Hopwood*[30] case the AC interpreted 'reasonableness' in the context of discretion holding that "administrative authorities in whom are vested a discretion must exercise it reasonably, i.e. by the use of their reason, ascertain and follow the course which reason directs".

Within U.S. jurisdiction those grounds were discussed that are missing under Armenian law. The most attractive one was the precondition of 'reasonableness'. Because in formal sense law sometimes may be excessively rigid and do not keep pace with real circumstances, hence the notion of 'reasonableness' is what Armenian jurisdiction needs as a legal tool for assessing lawfulness of an exercised discretionary power.

Summary

Summarizing the chapter, it may be noted that discretionary power is a pure administrative matter insofar as firstly it is conferred to administrative authorities by law, secondly its nature best fits with the executive's legal and factual status. As much the role of discretionary power is important in public law relations, likewise the limitation of such power are essential in the interests of private rights. The law which defines discretion, simultaneously

[29] *Id. at 321*
[30] *Roberts v. Hopwood, All ER 24; AC 578 (1925)*

prescribes the legal grounds for its limitation. They constitute lawfulness of discretionary power. The formulation "[…] *as well as pursue other goals prescribed by law*" expressed in the article 6 of the LFAAP shows that the list of legal grounds affecting lawfulness of discretionary power is not exhaustive and not restricted with the ones presented above. Thus in every concrete case they are to be revealed and be assessed in validity. If the legal premises discussed in this chapter are not properly kept, then we deal with the problem of errors of discretionary power or an overstepped discretion.

CHAPTER 2: Legal Remedies for Obtaining Judicial Review of Discretionary Power

"What is there in the exalted station of an executive officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim?"-

Chief Justice John Marshall, Marbury v. Madison, 1 Cranch (5 U.S.) 127, 166 (1803)

In the framework of this chapter it is necessary to address the issues as to whether there are judicial remedies for supervision over the legality of discretionary power exercised by administrative authorities, how they are obtained and realized.

§1. Historical perspective

In legal history the principle of judicial review was first established in the famous case of *Marbury v. Madison*.[31] The case is known for its breakthrough conclusion that courts can review the constitutionality of acts of legislative branch and actions of executive branch. The judicial branch has the power to determine whether the act or action is in conformity with the Constitution or not. And if they have a problem of constitutionality the Court is entitled to invalidate them by declaring unconstitutional. It can hardly be overemphasized that phrases such as 'rule of law' and 'a government of laws, not of men' would be virtually meaningless without an independent branch of government whose function includes assuring fidelity to law.[32] So it is well established that, among other things, the actions of the executive are subject to judicial review for legality and lawfulness.

[31] *Marbury v. Madison, 1 Cranch (5 U.S.) 127, 166 (1803)*

[32] *Funk, W. F., & Seamon, R. H., Administrative law: Examples and explanations. 2nd edition, (2007), at 201*

§2. Reviewing competence of judiciary over discretionary power under Armenian jurisdiction

Article 61 of RA Constitution titled 'right to judicial protection' prescribes: *everyone shall have the right to effective judicial protection of his or her rights and freedoms*. 1st paragraph of article 6 of ECHR titled 'right to a fair trial' provides: […] *everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*. The ECtHR has consistently formed legal practice[33] that access to court is a component to the judicial protection of a person guaranteed by article 6. Comprehensive study of a number of RA ConC decisions[34] and ECtHR judgements shows their explicit legal approach that judicial review is an inalienable element of the right to judicial protection and fair trial guaranteed by RA Constitution and ECHR. Therefore, it is nearly excepted a situation when actions of government adversely affect the rights and freedoms of a citizen and at the same time be exempted from judicial review. Judicial review is a pledge for protection against arbitrariness. Outright and unjustified unavailability of which will disrupt the grounds of rule-of-law state.

Recommendation (2004)20 of COE[35] refers to the question of judicial review of administration. 1st principle of this Recommendation provides that all administrative acts should be subject to judicial review. In an explanatory memorandum of the Recommendation this principle is commented as follows: "although discretionary power is in principle exempt from judicial review, the tribunal may seek to determine whether the administration has overstepped limits in the use of its discretionary power or whether it has committed manifest error". It may be inferred from the set out principles that European legal thought is inclined to the position that all administrative action (including those that are direct consequence of discretion) should be subject to judicial review. However, it sets higher threshold for obtaining judicial review of discretionary power since remedies for review may be sought upon two grounds– 'manifest error' and 'abuse of discretion'.

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[33] *Case of Luordo v. Italy, Application no. 32190/96, 2003, § 83*

[34] *Decision of the ConC of RA of 18 December 2012, ՍԴՈ-1063, Decision of the ConC of RA of 03 March 2015, ՍԴՈ-1192, Decision of the ConC of RA of 22 December 2015, ՍԴՈ-1249*

[35] *Committee of Ministers of the Council of Europe, Judicial Review of Administrative acts, (Recommendation No. R (2004)20)*

In 2008 Administrative Court was established in Armenia. Ever since this body as both court of law and fact is entitled to exercise administrative jurisdiction over the legality of administrative action or inaction. Normative legal act that regulates legal relations within the administrative procedure is the CAP. The CAP establishes procedure of the right of judicial protection of persons (whether physical or legal entities) from administrative acts. Under article 3 of the CAP, *any physical person or legal entity has the right to appeal to Administrative Court if it considers that the administrative act has breached its rights and freedoms*. Part 5 of article 125 of the CAP stipulates: *in case administrative authority has been entitled to act in its discretion, Administrative Court checks whether the discretionary power is legitimately implemented*. This statutory provision virtually enables competent Courts to review the lawfulness of discretionary powers exercised by administrative authorities. That said, article 3 generally and article 125 particularly consider discretionary power reviewable by Administrative Court in the framework of administrative procedure.

In RA the Court of Cassation, as a supreme judicial instance, is constitutionally empowered to ensure the uniform application of laws or other regulatory legal acts.[36] As a rule, ordinary courts in Armenia are required to follow legal positions expressed by COC of RA. COC of RA in its decisions has expressed a legal opinion that judicial intervention to administrative discretion is permissible only in terms of checking lawfulness of such discretionary power.[37] In fact, legality of exercised discretion may be undergone to judicial supervision. However, in judicial review of the exercise of discretionary powers of administrative authorities, the administrative jurisdiction may review the legality of the disputed action, but not the appropriateness of such action.[38] Courts lack the competence to assess expediency or necessity for the exercise of discretionary power, since only administrative authorities are entitled to decide as to how dispose their discretionary power provided it is not unlawful .[39] In favor of this viewpoint speaks the logic of the article 75(2) of the LFAAP. Especially, this article, defining the

[36] *Article 171 of RA Constitution*
[37] *Judgement of COC of RA of 3-295/ՎԴ02/03/, 2007*
[38] *Arman Zrvandyan, supra note 15, § 46*
[39] Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Ռայմերս, Վ., Ռուբել, Ռ. *Supra note 10, at 206*

boundaries of consideration of administrative complaint by superiority, stipulates that […] *in case of exercise of discretionary power administrative complaint shall also be considered from the perspective of appropriateness.* The will of legislator to provide a legal opportunity for a superior administrative body to consider discretionary power not only from the perspective of legality, but also appropriateness, is reasoned by the circumstance that superior body is also administrative authority. Hence, in this regard there is no danger for breach of balance-of-power.

In conclusion, within Armenian legal system there are possible judicial remedies that make review of discretionary power accessible, notwithstanding with the fact that it may be narrowly restricted in certain aspects. Administrative actions that are result of exercised discretionary power have special characteristics in terms of judicial review. In particular, subject of judicial review is not the action itself, but the legality of discretion that entailed the action. Consequently, standard threshold of obtaining remedies for judicial review would cast shadow over the destination of discretionary power. Conditioned by this, opportunities for availability of judicial review substantially differ from ordinary cases.

§3. Reviewing competence of judiciary over discretionary power under U.S. jurisdiction

The APA is the United States federal statute that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations and grants U.S. federal courts oversight over all agency actions.[40] Under section 701(a) (2) of APA, *this chapter applies, according to the provisions thereof, except to the extent that agency action is committed to agency discretion by law*. As a matter of fact, section 701 excludes administrative action from judicial review insofar as the action is committed to discretion by law. Then how can a court determine that something is an abuse of discretion if it cannot review actions committed to agency discretion?.[41] The term 'committed to agency discretion by law' is of course diaphanous and, as has been oft noted, difficult to harmonize with the APA's general provision directing that agency action be set aside for an 'abuse of discretion'.[42]

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[40] *Cited in https://en.wikipedia.org/wiki/Administrative_Procedure_Act_(United_States)*
[41] *Funk, W. F., & Seamon, supra note 32, at 231*
[42] *John M. Rogers, A Fresh Look at Agency Discretion, 57 Tul. L. Rev. 776, 787-92 (1983).*

Several doctrines illustrate judicial unwillingness to intrude into the administrative process[43]. In effect, courts have adopted a second-best solution to the problem of discretionary agency action that is otherwise unreviewable if the agency ties its own hands through regulations or directives, then the court will enforce such substantive restrictions on the agency's authority.[44] In the courts' view, review forces agencies to respect the rule of law and the reliance interests of third parties affected by agency regulation. When agencies fail to comply with their own rules, they open themselves to external review.[45] To substantiate this reasoning U.S. case law will be discussed further to comprehend how courts treat to the interpretation of the provision that exempts agency action from judicial review due to administrative discretion granted by law.

Citizens to Preserve Overton Park v. Volpe is a leading case.[46]There, under federal statutes the Secrecy of Transportation was prohibited from using federal funds to finance construction of highways through public if a 'feasible and prudent' alternative route exists. When funds for a highway through Overton park was granted, the action of Secrecy was immediately challenged. The respondent argued that the action is not subject to judicial review because it was committed to his discretion. The Supreme Court disagreed with this argument for the reasoning that "this is very narrow exception, which applies in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply. Here, the Secrecy was governed by a statutory requirement that plainly provided law to apply and thus the exemption for action 'committed to agency discretion' is inapplicable". It is evident from the Court's reasoning that an agency action could be beyond judicial oversight only when there was 'no law to apply'. The Court meant by 'no law to apply' that there are no standards by which to evaluate the decision. If there are no standards to apply, a court cannot review a decision without usurping the discretionary function assigned to the agency.[47] Whereas, the decision is to be the result of the agency's intuitive or numinous discretionary process, not a court's.[48]

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[43] *Harold J. Krent, Reviewing agency action for inconsistency with prior rules and regulations, 1997*
[44] *Id.*
[45] *Id.*
[46] *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)*
[47] *Koch, Charles H., Jr., Judicial Review of Discretion, Faculty Publications. 624, (1986)*
[48] *UAW v. Donovan, 746 F.2d 855, 863 (D.C. Cir. 1984), cert. denied, 106 S.Ct. 81 (1985)*

The other relevant case is *Webster v. Doe*[49]. NSA states that: *The Director of CIA may, in his discretion, terminate the employment of any employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the USA*. Here, an employee of CIA was fired when it appeared that latter was a homosexual. The employee challenged the agency action finding that it was unlawful in terms of NSA, furthermore it was unconstitutional. The Court found that "the language of NSA fairly exudes deference to the Director. It expressly states that the decision is in his discretion. Moreover, in national security matters deference to the agency is most appropriate". In view of the foregoing reasoning, the Court held that the employment termination decision was committed to the agency's discretion by law, thus judicial review of the action was not permissible. However, the claim was allowed from constitutional perspective and reviewable for constitutional defect. Although, the statute might not constrain the Director's discretion, the Constitution necessarily did.[50]

In later cases, the Court restated the test as precluding review if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.[51] *Heckler v. Chaney*[52] is another leading case, in which the Court not only reaffirmed its previous legal position regarding the issue under discussion, but also developed it to the extent that it is better known in legal community. There, Food and Drug Administration's (FDA) failure to enforce the Act with respect to drugs used in lethal injections was challenged. The Court held that no law applied to the exercise of the FDA's prosecutorial discretion [53] and challenge precluded from review. In reaching its conclusion, the Court explained that agency failures to enforce were presumptively unreviewable for the reasoning that "An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake

[49] *Webster v. Doe, 486 U.S., 1998*
[50] *Funk, W. F., & Seamon, R. H., supra note 32, at 233*
[51] *Id. at 231*
[52] *Heckler v. Chaney, 470 U.S. 821, 831 (1985)*
[53] *Funk, W. F., & Seamon, R. H, supra note 50*

the action at all. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities".

Nonetheless, the Court continued that "judicial review of a refusal to enforce might still be obtainable in several contexts, of greatest relevance here when the agency's determination not to enforce was inconsistent with the agency's rules. Presumably, courts could assume their traditional review function to restrain agency excesses or inadvertence when easily administrable constraints existed, such as an agency rule inconsistent with the non-enforcement decision. Thus, even in those contexts that would otherwise be committed by law to agency discretion, judicial review could still be important if the agency itself had curtailed its own discretion through a preexisting rule".[54]

Just as in the APA context, however, courts hold otherwise unreviewable agency action reviewable if the agency acts inconsistently with one of its own rules, including those rules that do not have the force and effect of law.[55] In this context the case of *Berkovitz v. United States* is precedential.[56] The Court's views came up with the following: "when a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply. No discretion exists if a previously established policy limits the agency's choice: the agency has no rightful option but to adhere to the directive."

Summary: U.S. – Armenian legal system comparison

In comparing two legal systems with respect to reviewing competence of judiciary over discretionary power, one can observe that within both jurisdictions discretionary power is judicially reviewable. However, there is a strong dissimilarity in the grounds that make judicial review obtainable. In Armenian legal system judicial remedies may be easily sought in all cases when discretionary power is challenged from the perspective of lawfulness in all its respects. Whereas, U.S. legal system considers that Courts are competent to review discretionary power when an agency has 'law to apply' in a given situation or an agency unreasonably deviates from its preexisting policy (they both jointly or separately constitute 'abuse of discretion'). This latter may be identified with the ground of 'prohibition of arbitrariness' existing in Armenian law.

[54] *Supra note 52*
[55] *Harold J. Krent, supra note 43, 1997*
[56] *Berkovitz v. United States, 486 U.S. 531 (1988)*

Thus in U.S. legal system possibilities that Courts gain reviewing competence are relatively reduced in comparison with Armenian legal system. This high threshold for competence achievement has its privileges and disadvantages. It enables administrative authorities to exercise their discretion freely not fearing potentially unnecessary judicial supervision, on the other hand because of formal considerations cases that really needs supervision may be disregarded. This 'difficult accessibility' to the Court's jurisdiction will not be effectively applicable within Armenian legal system as the experience shows that in Armenian reality administrative authorities are readily tempted by abuse of discretion, moreover they do not enjoy high public confidence.

CHAPTER 3: The Scope of Judicial Review of Discretionary Power

"Often one can equally characterize an action as non-reviewable or as reviewable but the scope of review is very narrow*" – Justice Scalia, circuit judge, Chaney v. Heckler, 718 F.2d 1174,1195 n.3(D.C. Cir. 1983) (dissent)*

Once judicial review of administrative discretion is obtained and a court takes jurisdiction over it, the issue of the scope of that review needs to be addressed. The scope of judicial review

is the standard by which a court will judge the validity of the administrative action in review proceedings.[57] In such judicial proceedings challenged action may be reviewed in both substantive and procedural aspects. The former aspect means that administrative authority ought to have substantive power under the empowering statute to exercise discretionary power in question. The latter one refers to the question of whether the conferred discretionary power was exercised in a procedure or in a manner prescribed by law.

However, in assessing substantive or procedural law breaches the review standard of discretionary power could not be the same as compared with ordinary judicial cases. This is reasoned by the circumstance that judicial review could not relate to the appropriateness of discretion. And there is a danger that in the process of checking lawfulness of an exercised discretion a Court may overstep its powers intruding into the domain of administration. It may occur in all cases when an administrative authority is compelled to exercise its discretion in a manner that Court finds lawful by the judgment, or the latter's reasoning predetermines particular performance of discretionary power. In that case judiciary would assimilate functions of administrative authority and in fact would be turned into administrative body.

The question of scope of judicial review must be seen as a correlation between right to judicial protection concerns on the one hand, and separation of power on the other hand. A full judicial review of agency's discretion through courts is incompatible with the separation of powers as a principle of checks and balances. It would give the judicial branch too much power.[58] Thus, a full judicial review may entail a situation when control of 'abuse of discretion' results in 'abuse of review' by courts thus impairing the essence of discretionary power and the principle of checks and balances. On the other hand, persons, whose rights and freedoms are adversely influenced by an administrative discretion, should enjoy a guarantee of effective judicial protection. An equitable balance should be struck between these two legal interests. Therefore, it is necessary to learn as to where the scope of judicial review ends.

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[57] *Benjamin W. Mintz & Nancy G. Miller, A Guide to Federal Agency Rulemaking (2nd ed.) (1991)*

[58] *Oster, J. The Scope of Judicial Review in the German and U.S. Administrative Legal System. German Law Journal, 9(10), 1267-1297, (2008)*

In this context, not less important is the question of the powers of courts with respect to deciding the future fate of an administrative action if judicial review shows that discretionary power was performed with substantive or procedural flaws.

§1. Legal approaches under Armenian law

According to 2nd paragraph of Part 5 of article 125 of the CAP, *if administrative court concludes that the exercise of discretionary powers by the administrative body was unlawful, then in the conclusive part of the judgment the Administrative court prescribes the duty of the administrative body to adopt the administrative act or to take the action or to refrain from the action taking as a bases the court's legal positions*. Even though this provision does not directly authorize the AC to instruct administrative authorities to act in a certain way if the trial ascertains that the exercise of discretionary power was unlawful, in any case it empowers the AC to impose a duty on administrative authorities to take as a bases the legal positions of AC when reconsidering the case. Yet, it should be noted that if the legal positions of AC contain formulations with excessive predetermining meaning, their deliberation may not leave a latitude for administrative authorities in exercising their discretion once again. In that case administrative authorities would act in a way the Court denoted. Which is unacceptable from the perspective of separation of powers.

In the light of absence of other legal provisions regulating powers of the Court concerning administrative discretion or the scope of judicial consideration of discretion, it is clear that (I) Armenian legislature does not draw a distinction among different forms of discretion related to the scope of their judicial review, (II) likewise, limitations of judicial review of discretionary power is not regulated. Nonetheless, incomplete regulation of this legal relation by the legislature may be completed within consistent judicial practice by its legal interpretations.

In one of asylum cases the AC of RA has had a chance to discuss the nature of discretionary power and its scope of judicial review. After finding that the powers of the administrative body were of discretionary nature, the AC found that it has limited powers of

review.[59] In its judgement the AC held that: "the court's act cannot replace the administrative authority and implement the authority's discretion. If the authority is competent to choose among several lawful options, then the court cannot realize this discretion and decide, instead of the authority, which option must be chosen. If the court was able to do this, it would violate the principle of separation of powers prescribed by Article 5 of the Constitution of RA".[60] In this case the AC highly emphasized constitutional principle of separation of powers acknowledging red line that exists between an executive and judiciary. That said, when the AC ascertained that dealt with administrative discretion, it considered that the review could not continue and its powers expired there.

The examination of a number of AC judgments[61] shows that in case courts find an exercise of discretionary power to be unlawful (whether reviewing in the context of proportionality, prohibition of arbitrariness or other ground), they declare administrative act invalid in 'holds' part of the judgement without further instructions to the respective administrative body. Which means that courts acknowledge and designate the importance of separation of powers in this regard.

However, this approach was not always maintained, which became an occasion for the COC of RA to refer to the scope of judicial review related to choosing an amount of fine that should be imposed for an offence. For instance, in *State Revenue Service v. 'Ankrkneli Tsul' LLC* case[62] the AC of RA held that the discretionary power was exercised unlawfully because assigned sanction was disproportionate to the offence. Moreover, it defined an exact amount of fine that administrative agency should impose on legal entity. But the COC of RA has reversed AC judgment for the reasoning that: "in cases, when the Court finds that the administrative authority exercised its discretionary power in breach of the law, the Court lacks competence to prescribe maximum, minimum or specific amount of fine. In other words, the Court interfered with the discretionary power of the administrative authority, which is permissible only within the

[59] *Arman Zrvandyan, supra note 15, § 57*
[60] *Judgment of the AC of the RA of ՎԴ/1693/05/08, 4 September 2009, at 10*
[61] *Judgment of the AC of RA of ՎԴ/0056/05/15, 05 May 2015*
[62] *Judgment of the AC of RA of ՎԴ/1492/05/08, 26 December 2008, Judgment of the AC of RA of ՎԴ/5706/05/12, 10 June 2015*

limits of checking the legality of the exercise of such discretion". Actually COC reiterated its legal opinion previously expressed in *Mayor of Yerevan v. Artur Khachatryan* case.[63]

As a matter of fact, precedential law of RA defines the scope of judicial review of discretionary power concerning an imposition of certain amount of fine. The scope of such review is restricted with mere assessment of legality of the exercised discretion. After finding that the exercised discretion is in breach of law, the Court is not entitled to decide further on which legal consequence best fits to the particular factual circumstances instead of administrative authority. Thus the scope of judicial review is precise as regards discretion applied in the sphere of administrative penalties.

Diametrically different image comes on occasions when discretionary power includes only two possible alternatives at administrative authority's disposal to choose as a legal consequence. If a court ascertains that the solution preferred by administrative authority is not lawful, then only one possible alternative remains to be available for administrative authority to apply.[64] In such cases discretionary power equalize to zero in fact turning into binding powers.[65] Otherwise speaking, despite the discretion granted to the administrative authorities, only one course of action will be legal and the discretionary freedom is seen to develop into a duty to act in a particular way.[66] This incorrect alternative is consequently subject to being set aside by the court and the discretion conferred upon the administration does not exist any longer.[67] This form of discretion implies the broadest scope of judicial review triggering the most intensive judicial interference with discretionary power. Even though in a formal sense the court does not direct the administrative authority to exercise its discretion in a way, but the latter does not have an alternative factually being deprived of discretion.

As a conclusion, it may be argued that in Armenian legal system the issue of the scope of judicial review is not comprehensively regulated at a legislative level. Instead, courts have tried to fill this gap. Judicial practice proves that dependent upon the form of discretionary power the

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[63] *Judgement of COC of RA of 3-295/ՎԴ, 02 March 2007*
[64] Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Ռայմերս, Վ., Ռուբել, Ռ., *supra note 10, at 207*
[65] *Id.*
[66] *Kunnecke, M., supra note 12, at 37*
[67] *Erath, D., Scope of judicial review in German administrative law. Stellenbosch Law Review, 8(2),1997, at 192-204.*

scope of its review fluctuates. The broader scope of judicial review, the stricter interference into the discretionary power conferred to administrative authority is. Meanwhile, courts have manifested cautiousness to be in conformity with the principle of separation of powers.

Nevertheless, a judge examines the case in accordance with the Constitution and laws on the basis of his/her inner conviction (article 7 of the JC). Which means that a judge is only bound by the Constitution and laws. That's why there is a necessity of amendments and supplements in the CAP clarifying the scope of judicial review of discretion and the powers of a court with respect to that. The proposed version of amendments regarding this issue will be presented in the section of 'Recommendation'.

§2. Legal approaches under U.S. law

Section 706 of APA titled 'scope of review' provides that: *to the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*. This procedural norm empowers the reviewing court with quite mighty legal tools to restrain unlawfulness of agency action, including an abuse of discretion. Actually this norm is a standard for review.

The reviewable types of discretion are generally covered by either the arbitrariness standard or the abuse of discretion standard.[68] These two standards assume similar level of judicial review. Very often they coincide, for this reason they are viewed as cumulative. Both standards, however, instruct the court to tolerate a high risk of error and to approach the administrative decision with a restrained critical attitude.[69]

As regards the clause of 'abuse of discretion', it is not sufficiently certain in terms of limitations of judicial review, rather it has a broad and general character. So far as the statute

[68] *Koch, Charles H. Jr., supra note 47, at 471*
[69] *Id.*

specifies the extent of review which is to be had, the statute is controlling, to the extent that the statute is silent as to the intended breadth of review, the question is one for the courts.[70]

In *Airmark Corp. v. FAA*[71], Federal Aviation Administration's (FAA) for failure to exempt small air carriers from aircraft noise regulation deadlines was challenged. The FAA had the authority to grant necessary exceptions from general deadlines set by legislation. The FAA adopted compliance rules incorporating criteria granting exceptions. Out of 145 petitions the FAA granted 15 exemptions. The Court held that: "The FAA has broad discretion to determine whether the public interest would or would not be served by granting noncompliant carriers exemptions". Recognizing agency's broad discretion, nevertheless, the court went on to consider whether the FAA has exercised its discretion in an arbitrary and capricious way. The court thus limited its review authority, but did assert its authority to delve into the core decision.[72] In the end the Court concluded that "the FAA had arbitrarily applied different decisional criteria to similarly situated carriers […] and the exercised discretion was grossly inconsistent and patently arbitrary". So, together with the stress of the value of discretion, the Court collated exercised discretion with the set out standards from the relevant statutes and found that it was arbitrarily applied.

For generations, reviewing courts have been limited by the concept of expertise.[73] The concept of expertise is largely understood in relative terms in that expertise has been understood as meaning that administrators are more familiar with the issues and record than judges.[74] Such issues and records mostly concern question of fact. But when discretion raises issues concerning questions of law the scope of review automatically broadens. The reviewing court's authority over questions of law is plenary.[75] In this context the legal opinion expressed in *Coal Exporters Association of the United States v. United States* case is relevant. There the Court held that: "we admit that the Commission has substantial discretion as to how to carry out Congress's

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[70] https://repository.law.umich.edu/cgi/viewcontent.cgi?filename=21&article=1000&context=michigan_legal_studies&type=additional, at 336

[71] Airmark Corp. v. FAA, 758 F.2d 685, 688 (D.C. Cir. 1985)

[72] Koch, Charles H. Jr., supra note 47, at 477

[73] SEC v. Chenery Corp., 318 U.S. 80, (1943), at 92-93

[74] Sidney Shapiro and Elizabeth Fisher, Chevron and the Legitimacy of "Expert" Public Administration, 22 Wm. & Mary Bill Rts. J. 465 (2013), at 466

[75] Koch, Charles H. Jr., supra note 72

instruction concerning the accommodation of shipper and rail carrier interests, but wherever the bounds of discretion are, we have no doubt that the agency's accommodation, as announced and applied in this case, is not one that Congress would have sanctioned".[76]

The least intensity of review is required in case administrative agency is authorized to make policy within conferred discretion. Policymaking is often characterized as the zenith of administrative authority: the point at which courts have the least authority and agencies the most. [77] Because any policymaking involves substantial uncertainty, it is important that courts do not inadvertently assume authority they are neither intended to have nor capable of exercising.[78] Therefore, discretionary power involving policymaking decision cannot be subject to strict scrutiny. In *WNCN Listeners Guild v. FCC*[79], the Supreme Court, reversing Appellate Court's decision, took a standing that: "the decision to permit the market to decide program format was a question of policy rather than law".[80] Then it continued: "the judicial function was extremely limited because the question was left to the broad discretion of the FCC […] it should have permitted the agency to carry out the function for which it was designed".[81] As it was noted by Judge Harold Leventhal in his 'hard look' doctrine: "the court should ensure that the agency has taken a hard look at the policy question, but once the court determines that the agency has undertaken a careful and complete analysis, the court's role with respect to the core discretionary decision comes to an abrupt end".[82]

In *MTA v. King* case the Court set a high threshold for the scope of review. Here, an employment termination of a state official was challenged. The plaintiff argued that termination was a result of abuse of discretion. In the end the Court held that: "As long as an administrative sanction or decision does not exceed an agency's authority, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion, unless, under the

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[76] *Coal Exporters Ass'n, 745 F.2d, at 82*
[77] *Koch, Charles H. Jr., supra note 47, at 483*
[78] *Id. at 486*
[79] *FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)*
[80] *Id. at 592-99, 604.*
[81] *Id*
[82] *Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); Leventhal, Environmental Decision-making and the Role of the Courts, 122 U. PA. L. REV. (Judge Harold Leventhal elaborating on his decision in Greater Boston) (1974), at 509,511*

facts of a particular case, the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary or capricious".[83]

Perhaps the most important factor in determining the scope of judicial review is the principle of separation of powers. The separation of powers means that one branch may not overstep essential functions of another.[84] *Maryland Aviation Administration v. Noland* is a leading case. There, the court best interpreted the interrelationship between agency discretion and its judicial review in the context of the principle of separation of powers. The court particularly noted: "when an agency or official in the executive branch of Government exercises 'judgment', the agency or official is ordinarily performing a task which the Constitution or statutes have assigned to the executive branch and not to the judicial branch. The phrase that a court 'substitutes its judgment' for the judgment of the executive branch suggests that the court is engaging in precisely the same type of determination, and is performing a function, which has been assigned to the executive. Nevertheless, for the court to perform the same function as the executive branch would not be consonant with the express separation of powers mandate".[85] Furthermore, this case narrowed judicial review of the penalties imposed by administrative agencies and the Office of Administrative Hearings, saying that the separation of powers between the executive branch and the judiciary permits only limited review of 'Executive' decisions about penalties.[86]

In essence this reasoning was relied on the earlier case of *Sadler v. Dimensions Healthcare Corp.*, where the Court emphasized that: "judicial review of the actions of an administrative agency is restricted primarily because of the fundamental doctrine of separation of powers".[87] Thus, the courts may review a law to determine whether it is constitutional and in accord with other law, but they may not determine whether a law is necessary or prudent,

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[83] *MTA v. King, 369 Md. 274 (2002), at 291.*
[84] *Joel A. Smith, Separation of Powers Redux-Receded Scope of Judicial Review, 44 Md. B.J. 19 (2011)., at 20*
[85] *Maryland Aviation Administration v. Noland, 386 Md. 556, 873 A.2d 1145 (2005)*
[86] *Joel A. Smith, supra note 84*
[87] *Sadler v. Dimensions Healthcare Corp., 378 Md. 509 (2003)*

likewise the courts may determine whether the governor has administered a law correctly, but they may not question his political actions, such as his appointment officers.[88]

Summary: U.S. – Armenian law comparison

Drawing parallels between Armenian and U.S. legal approaches towards the scope of judicial review of discretionary power, it becomes apparent that this issue is seen in the context of separation of powers under both jurisdictions. Both of them support the view that scope of review has certain limits. Thus they negate the notion of a full judicial review. In both legal systems the standard of such review was elaborated as a result of case-law practice. However, American standards are stricter, i.e. their judicial review over the legality of discretionary power has relatively more commensurate and narrower scope. They do not dive into the details of every element constituting lawfulness of an exercised discretion in contrast to Armenia, where the lawfulness of discretion is scrutinized from all possible perspectives (except for appropriateness). The concept of 'Policymaking' is a vivid example of that. Perhaps it worth to be borrowed for Armenian context. Because sometimes an exercised discretion does satisfy formal requirements of law (e.g. procedural errors), but it is of high value for the regulation of a certain legal relation.

[88] *Joel A. Smith, supra note 84*

CONCLUSION

As a result of the study on the issue as to ‘what are the limits of judicial review of discretionary powers exercised by administrative bodies considering the need to strike an equitable balance between the principle of separation of powers and the necessity to ensure the effective application of limitations of discretionary powers’, this Paper elaborated the following aspects:

In spite of its lexical sense, in the eyes of law ‘discretionary power’ does not authorize administrative authorities with an absolute right to act in their own caprice. To escape potential manifestations of arbitrariness the national legislator has established legal grounds for limitations of discretionary power. Considering those grounds in conjunction, it may be argued that

'discretionary power' is restricted with the constitutional principles designed for protecting human rights and freedoms. The national legislative regulation of limitations of discretionary power reaches such extent of comprehensiveness that if they are undeviatingly followed by administrative authorities, then cases of errors or an abuse of discretion would almost be excepted. In contrast to this, under U.S. law limitations of discretion do not have a statutory basis, rather they were elaborated within case-law. Not necessarily, but much better for Armenian legal system to borrow the concept of 'reasonableness' as a legal tool to assess the legality of discretionary power.

The limitations of discretionary power firstly may be seen as self-limiting legal institute for administrative authorities. But as the study showed, despite comprehensive regulation of this institute, administrative authorities still abuse discretionary power conferred to them. Like any other interfering action, an exercise of discretionary power may be appealed to the Court. Although Armenian law is influenced by European legal thought, where the discretionary power is considered to be principally exempted from judicial review and relatively high threshold for obtaining judicial review is set, nevertheless RA adopted different approach. In this regard the national legal regulations are so broad that a challenged discretion may readily gain reviewing competence of the AC. This easy-access to the Court for the lawfulness of an exercise of discretion is welcomed since administrative authorities of RA (I) do not exhibit high level of professionalism, (II) do not enjoy high public confidence. Thus very often the lawfulness of their actions are doubted by the addressees of such actions. This is evidenced by the overload of the AC of RA. So long as this situation continues, there would be no need to complicate the procedure of obtaining judicial review of administrative discretion.

In RA the issue of the scope of judicial review of discretionary power is not comprehensively regulated at a legislative level. Although COC have tried to fill this gap through legal interpretations, it still needs to have a legislative basis. Since the Courts is only bound by Constitution and laws, and it may not follow the legal positions of COC by denoting weighty arguments on the difference of factual circumstances. Meanwhile, the relevant legal provision stipulating the powers of the AC with respect to the lawfulness of an exercise of discretionary power is open for controversial interpretations. In particular, the phrase '*taking as a*

bases the court's legal positions' in the provision is problematic in all cases when the court's legal positions predetermine the course of conduct of administrative authorities. Such deficiency of legal regulation is incompatible with the principle of separation of powers. Thus the problem requires urgent solution.

The study on Armenian and U.S. case-law comes to prove that the key factor in determining the scope of judicial review of administrative discretion is the 'lawfulness'-'appropriateness' dichotomy. To be sure the principle of separation of powers is not shaken, it is necessary to ascertain whether in assessing lawfulness of an exercise of discretionary power the limits of judicial review does not approach to the edge of its appropriateness. One circumstance is undisputed – the reviewing Court is not competent to substitute its judgement for those actions/inactions of administrative authorities that are result of discretionary power.

RECOMMENDATIONS

- Suggest supplements in the article 6 of the LFAAP on prescribing 'reasonableness' as another ground for limitations of discretionary power.

- Suggest amendments and supplements in the CAP in the form of a special procedural norm stipulating that “in checking the lawfulness of an exercise of discretionary power, the AC is not entitled to consider it directly or indirectly from the perspective of appropriateness”.
- Suggest amendments and supplements in the article 125(5) of the CAP reformulating the second sentence of that provision as follows: “if administrative court concludes that the exercise of discretionary powers by the administrative body was unlawful, then in the conclusive part of the judgment the Administrative court prescribes the duty of the administrative body *to reconsider the case taking into account the circumstances that, in the Court' view, led to unlawfulness*”.

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