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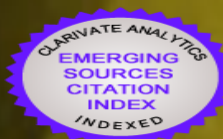
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**LEGAL FRAMEWORKS, NATIONAL SECURITY, AND
GOVERNANCE IN THE UKRAINIAN EXPERIENCE**



**2-Balancing State Discretion and the Rule of
Law: Challenges, Opportunities, and Prospects in
the Era. By. VLADYSLAV NOVITSKYI. and others,
p. 35**

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(2)

**BALANCING STATE DISCRETION AND THE RULE OF LAW:
CHALLENGES, OPPORTUNITIES, AND PROSPECTS IN THE ERA
OF DIGITAL GOVERNANCE**

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ABSTRACT

The purpose of the study is to study the theoretical foundations and practical approaches to the implementation of discretionary powers of state authorities and to find ways to improve control over its application. The study identified key problems in the implementation of discretion : the lack of clear boundaries and standards of application, an insufficient level of transparency, weakness of appeal mechanisms and risks of abuse in the digital environment. The best international practices are summarized, demonstrating the need to combine judicial control, preventive supervision and ethical self-regulation. The feasibility of introducing electronic databases of discretionary decisions in Ukraine, the creation of independent supervisory bodies and regulatory regulation of algorithmic management is substantiated. The practical significance of the results obtained lies in the possibility of using the proposed approaches to form a transparent and accountable model of public administration in accordance with European standards.

Keywords: *discretion of state power, rule of law, public administration, judicial control, transparency, digitalization , ethical standards, algorithmic solutions.*

1- INTRODUCTION

Modern public administration systems operate in an extremely dynamic legal environment, which requires state bodies to be able to make decisions in situations of uncertainty and legal vacuum. A state's discretion is one of the main ways the state can put a stop to such problems: the state can take certain freedom of choice to avoid these challenges. But it is this freedom that is the source of the risk of abuse, since the lack of the binding legal limit gives a room to arbitrary and biased decisions, which is opposite to the principle of the rule of law. In view of the global trends for strengthening the principles of democratic public administration and digitalization, the above problem acquires special significance. Over the past decades, world literature has been actively studying the problem of discretion by meshing it with the rule of law. Particularly, Etcheverry¹, Heath², Bellamy³ subordinate the nature of discretion of the judges as to

¹) Etcheverry, J. B. (2018). Rule of law and judicial discretion. *Archiv für Rechts- und Sozialphilosophie*, 104(1), 121–134. <https://doi.org/10.25162/arsp-2018-0007>

²) Heath, J. (2020). Administrative discretion and the rule of law. In *The machinery of government: Public administration and the liberal state* (pp. 254–299). Oxford University Press. <https://doi.org/10.1093/oso/9780197509616.003.0006>

³) Bellamy, R. (2024). Can the rule of law meet the Hobbes challenge? Democracy and the rule of law. In E. Biale, F. Liveriero, & R. Sala (Eds.), *Public ethics for real people* (pp. 131–150). Palgrave Macmillan. https://doi.org/10.1007/978-3-031-81865-3_7

judicial transparency, Kouroutakis⁴, Cui⁵ point out the new risks of algorithmic decisions. Of considerable interest are the works of Begiraj and Moxham⁶, which compare the theoretical and practical application of the rule of law in the EU, as well as Burke's⁷ study on the ethical aspect of decision-making in public administration. An analysis of the practices of Canada, the USA, the UK, Germany and China demonstrates different approaches to regulating discretion, focusing on judicial review, proportionality, public transparency and ethical responsibility. Despite a significant body of scientific works, a number of "blank spots" remain in the study of this topic. First, there are no comprehensive studies of the impact of digitalization and artificial intelligence on the transparency and accountability of discretionary decisions in the domestic context. Second, insufficient attention has been paid to the formation of clear mechanisms for independent external control and preventive monitoring of discretion. Third, the issue of combining ethical norms and legal frameworks for the use of discretion in Ukraine requires further theoretical and practical development.

The purpose of this work is to investigate modern approaches to the exercise of discretionary powers of state authorities in the context of the principle of the rule of law, identify the main problems and risks of abuse of discretion, characterize the international experience of control over discretion, and identify promising areas for improving control mechanisms in Ukraine.

Literature review

Studies on the issues of state discretion and the rule of law focus on the interaction of the principles of legality and the effectiveness of administrative decisions. Etcheverry⁸ emphasizes that discretion is an inevitable part of the activities of state bodies, but its limits must be determined by legal norms to avoid arbitrariness. Heath⁹ emphasizes the importance of administrative control to ensure that decisions comply with the principles of the rule of law. Bellamy¹⁰ considers the rule of law as a mechanism for constraining discretionary powers, emphasizing the need for a balance between administrative flexibility and legal certainty. In addition, Begiraj and Moxham¹¹ focuses on the divergence between the theoretical and practical application of the rule of law in the EU, which affects the effectiveness of checks on discretion.

⁴) Kouroutakis, A. (2024). Rule of law in the AI era: addressing accountability, and the digital divide. *Discover Artificial Intelligence*, 4, 115. <https://doi.org/10.1007/s44163-024-00191-8>

⁵) Cui, Y. (2024). Studies on the development of AI and the rule of law. In *Blue book on AI and rule of law in the world* (pp. 335–403). Springer. https://doi.org/10.1007/978-981-99-9085-6_6

⁶) Begiraj, J., & Moxham, L. (2022). Reconciling the theory and the practice of the rule of law in the European Union: Measuring the rule of law. *Hague Journal on the Rule of Law*, 14, 139–164. <https://doi.org/10.1007/s40803-022-00171-z>

⁷) Burke, C. (2024). The gradual transformation of the international law of peace in light of reconciliation studies. In I. M. AlDajani & M. Leiner (Eds.), *Reconciliation, conflict transformation, and peace studies* (pp. 245–266). Springer. https://doi.org/10.1007/978-3-031-47839-0_13

⁸) Etcheverry, J. B. (2018). *Id.*

⁹) Heath, J. (2020). *Id.*

¹⁰) Bellamy, R. (2024). *Id.*

¹¹) Begiraj, J., & Moxham, L. (2022). *Id.*

Cachia¹² examines European integration as a factor in the transformation of administrative governance, while Helsinki Rule of Law Forum¹³ emphasizes the role of international standards in shaping approaches to limiting discretion. Shane¹⁴ notes that the inability to regulate all managerial situations makes discretion a necessary element of public administration, but its abuse undermines public trust.

A separate line of research concerns the impact of technology on discretionary powers. Cui¹⁵ analyzes the challenges associated with the use of artificial intelligence, noting that algorithmic solutions can complicate the control over the legality of administrative actions. The author Kouroutakis¹⁶ believes digitalization creates more transparency but raises concerns about systems making decisions without clarity while making decisions. Li¹⁷ proposes the concept of combining “rule by man”, “rule by law” and “rule by virtue” as an approach to the justified use of discretion. The issue of judicial control over discretionary decisions is central to many studies. Bylostotskii¹⁸ emphasizes the importance of judicial assessment of discretionary decisions, and Sempill¹⁹ analyzes the historical prerequisites of legal control that shape modern approaches to limiting the arbitrariness of officials. Zekos²⁰ notes that excessive political interference can undermine mechanisms of judicial review, threatening the rule of law. Nalle²¹ emphasizes the importance of accessible mechanisms for challenging discretionary decisions that ensure compliance with legal standards.

In general, current research focuses on the need to establish clear boundaries of discretionary powers, implement effective control mechanisms, and take into account the challenges of the digital age. This confirms the relevance of further scientific research in the field of legal regulation of discretion, in particular through the prism of technological changes and international experience^{22, 23, 24}. Some studies draw attention

¹² Cachia, J. C. (2023). Europeanisation and the rule of law. In *The Europeanisation of party politics in Malta* (pp. 277–351). Springer. https://doi.org/10.1007/978-3-031-23290-9_7

¹³ Helsinki Rule of Law Forum. (2022). A Declaration on the Rule of Law in the European Union. *European Law Journal*, 27(3), 279–284. <https://doi.org/10.1111/eulj.12419>

¹⁴ Shane, P. M. (2018). *The rule of law and the inevitability of discretion*. Law Archive. https://osf.io/preprints/lawarchive/savny_v1

¹⁵ Cui, Y. (2024). *Id.*

¹⁶ Kouroutakis, A. (2024). *Id.*

¹⁷ Li, X. (2024). The sequential problems of "rule of man," "rule of law," and "rule of virtue". *Journal of Education, Humanities and Social Sciences*, 28, 361–367. <https://doi.org/10.54097/x4v0r712>

¹⁸ Bylostotskii, O. (2023). *Discretionary powers of judge: problems of theory and practice* [PhD dissertation]. Odessa State University. https://onu.edu.ua/pub/bank/userfiles/files/science/razovi_spec_vcheni_rady/df420812023/Dis_Bilostotskyi_OV_.pdf

¹⁹ Sempill, J. (2020). The rule of law and the rule of men: History, legacy, obscurity. *Hague Journal on the Rule of Law*, 12, 511–540. <https://doi.org/10.1007/s40803-020-00149-9>

²⁰ Zekos, G. I. (2022). Politics supersedes the rule of law. In *Political, economic and legal effects of artificial intelligence* (pp. 255–308). Springer. https://doi.org/10.1007/978-3-030-94736-1_6

²¹ Nalle, V. I. W. (2018). The scope of discretion in government administration law: Constitutional or unconstitutional? *Hasanuddin Law Review*, 4(1), 1–14. <https://doi.org/10.20956/halrev.v4i1.1316>

²² Asta, F. (2020). Arbitrary decision-making and the rule of law: The role of the jurisdiction in migrants' detention proceedings – between discretion and arbitrariness. *Etikk i Praksis – Nordic Journal of Applied Ethics*, 14(2), 107–136. <https://doi.org/10.5324/eip.v14i2.3491>

to the role of expert knowledge in the exercise of discretion. For example, Lofthouse and Schaefer²⁵ emphasizes the importance of involving professional expertise in making managerial decisions, as a lack of competence increases the risks of arbitrariness. Teeple²⁶ analyzes the relationship between the functioning of the judicial system and the control over discretion, indicating that the weakness of the judiciary makes effective oversight impossible. Levchuk and Romtsiv²⁷ emphasize the importance of constitutional fixation of the principle of the rule of law, which serves as the basis for limiting discretion. Ferrarini and al.²⁸ draw attention to the insufficient development of soft law (soft law) in the field of corporate governance, which is also relevant to the public sphere, where discretion is often used within unregulated situations.

A significant contribution to the study of aspects of discretion has also been made by Peng²⁹ and Cheung³⁰, who analyze the Chinese approach to combining legal and moral-ethical mechanisms in public administration. Landesmann et al.³¹ in their research emphasize that the restoration of effective state power in post-crisis conditions requires increased transparency and control over discretionary decisions. Yadong³² examines the impact of the development of artificial intelligence on public administration, emphasizing the importance of creating standards for algorithmic control. Zajac³³ examines the issue of admissibility of dubious evidence in criminal proceedings as a challenge to the rule of law, which partially overlaps with the problem of opaque use of discretion.

Thus, based on the analysis of scientific sources, it can be concluded that research into the discretion of state power covers issues of its legal certainty, judicial and administrative control, transparency, ethics, as well as challenges associated with digitalization and algorithmic solutions^{34, 35, 36, 37}. However, the problems of insufficient

²³⁾ Barikova, A. (2021). Instruments of public administration activity regarding discretion in applying provisions of financial law. *The Journal of V. N. Karazin Kharkiv National University. Series Law*, (31), 52–60. <https://doi.org/10.26565/2075-1834-2021-31-07>

²⁴⁾ Burke, C. (2024). *Id.*

²⁵⁾ Lofthouse, J. K., & Schaefer, A. (2024). *Id.*

²⁶⁾ Teeple, G. (2024). *Id.*

²⁷⁾ Levchuk, N., & Romtsiv, O. (2024). The principle of the rule of law in constitutional law. *Bulletin of Lviv Polytechnic National University. Series: Legal Sciences*, 11(4), 126–133. <https://doi.org/10.23939/law2024.44.126>

²⁸⁾ Ferrarini, G., Siri, M., & Zhu, S. (2024). The EU's proposed reform of directors' duties and the missing link to soft law. *European Business Organization Law Review*, 25, 359–383. <https://doi.org/10.1007/s40804-023-00290-6>

²⁹⁾ Peng, H. (2023). Civil and commercial law. In J. Zhu, T. Meng, H. Peng, H. Feng, X. Liu, & X. Peng (Eds.), *China's legal system* (pp. 119–188). Springer. https://doi.org/10.1007/978-981-19-8994-0_5

³⁰⁾ Cheung, C. (2024). The rule of law, liberal constitutionalism, and China: Problems and prospects. In *Hayek and post-war Chinese liberalism* (pp. 137–179). Palgrave Macmillan. https://doi.org/10.1007/978-3-031-64888-5_6

³¹⁾ Landesmann, M., Pindyuk, O., Tverdostup, M., & Kochnev, A. (2024). Economic reconstruction of Ukraine. In L. Mátyás (Ed.), *Central and Eastern European economies and the war in Ukraine* (pp. 317–372). Springer. https://doi.org/10.1007/978-3-031-61561-0_10

³²⁾ Yadong, C. (Ed.). (2024). *Blue book on AI and rule of law in the world (2022)*. Springer. <https://doi.org/10.1007/978-981-97-1060-7>

³³⁾ Zajac, K. (2025). The admissibility of tainted evidence in criminal proceedings as a rule of law issue under the ECHR. *Criminal Law Forum*. <https://doi.org/10.1007/s10609-024-09496-w>

³⁴⁾ Ferrarini, G., Siri, M., & Zhu, S. (2024). *Id.*

development of effective external audit mechanisms and the lack of clear ethical standards for the use of discretion in public administration remain unresolved.

Methodology

The research was carried out at the Department of Administrative Law and Public Administration using an interdisciplinary approach that combined theoretical analysis of scientific sources, a comparative method and a system-structural approach. The theoretical basis was formed on the basis of modern publications by leading European and world authors, as well as international practices published in scientific journals and collections^{38, 39, 40}. The comparative method allowed us to compare the experience of different countries and international organizations in regulating discretion and the rule of law^{41, 42, 43, 44}. The system-structural approach was used to study the relationship between the level of control over discretionary decisions and the risk of abuse of power. To visualize the results, a quantitative content analysis of scientific publications for 2019–2024 was used, followed by a graphical representation in the form of diagrams and tables created by the author based on data from international and domestic scientific sources.

2. RESULTS

The concept of discretion of state power in the scientific literature is considered as the right of the subject of power to act within the limits of the granted freedom of choice, choosing between several permissible solutions in accordance with the law. At the same time, this concept cannot be identified with arbitrariness, since discretion is limited by the norms of law and the principle of the rule of law⁴⁵.

Cachia emphasizes that the discretion of state bodies has become an integral part of public administration in the context of European integration, but requires effective control by the judiciary⁴⁶. Shane emphasizes that discretion is natural and inevitable, since it is impossible to foresee all possible situations. It is designed to ensure flexibility of decisions, but must be applied in compliance with the principles

³⁵⁾ Lofthouse, J. K., & Schaefer, A. (2024). Expert knowledge and the administrative state. *Public Choice*. <https://doi.org/10.1007/s11127-024-01228-3>

³⁶⁾ Teeple, G. (2024). The law and judiciary. In *The democracy that never was* (pp. 349–417). Palgrave Macmillan. https://doi.org/10.1007/978-3-031-68020-5_9

³⁷⁾ Zajac, K. (2025). *Id.*

³⁸⁾ Asta, F. (2020). *Id.*

³⁹⁾ Bellamy, R. (2024). *Id.*

⁴⁰⁾ Beqiraj, J., & Moxham, L. (2022). *Id.*

⁴¹⁾ Etcheverry, J. B. (2018). *Id.*

⁴²⁾ Etcheverry, J. B. (2018). *Id.*

⁴³⁾ Etcheverry, J. B. (2018). *Id.*

⁴⁴⁾ Burke, C. (2024). *Id.*

⁴⁵⁾ Etcheverry, J. B. (2018). *Id.*

⁴⁶⁾ Cachia, J. C. (2023). *Id.*

of good faith and fairness⁴⁷. According to Heath, discretion should be accompanied by transparency, accountability and control, because excessive freedom of action by officials threatens to turn into arbitrariness⁴⁸. In the European context, the rule of law acts as a safeguard against abuse of discretion and a guarantee of respect for human rights and fundamental freedoms^{49, 50}. The aforementioned position of Li is interesting, who analyzes discretion through the prism of the relationship between “rule by man”, “rule by law” and “rule by virtue”, emphasizing that any discretionary actions must be consistent with moral guidelines and public benefit⁵¹. Additionally, it is worth noting the modern challenges associated with the use of discretion in the era of digitalization and the development of artificial intelligence, where the issue of responsibility and transparency of decisions arises^{52, 53}.

Thus, theoretical approaches to defining the discretion of state power emphasize its importance as a tool for flexible management in conditions of uncertainty, but at the same time emphasize the need to limit this freedom by the principles of legality and the rule of law⁵⁴. This allows avoiding abuses and ensuring a balance between the effectiveness of state power and the protection of citizens' interests.

2.1. THEORETICAL UNDERSTANDING AND CONCEPTUAL CHALLENGES OF STATE DISCRETION

In modern public administration, discretionary powers are a necessary tool for decision-making in situations where the regulatory framework does not provide a clear answer. However, the practical implementation of these powers requires a balance between freedom of choice and the rule of law^{55, 56}. In other words, discretion's phenomenon is openly exhibited while trying to regulate such diverse or unpredictable relationships that demand high professionalism and ethical accountability on part of the officials⁵⁷.

2.2. PRACTICAL RISKS, ABUSE, AND THE DIGITAL TRANSFORMATION OF DISCRETION

It is the transparency of procedures, the possibility of appealing the decision, and the possibility of justification for it that are paid particular attention in public

⁴⁷⁾ Shane, P. M. (2018). *Id.*

⁴⁸⁾ Heath, J. (2020). *Id.*

⁴⁹⁾ Helsinki Rule of Law Forum. (2022). *Id.*

⁵⁰⁾ Bellamy, R. (2024). *Id.*

⁵¹⁾ Li, X. (2024). *Id.*

⁵²⁾ Kouroutakis, A. (2024). *Id.*

⁵³⁾ Cui, Y. (2024). *Id.*

⁵⁴⁾ Zekos, G. I. (2022). *Id.*

⁵⁵⁾ Asta, F. (2020). *Id.*

⁵⁶⁾ Zekos, G. I. (2022). *Id.*

⁵⁷⁾ Heath, J. (2020). *Id.*

administration⁵⁸. Consequently, we suggest considering that Table 1 summarizes the approaches to the exercise of discretion.

Table 1. Peculiarities of the exercise of discretionary powers in public administration and law enforcement

Indication of exercise of discretion	Manifestation in public administration	Manifestation in law enforcement
The presence of legal uncertainty	Decisions are made in cases where the law does not provide clear regulation ⁵⁹	A judge or other law enforcement authority makes decisions based on principles of fairness ⁶⁰
Orientation to public benefit and balance of interests	Taking into account public and state interests in decision-making ⁶¹	Ensuring a balance between the interests of the parties ⁶²
Transparency and accountability	Publication of decisions and public reporting ⁶³	Justification of court decisions and the possibility of their appeal ⁶⁴
Ensuring control and supervision	Administrative control over the activities of government bodies ⁶⁵	Judicial control and supervision of compliance with procedures ⁶⁶
Risks of abuse	Possibility of corruption or biased decision-making ⁶⁷	Exceeding authority or ignoring the principle of impartiality ⁶⁸

⁵⁸ Barikova, A. (2021). *Id.*

⁵⁹ Asta, F. (2020). *Id.*

⁶⁰ Etcheverry, J. B. (2018). *Id.*

⁶¹ Cachia, J. C. (2023). *Id.*

⁶² Bellamy, R. (2024). *Id.*

⁶³ Heath, J. (2020). *Id.*

⁶⁴ Bylostotskii, O. (2023). *Id.*

⁶⁵ Helsinki Rule of Law Forum. (2022). *Id.*

⁶⁶ Sempill, J. (2020). *Id.*

⁶⁷ Zekos, G. I. (2022). *Id.*

⁶⁸ Nalle, V. I. W. (2018). *Id.*

The impact of digitalization and new technologies	Application of algorithms in decision-making with risks of losing the human factor ^{69,70}	The complexity of controlling decisions made using AI ⁷¹
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Source : created by the author based on Asta⁷², Barikova⁷³, Bellamy⁷⁴, Cachia⁷⁵, Cui⁷⁶, Etcheverry⁷⁷, Heath⁷⁸, Helsinki Rule of Law Forum⁷⁹, Kouroutakis⁸⁰, Nalle⁸¹, Sempill⁸², Bylostotskii⁸³.

All in all, discretionary powers exercised in public administration and law enforcement necessitate that such actions follow clear ethical and legal standards and are subject to permissive oversight and accountability. The development of the new technologies and digital solutions dramatically increases the threat of abuse of discretion, and it is against the rule of law. For that reason, it is important to guarantee transparency, justification and possibility of appealing by means of discretion decisions, which maintain public confidence in state institutions.

The use of discretionary powers in the activities of bodies of state, generally, accompany some problems associated with legal norm uncertainty and opportunity for subjective interpretation. The main problem is the unclear boundaries of discretion, which makes arbitrary decisions and a violation of the principle of legality⁸⁴. When making biased or corrupt decisions the use of discretion could undermine citizens' trust on government⁸⁵. Second important problem is lack of transparency when making discretionary decisions. Often, officials do not explain the logic of their actions or do not publish the motivational part of decisions, which makes proper public control impossible⁸⁶. This gives rise to another threat – abuse of power against the background

⁶⁹ Kouroutakis, A. (2024). *Id.*

⁷⁰ Cui, Y. (2024). *Id.*

⁷¹ Cui, Y. (2024). *Id.*

⁷² Asta, F. (2020). *Id.*

⁷³ Barikova, A. (2021). *Id.*

⁷⁴ Bellamy, R. (2024). *Id.*

⁷⁵ Cachia, J. C. (2023). *Id.*

⁷⁶ Cui, Y. (2024). *Id.*

⁷⁷ Etcheverry, J. B. (2018). *Id.*

⁷⁸ Heath, J. (2020). *Id.*

⁷⁹ Helsinki Rule of Law Forum. (2022). *Id.*

⁸⁰ Kouroutakis, A. (2024). *Id.*

⁸¹ Nalle, V. I. W. (2018). *Id.*

⁸² Sempill, J. (2020).

⁸³ Bylostotskii, O. (2023). *Id.*

⁸⁴ Asta, F. (2020). *Id.*

⁸⁵ Zekos, G. I. (2022). *Id.*

⁸⁶ Heath, J. (2020). *Id.*

of impunity, since the lack of control stimulates the unjustified expansion of the powers of officials⁸⁷.

The risks of abuse of discretion are also exacerbated by the lack of clear standards for challenging relevant decisions. Citizens who consider a discretionary decision to be unlawful often lack accessible and effective mechanisms for protection⁸⁸. This creates a situation where discretion is transformed into a tool of manipulation or administrative pressure. The impact of digitalization on the problem of abuse of discretionary powers deserves special attention. The use of algorithms and artificial intelligence in the field of public administration can lead to hidden forms of discretion, when a person does not understand the logic of automatic decisions and has no opportunity to challenge them⁸⁹,⁹⁰. As a result, the danger of “digital arbitrariness” arises, when responsibility for the actions of the algorithm is blurred.

Thus, the main challenges in the exercise of discretion are the unclear legal boundaries, lack of transparency, lack of effective control and appeal, and the growing influence of technological solutions without proper regulation. These factors pose serious risks of abuse and require improved legal regulation and the introduction of robust external and internal control mechanisms.

2.3. INTERNATIONAL APPROACHES AND RECOMMENDATIONS FOR UKRAINE

World experience demonstrates that the successful use of discretionary powers is possible only in the presence of clearly established mechanisms of control, transparency and accountability, which are based on the principle of the rule of law. Different countries use their own approaches to regulating the balance between the freedom of action of state bodies and guarantees of protection of citizens' rights. Analyzing these approaches, several best practices can be identified that are useful for borrowing in the Ukrainian legal space. Table 2 presents a summary of international experience.

Table 2. International experience and best practices in ensuring a balance between discretionary powers and the rule of law

Country/i nternatio nal practice	Main approaches to balancing discretion and the rule of law	Source
European Union	Introducing clear criteria for discretion in directives and regulations; systematic monitoring and reporting to EU institutions ⁹¹	Begiraj & Moxham

⁸⁷⁾ Sempill, J. (2020). *Id.*

⁸⁸⁾ Nalle, V. I. W. (2018). *Id.*

⁸⁹⁾ Kouroutakis, A. (2024). *Id.*

⁹⁰⁾ Cui, Y. (2024). *Id.*

⁹¹⁾ Begiraj, J., & Moxham, L. (2022). *Id.*

Germany	A developed system of judicial review of discretionary decisions of administrative bodies; emphasis on proportionality of decisions ⁹²	Etcheverry
Great Britain	The use of “reasonableness” test » and a clear doctrine of legal accountability of authorities ⁹³	Bellamy
USA	The principle of “pure discretion” with the mandatory possibility of appealing decisions to higher authorities and courts ⁹⁴	Heath
Canada	Emphasis on ethical training of public servants and constant auditing of decisions for objectivity ⁹⁵	Burke
China	Combining legal and moral-ethical requirements in the practice of state discretion ; gradual implementation of transparency in digital platforms ^{96,97}	Li, Cui
International organizations (UN, OECD)	Recommendations for the formation of independent oversight bodies and the development of mechanisms for controlling algorithmic decisions ^{98, 99}	Kouroutakis

Source : created by the author based on Beqiraj & Moxham¹⁰⁰, Bellamy¹⁰¹, Burke¹⁰², Cui¹⁰³, Etcheverry¹⁰⁴, Heath¹⁰⁵, Kouroutakis¹⁰⁶, Li¹⁰⁷

Consequently, it should be said that the international practice shows that the combination of a clear regulatory framework with an efficient judicial control and continuous checks on decisions is the main ways to protect against abuse of discretion. Public authorities are becoming open and accountable, and legal rules are being adapted to the digital age, the factors of the rule of law. These approaches can make a great

⁹²) Etcheverry, J. B. (2018). *Id.*

⁹³) Bellamy, R. (2024). *Id.*

⁹⁴) Heath, J. (2020). *Id.*

⁹⁵) Burke, C. (2024). *Id.*

⁹⁶) Li, X. (2024). *Id.*

⁹⁷) Cui, Y. (2024). *Id.*

⁹⁸) Kouroutakis, A. (2024). *Id.*

⁹⁹) Cui, Y. (2024). *Id.*

¹⁰⁰) Beqiraj, J., & Moxham, L. (2022). *Id.*

¹⁰¹) Bellamy, R. (2024). *Id.*

¹⁰²) Burke, C. (2024). *Id.*

¹⁰³) Cui, Y. (2024). *Id.*

¹⁰⁴) Etcheverry, J. B. (2018). *Id.*

¹⁰⁵) Heath, J. (2020). *Id.*

¹⁰⁶) Kouroutakis, A. (2024). *Id.*

¹⁰⁷) Li, X. (2024). *Id.*

contribution to strengthening the legal system of Ukraine and increasing citizen trust in the state institutions.

A study of the issue of discretion of the state authorities in terms of the rule of law principle was carried out on an interdisciplinary basis based on the theoretical analysis, comparative method, system–structural approach and elements of legal forecasting. Modern scientific works and international practices gave the basis to the study theoretically, because they give us the opportunity to identify pattern and risks in jurisdiction of discretionary powers^{108, 109, 110}. The comparative method was applied to enable the analysis of experience of different countries and international organisations in the balancing act between discretion and the rule of law¹¹¹. This system-structural approach allowed us to investigate the relations between the level of control over discretionary decisions and their risk of abuse¹¹². Figure 1 was prepared to visualize results and present the trends of the use of discretion in public administration representation in scientific publications during the past five years by showing the frequency of mentioning of key aspects.

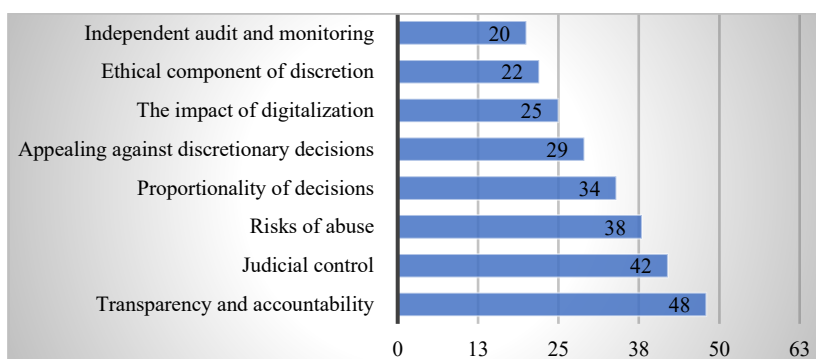


Figure 1. Frequency of mention of key aspects of discretion and the rule of law in academic sources (2019–2024)

¹⁰⁸⁾ Asta, F. (2020). *Id.*

¹⁰⁹⁾ Bellamy, R. (2024). *Id.*

¹¹⁰⁾ Heath, J. (2020). *Id.*

¹¹¹⁾ Beqiraj, J., & Moxham, L. (2022). *Id.*

Kouroutakis, A. (2024). *Id.*

¹¹²⁾ Etcheverry, J. B. (2018). *Id.*

; Burke, C. (2024). *Id.*

Source : created by the author based on Asta¹¹³, Beqiraj and Moxham¹¹⁴, Bellamy¹¹⁵, Burke¹¹⁶, Cui¹¹⁷, Etcheverry¹¹⁸, Heath¹¹⁹, Kouroutakis¹²⁰, Li¹²¹, Sempill¹²²

The obtained numerical data (see Table 3) indicate the heterogeneity of scientific attention to individual aspects of discretion and the rule of law. The highest indicators are demonstrated by the categories “Transparency and accountability” (48 mentions) and “Judicial control” (42 mentions). This is explained by the fact that transparency and accountability are the basis of democratic public administration, and judicial control is the most effective tool for preventing abuse^{123, 124}. The third position is occupied by the aspect “Risks of abuse” (38 mentions), which indicates significant concern among scientists about the possibility of turning discretion into an instrument of administrative arbitrariness¹²⁵. At the same time, the aspect “Proportionality of decisions” (34 mentions), although important, attracts less attention. This may indicate that academic research often focuses more on institutional mechanisms of control than on the practical assessment of the balance of decisions¹²⁶. Significantly lower rates relate to “Appealing discretionary decisions” (29 mentions) and “The impact of digitalization “ (25 mentions). This may indicate the underdevelopment of appeal practices compared to ex ante control mechanisms, as well as the relative novelty of the challenges associated with the use of artificial intelligence and algorithmic decisions in public administration^{127, 128}. The lowest rates are for the aspects “Ethical component of discretion “ (22 mentions) and “Independent audit and monitoring” (20 mentions). This trend indicates that issues of ethics and external monitoring remain under-researched and require further academic attention. This can lead to a situation where formally correct decisions are made without taking into account moral principles or without proper external assessment of their effectiveness^{129, 130}.

¹¹³ Asta, F. (2020). *Id.*

¹¹⁴ Beqiraj, J., & Moxham, L. (2022). *Id.*

¹¹⁵ Bellamy, R. (2024). *Id.*

¹¹⁶ Burke, C. (2024). *Id.*

¹¹⁷ Cui, Y. (2024). *Id.*

¹¹⁸ Etcheverry, J. B. (2018). *Id.*

¹¹⁹ Heath, J. (2020). *Id.*

¹²⁰ Kouroutakis, A. (2024). *Id.*

¹²¹ Li, X. (2024). *Id.*

¹²² Sempill, J. (2020). *Id.*

¹²³ Beqiraj, J., & Moxham, L. (2022). *Id.*

¹²⁴ Heath, J. (2020). *Id.*

¹²⁵ Zekos, G. I. (2022). *Id.*

¹²⁶ Etcheverry, J. B. (2018). *Id.*

¹²⁷ Kouroutakis, A. (2024). *Id.*

¹²⁸ Cui, Y. (2024). *Id.*

¹²⁹ Li, X. (2024). *Id.*

¹³⁰ Cui, Y. (2024). *Id.*

Thus, the analyzed data show a clear dominance of interest in the topics of control, transparency and prevention of abuse. At the same time, aspects of ethics, proportionality and the impact of digitalization require further research and practical improvement in both the international and Ukrainian legal systems. The difference in the number of mentions demonstrates the existence of a balance between the institutional and procedural components of discretionary control, but also reveals gaps in moral and ethical aspects and digital challenges.

Modern challenges in the field of public administration require improvement of mechanisms of control over discretionary powers in Ukraine. This is due to the need to strengthen the principle of the rule of law and increase citizens' trust in state bodies. Analysis of European experience allows us to identify several priority areas that can be adapted in the Ukrainian context.

First of all, institutional control needs to be strengthened, which involves expanding the powers of administrative courts to review discretionary decisions of public authorities. It is important to introduce clear criteria for assessing the validity of decisions based on the principle of proportionality, which is actively used in the practice of the Court of Justice of the European Union^{131, 132}. The second promising area is ensuring public transparency by mandatory publication of the motivation part of discretionary decisions and the introduction of a single electronic database of such decisions, which is practiced in many EU countries¹³³. This will allow citizens and the expert community to independently monitor the decisions made. The third important direction is the development of preventive control mechanisms. It is advisable to create independent supervisory bodies or special advisory committees to assess discretionary decisions before they are made. A similar practice exists in Canada and the Scandinavian countries, where independent commissions play a significant role¹³⁴. The fourth perspective is to strengthen the ethical component of public administration. A code of ethical conduct for officials regarding the use of discretion should be developed with an emphasis on the inadmissibility of conflicts of interest, and regular training of officials in anti-corruption standards should be provided¹³⁵. Special attention should be paid to digital risks. The introduction of automated decisions in public administration requires the creation of regulatory norms that would ensure the transparency of algorithms and the possibility of appealing decisions made by artificial intelligence^{136, 137}. This will be an important step towards preventing “digital arbitrariness” in administrative decision-making.

Thus, promising areas for improving control over the discretion of government in Ukraine are strengthening judicial and administrative control, implementing transparent electronic systems for publishing decisions, developing independent preventive

¹³¹⁾ Etcheverry, J. B. (2018). *Id.*

¹³²⁾ Beqiraj, J., & Moxham, L. (2022). *Id.*

¹³³⁾ Helsinki Rule of Law Forum. (2022). *Id.*

¹³⁴⁾ Burke, C. (2024). *Id.*

¹³⁵⁾ Li, X. (2024). *Id.*

¹³⁶⁾ Kouroutakis, A. (2024). *Id.*

¹³⁷⁾ Cui, Y. (2024). *Id.*

monitoring, raising ethical standards, and regulating algorithmic decisions according to European models. These implementation will help to equalize the national legal system with European and improve the rule of law.

3. DISCUSSION

The research findings confirm the relevance of the problem of discretion of the state authorities when ensuring the rule of law in Ukraine. The findings of the analysis indicated that the main risks of abuse of power were a deficit of clear boundaries within which it may be used, a lack of transparency, poor control mechanisms and growth of threats caused by management digitalization. The data of the study are partially similar to Asta¹³⁸ and Heath¹³⁹, who argue genuinely that the interpretation of powers leads to arbitrary interpretation and a danger of presentation of discretion into administrative arbitrariness. However some authors argue that too much regulation and restriction on discretion results in loss of flexibility of state authorities, an especially important matter in the crisis situations^{140, 141}. With regard to this aspect, there is a considerable difference between the positions of various researchers.

The results of this study are consistent with the idea proposed by international studies^{142, 143} that transparent mechanisms to monitor and control the discretionary decisions should be implemented¹⁴⁴. However, in the works of Cui¹⁴⁵ and Kouroutakis¹⁴⁶, the emphasis shifts to the digital sphere, where the issue of transparency becomes even more complicated due to the influence of automated systems and algorithms. In our own study, we suggested that the main factor in the risk of abuse is not so much the presence of discretion itself, but the lack of clear rules for its justification and external control. This is also confirmed by the findings of Nalle¹⁴⁷, who points to the need to create effective judicial mechanisms for challenging discretionary decisions.

Li's¹⁴⁸ position, which emphasizes the importance of moral and ethical principles for the use of discretion, is only partially represented in the practice of public administration in Ukraine. Our results indicate that this aspect is not sufficiently taken into account, which is an important point of growth in the field of raising civil service

¹³⁸⁾ Asta, F. (2020). *Id.*

¹³⁹⁾ Heath, J. (2020). *Id.*

¹⁴⁰⁾ Bellamy, R. (2024). *Id.*

¹⁴¹⁾ Burke, C. (2024). *Id.*

¹⁴²⁾ Beqiraj, J., & Moxham, L. (2022). *Id.*

¹⁴³⁾ Cachia, J. C. (2023). *Id.*

¹⁴⁴⁾ Byrkovych, T., et al. (2023). State policy of cultural and art projects funding as a factor in the stability of state development in the conditions of globalization. *Economic Affairs (New Delhi)*, 68(1), 199–211. <https://doi.org/10.46852/0424-2513.1s.2023.23>

¹⁴⁵⁾ Cui, Y. (2024). *Id.*

¹⁴⁶⁾ Kouroutakis, A. (2024). *Id.*

¹⁴⁷⁾ Nalle, V. I. W. (2018). *Id.*

¹⁴⁸⁾ Li, X. (2024). *Id.*

standards. Compared to international approaches, Ukraine lags behind in the field of implementing independent oversight bodies and systematic auditing of discretionary decisions, which is a generally accepted practice in the countries of the European Union¹⁴⁹. This allows us to conclude that there is a need to develop appropriate regulations and create independent control structures.

A limitation of this study is that it does not take into account empirical data on specific cases of abuse of discretion in Ukraine due to the limited openness of such information in state reports. At the same time, the study is based on a comparative analysis of theoretical sources and international practices, which allows us to generalize approaches to improving control mechanisms. The results obtained generally correspond to the hypothesis that the discretion of the authorities can remain an effective tool of public administration only if its boundaries are clearly regulated, transparent, the possibility of appeal and constant external control. A promising direction for further research is an in-depth study of the practice of using discretionary powers in Ukraine based on an analysis of judicial practice and studying the dynamics of citizens' appeals to appeal such decisions. In addition, research is needed on the regulation of discretion in the context of the digital transformation of public administration and the use of artificial intelligence, as this area still remains without due attention in Ukrainian legislation and practice.

CONCLUSION

4.

The results of the study indicate that the problem of control over discretionary powers of state authorities requires not only legal regulation, but also a comprehensive approach taking into account ethical and digital challenges. It was expected to identify the role of transparency and judicial control as key factors, but the novelty of the study is the emphasis on the need for preventive supervision and the introduction of mechanisms for controlling decisions made by algorithms. The practical significance lies in the possibility of using the developed approaches to reform the Ukrainian public administration system in accordance with European standards. One of the limitations of the study is the lack of access to detailed statistical data on the use of discretion in Ukraine and examples of judicial practice, which requires additional study. In the future, it is advisable to focus on the empirical analysis of national cases, as well as research into the impact of digital transformation on the quality of management decisions. It is also important to develop recommendations for the creation of independent advisory bodies and approve mandatory standards for the publication of justifications for discretionary decisions. Promising research directions include determining the optimal model for combining legal, ethical, and technological components in the application of discretion and studying international audit tools as an effective practice for preventing administrative abuse.

¹⁴⁹⁾ Helsinki Rule of Law Forum. (2022). *Id.*

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