

General Principles of Administrative Law

§ 5 Discretion

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§ 5 Discretion

Discretion	Strictly bound administration
<ul style="list-style-type: none">• Administration may take measures foreseen by law but is not obliged to do so – it may choose between different measures• Practicability of the decision is not subject to judicial review• Judicial review of the respect of legal framework in general, the respect of procedural rules in the decision making process and the reasons and motifs why a specific decision has been taken (no abuse of discretion)	<ul style="list-style-type: none">• Administration has to take the measures foreseen by law• No leeway and even if the measures are totally impractical• The law may be unconstitutional if it does not foresee exceptions in “hard cases” – but the administration can not deviate from the law autonomously• Motifs of the decision-maker may be irrelevant to assess the lawfulness of the decision

§ 5 Discretion

- A) "Intensity" of the Binding of Administration by Law**
- B) Jurisprudence of the ECtHR on Discretion**
- C) Discretion in the Recommendations of the CoE**
- D) Forms of Empowerment of the Administration to Act at its Discretion**
- E) Abuse of Discretion**
- F) Equality as Limit of Discretion**
- G) The Principle of Proportionality as a Limit of Discretion**

A) "Intensity" of the Binding of Administration by Law

"Intensity" of judicial control

relationship between executive
and judiciary



"Intensity" of the binding of
administration by law

relationship between executive
and legislature

A) "Intensity" of the Binding of Administration by Law

- **German model:** Concerning every legal question, there is only *one answer* which is "right". Therefore the courts may replace the appreciation of the administration regarding facts and legal situation by its own appreciation
 - Uniform application of the law all over the country
- **British model:** The courts – in general – control only, if the administration did not act arbitrary regarding facts and the legal situation ("ultra vires control")
 - Large margin of appreciation of the administration – but intense control of the legality of administrative procedure
- **French model:** ...
- **Scandinavian model:** ...
- **Georgian model:** ...

A) "Intensity" of the Binding of Administration by Law

“Intensity” of the binding of administration by law depends on national legal methodology

Uniform application of law in a state is

- only possible on the basis of one uniform legal methodology
- a demand of equality before the law

Different legal methodologies even in the “continental” European countries due to different

- ways of legal education,
- ways of training of civil servants
- conceptions of the role of judges
- conceptions of the role of administration (law enforcement or management?)

B) Jurisprudence of the ECtHR on Discretion

Article 6 ECHR – Right to a fair trial

(1) In the **determination of his civil rights and obligations** or of any criminal charge against him, **everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.** Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) and (3) [...].

B) Jurisprudence of the ECtHR on Discretion

Settled case law of the ECtHR (see *A. Zrvandan: Casebook on European fair trial standards in administrative justice, 2016, pp. 27 et seq.*)

- The words “determination of his civil rights and obligations” in the sense of Art. 6 (1) ECHR include also disputes between the individual and administrative bodies concerning property rights, economic rights, monetary claims, rights to social benefits which may be considered as disputes involving public law under domestic law.
- An “administrative body” deciding on “civil rights” is (in general) not a “tribunal” in the sense of Art. 6 (1) ECHR.
- In cases where adjudicatory bodies determine disputes over “civil rights and obligations” within the meaning of Article 6 (1) ECHR proceedings before them **shall be subject to subsequent control by a judicial body that has “full” jurisdiction in relation to both factual and legal matters.**

151. The Court reiterates that even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over “civil rights and obligations” does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are “subject to subsequent control by a judicial body that has “full” jurisdiction and does provide the guarantees of Article 6 § 1 [...]”.

152. Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have “full jurisdiction” will be satisfied where it is found that the judicial body in question has exercised “sufficient jurisdiction” or provided “sufficient review” in the proceedings before it [...].

153. In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative law appeals in the Member States of the Council of Europe, that the scope of judicial review over the facts of a case is limited and that it is the nature of review proceedings that the reviewing authority reviews the previous proceedings, rather than taking factual decisions. **It can be derived from the relevant case-law that it is not the role of Article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities.** In this regard, particular emphasis has been placed on the respect which must be accorded to decisions taken by the administrative authorities on grounds of “expediency” and which often involve specialised areas of law (for example, planning [...]; environmental protection [...]; regulation of gaming [...]).

B) Jurisprudence of the ECtHR on Discretion

[ECtHR, Judgment of 2011/07/21, no. 32181/04 and 35122/05 \(Sigma Radio Television Ltd vs Cyprus\):](#)

154. In assessing the sufficiency of a judicial review available to an applicant, the Court will have regard to the powers of the judicial body in question [...], and to such factors as **(a) the subject-matter of the decision appealed against**, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; **(b) the manner in which that decision was arrived at**, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and **(c) the content of the dispute**, including the desired and actual grounds of appeal [...].

155. Whether the review carried out is sufficient for the purposes of Article 6 will very much depend on the **circumstances of a given case**: the Court will confine itself as far as possible to examining the question raised in the case before it and to determining if, in that particular case, the scope of the review was adequate.

[ECtHR, Judgment of 2011/07/21, no. 32181/04 and 35122/05 \(Sigma Radio Television Ltd vs Cyprus\):](#)

156. The Court has held in a number of cases, where the court in question did not have full jurisdiction as such but examined the issues raised before it concerning the adjudicatory body's decision, that the judicial review in the case was sufficient and that the proceedings complied with Article 6 § 1 of the Convention. This has been the case, for example, where upon judicial review the applicants' submissions on their merits or grounds of appeal **were examined point by point**, without the court having to decline jurisdiction in replying to them or in ascertaining various facts [...]. Similarly [...] the Court held that there had been no violation of Article 6 § 1 as the High Court had examined the central issue in the case before it.

157. Where, however, the reviewing court is precluded from determining the central issue in dispute, the scope of review will not be considered sufficient for the purposes of Article 6 [...]. **The Court has therefore found violations of Article 6 § 1 in cases where the domestic courts considered themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the issues independently** [...]. In addition the Court has found a violation of Article 6 where a ground of challenge has been upheld by the reviewing court but it was not possible to remit the case for a fresh decision by the same or a different body [...].

ECtHR, Judgment of 2011/07/21, no. 32181/04 and 35122/05 (Sigma Radio Television Ltd vs Cyprus):

159. At the outset, it is common ground that the power of review of the Supreme Court [...] was not capable of embracing all aspects of the CRTA's decisions. In particular, as is usually the case in the systems of judicial control of administrative decisions found throughout the Council of Europe's Member States [...], **the Supreme Court could not substitute its own decision for that of the CRTA and its jurisdiction over the facts was limited.** Notwithstanding, it could have annulled the decisions on a number of grounds, including if the decision had been reached on the basis of a misconception of fact or law, there had been no proper enquiry or a lack of due reasoning, or on procedural grounds.

160. Such an approach by an appeal tribunal conducting the review of a decision of an administrative body can reasonably be expected, having regard to the nature of review proceedings and the respect which must be given to decisions taken by administrative authorities on grounds of "expediency" [...].

161. As to the subject-matter of the decision appealed against [...] a **classic exercise of administrative discretion in the specialised area of law** concerning broadcasting taken in the context of ensuring standard setting and compliance with the relevant legislation and regulations pursuant to public interest aims [...].

ECtHR, Judgment of 2011/07/21, no. 32181/04 and 35122/05 (Sigma Radio Television Ltd vs Cyprus):

162. In connection with the manner in which the decisions were arrived at, the Court observes, as it noted above [...], that a number of uncontested procedural guarantees were available to the applicant in the proceedings before the CRTA: the applicant was given details of the probable violation or the complaint made against it and the decisions were arrived at after a hearing had been held. The applicant was able to make written submissions and/or oral submissions during the hearing of the cases [...]. Further, it was open to the applicant to make a wide range of complaints in the context of the judicial review proceedings before the CRTA. It is noted in this respect that the applicant's allegations as to shortcomings in the proceedings before the CRTA, including those concerning objective partiality and the breach of the principles of natural justice, were subject to review by the Supreme Court.

163. Lastly, with regard to the content of the dispute, the Court observes that in its recourses to the Supreme Court the applicant raised a number of points concerning the legality of the CRTA decisions [...].

165. As is evident from the extensive reasoning in its judgment the Supreme Court examined all the above issues, point by point, without refusing to deal with any of them. [...].

166. It is also clear from the above that the applicant's cases did not centre on a fundamental question of fact which the Supreme Court did not have jurisdiction to revisit. [...]

C) Discretion in the Recommendations of the CoE

Recommendation No R(80)2 concerning the Exercise of Discretionary Powers by Administrative Authorities

I. Scope and Definitions:

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.

In the implementation of these principles the requirements of good and efficient administration, as well as the interests of third parties and major public interests, should be duly taken into account. Where these requirements or interests make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made to observe the spirit of this recommendation.

C) Discretion in the Recommendations of the CoE

Recommendation No R(80)2 concerning the Exercise of Discretionary Powers by Administrative Authorities

II. Basic principles

An administrative authority, when exercising a discretionary power:

1. does not pursue a purpose other than that for which the power has been conferred;
2. observes objectivity and impartiality, taking into account only the factors relevant to the particular case;
3. observes the principle of equality before the law by avoiding unfair discrimination;
4. maintains a 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;
5. takes its decision within a time which is reasonable having regard to the matter at stake;
6. applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

D) Forms of Empowerment of the Administration to Act at its Discretion

Conditional approach to legislation (Germany):

- Differentiation between:

Conditions



Legal consequences

- If a certain situation manifests, than a certain legal consequence follows
- **Possibility of a “strictly bound” administration:**

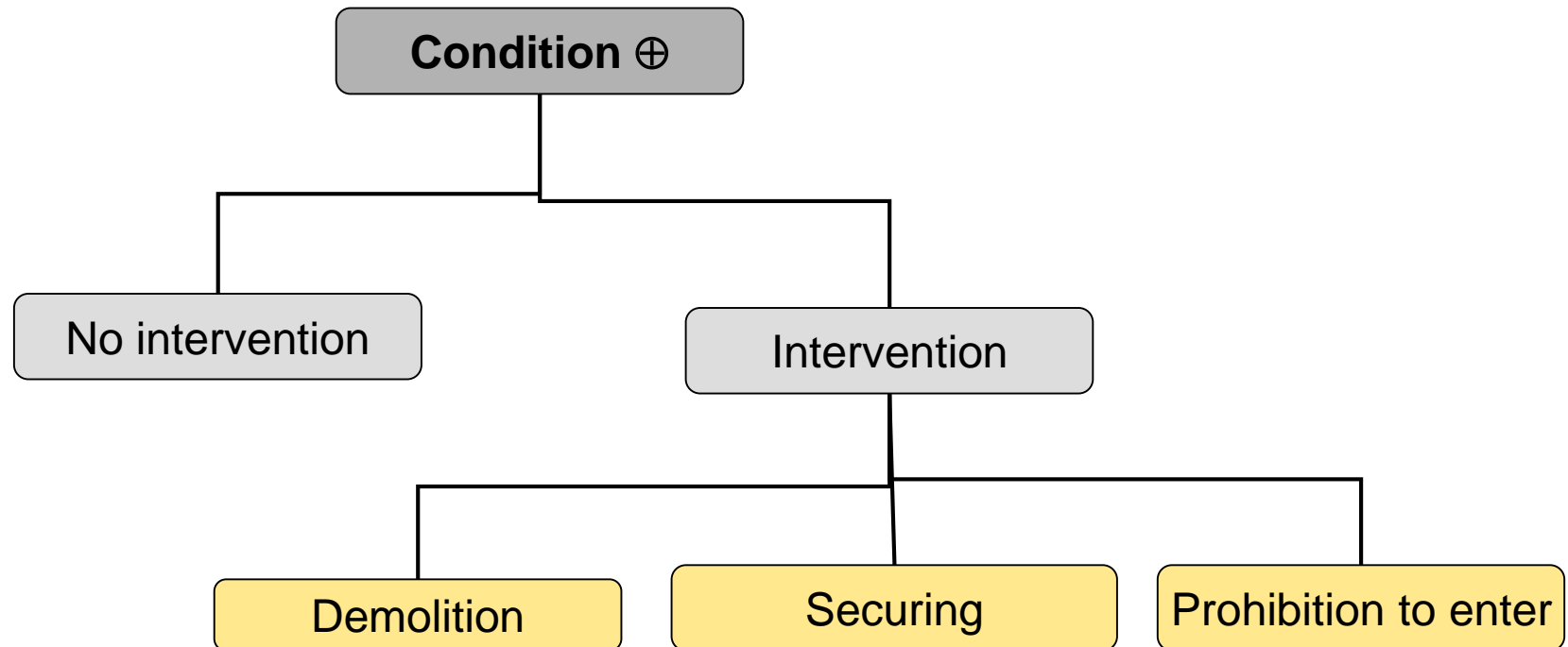
„A building permit has to be given, when the project is conform to building law“

Conditions	Legal consequence
The project is conform to building law.	The building permit has to be given.

D) Forms of Empowerment of the Administration to Act at its Discretion

Conditional approach to legislation and discretion (Germany):

If a building does not comply with building law, the responsible authority may oblige the owner to delete the building partly or completely, if it is not possible to assure the respect of building law otherwise



D) Forms of Empowerment of the Administration to Act at its Discretion

In contrast to the German approach: aim-oriented clauses:

“The competent administration shall ensure that building permits are only given for projects respecting the building law“

“The competent administration shall ensure the respect the building law“



No differentiation between conditions and legal consequences

No “strictly bound” administration

D) Forms of Empowerment of the Administration to Act at its Discretion

Indefinite Legal Terms: Terms whose meaning is not “fix” but open to different interpretations:

- **Liability** of a person
- Offending **morality**
- **Good faith**
- A building project shall not **disfigure** the site
- **Public safety** and **public order**

Who defines the content of these terms (gives flesh to them)?

- The courts by creating of “case groups” which gives indefinite legal terms more and more determination (Germany)?
- The administration itself, having a certain degree of latitude but being ‘framed’ (1) by the limits of the possible meanings of the wording and (2) by strict procedural rules (many other countries)?

D) Forms of Empowerment of the Administration to Act at its Discretion

Margins of Appreciation – Outer Limits of Judicial Control

Indefinite legal terms whose application in a single case by the administration can only be reviewed by the courts to a limited extent even in countries with a quite strict standards of review.

Standards of judicial review in case of margining of appreciation may still be:

- correct establishment of facts
- respect of procedural rules
- correct understanding of the indefinite legal terms to be applied in general

Examples are necessary

D) Forms of Empowerment of the Administration to Act at its Discretion

Margins of Appreciation – Examples

Example: How to evaluate an university exam?

Grade	Explanation
Excellent (1)	an outstanding achievement
Good (2)	an achievement that exceeds the average requirements considerably
Satisfactory (3)	an achievement that fulfils average requirements
Sufficient (4)	an achievement that fulfils the requirements despite flaws
Unsatisfactory (5)	an achievement that does not fulfil requirements due to major flaws

D) Forms of Empowerment of the Administration to Act at its Discretion

Margins of Appreciation – Outer Limits of Judicial Control

Further Examples:

- Assessment (e. g. at contests) of the quality of wine or other products changing with time
- Risk assessment under scientific uncertainties
- Assessment of complex economic evaluations
- Decisions by independent committees representing different social groups
- Administrative needs assessment concerning public procurement, recruiting etc.

E) Abuse of Discretion

Recommendation No R(80)2 concerning the Exercise of Discretionary Powers by Administrative Authorities

II. Basic principles

An administrative authority, when exercising a discretionary power:

1. does not pursue a purpose other than that for which the power has been conferred;
2. [...].

Abuse of discretion (wrong motives) may be

- wrong political or personal motives
- motives not covered by competence
- wrong financial motives
- non-use of discretion (administration is not aware that it has a choice)
- Unwillingness to take a decision (“management by doing nothing”)

F) Equality as Limit of Discretion

[Recommendation CM/Rec\(2007\)7 on good administration](#) :

Article 3 – Principle of equality

1. Public authorities shall act in accordance with the principle of equality.
2. They shall treat private persons who are in the same situation in the same way. They shall not discriminate between private persons on grounds such as sex, ethnic origin, religious belief or other conviction. Any difference in treatment shall be objectively justified.

F) Equality as Limit of Discretion

Respect of the principle of equality before the law as a limit for discretionary powers:

The similar cases must be treated in like manner and dissimilar cases in unlike manner by the **administrative practice**:

- Giving state aids to every enterprise who fulfils criteria foreseen by budgetary plans and administrative guidelines
- The local government decides to rent its communal hall for party conventions. Can it refuse to rent it to a political party not considered to be the political “correct” one?
- An illegal housing area developed over time in contradiction to building law: May the administration only proceed against A and not against B?

But: No obligation to maintain the same administrative practice forever

But: What is similar and what is dissimilar?

G) The Principle of Proportionality as a Limit of Discretion

[Recommendation CM/Rec\(2007\)7 on good administration](#) :

Article 5 – Principle of proportionality

1. Public authorities shall act in accordance with the principle of proportionality.
2. They shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued.
3. When exercising their discretion, they shall maintain a proper balance between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive.

G) The Principle of Proportionality as a Limit of Discretion

Content of the Principle of Proportionality:

- Which aim can be pursued?
- **Suitability**
 - Is the measure suitable for the aim it is used for, i.e. will it facilitate or achieve the pursued objective?
- **Necessity**
 - Does the authority concerned have another mechanism at its disposal which is less restrictive of freedom?
- **Appropriateness/Proportionateness/Reasonability**
 - Maintenance of a proper balance between any adverse effects which the measure has on the rights or interests of private persons and the purpose they pursue.

G) The Principle of Proportionality as a Limit of Discretion

Unsuitable measures:

- Obligation to prove ability with firearms for an authorisation to hunt with falcons
- Order to produce evidence regarding facts not relevant for the decision

Unnecessary measures

- dissolving of an assembly when it would have been possible to prevent dangers by obliging the organizer to respect some rules
- (strict) order to demolish a house which can easily be repaired

Inappropriate measures

- order to demolish a house because of non-respect of the distance space foreseen by law if the problem is limited to some centimetres (but: no general de-minimis-clause legitimating breach of law)
- compulsory an risky medical examination to clear up a banality

G) The Principle of Proportionality as a Limit of Discretion

- Principle of Proportionality may be considered as a consequence of the principle, that every interference in a (fundamental) right requires a legal basis (legality of administration/principle of legal reservation)
- Problem of “sweeping clauses” :

“To combat public dangers the police may take adequate measures”

- ↳ No general empowerment of the police to take any measure to reach the pursued objective
- ↳ immanent limitation of this empowerment to take only measures which are suitable, necessary and appropriate
- **Principle of Proportionality** = May be understood as a “guideline” to interpret legal “sweeping clauses” to protect individual freedoms

G) The Principle of Proportionality as a Limit of Discretion

Principle of Proportionality as a Limit to Administrative Action

- Limitation of the manoeuvring room given to administration by law
- Legal limit of discretion
- But: Strictly bound administration cannot overrule law with reference to the principle of proportionality

G) The Principle of Proportionality as a Limit of Discretion

[ECtHR, Judgment of 2016/04/21, no. 46588/15 \(case of Ivanova and Cherkeзов v. Bulgaria\)](#):

53. Under the Court's well-established case-law [...] the assessment of the necessity of the interference in cases concerning the loss of one's home for the promotion of a public interest involves not only issues of substance but also a question of procedure: whether the decision-making process was such as to afford due respect to the interests protected under **Article 8 of the Convention** [...]. Since the loss of one's home is a most extreme form of interference with the right to respect for the home, any person risking this – whether or not belonging to a vulnerable group – should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under that Article [...].

G) The Principle of Proportionality as a Limit of Discretion

[ECtHR, Judgment of 2016/04/21, no. 46588/15 \(Ivanova and Cherkezov v. Bulgaria\)](#):

53. [...]. The factors likely to be of prominence in this regard, when it comes to illegal construction, are whether or not the home was established unlawfully, whether or not the persons concerned did so knowingly, what is the nature and degree of the illegality at issue, what is the precise nature of the interest sought to be protected by the demolition, and whether suitable alternative accommodation is available to the persons affected by the demolition [...]. Another factor could be whether there are less severe ways of dealing with the case; the list is not exhaustive. **Therefore, if the person concerned contests the proportionality of the interference on the basis of such arguments, the courts must examine them carefully and give adequate reasons in relation to them [...]**; the interference cannot normally be regarded as justified simply because the case falls under a rule formulated in general and absolute terms. The mere possibility of obtaining judicial review of the administrative decision causing the loss of the home is thus not enough; the person concerned must be able to challenge that decision on the ground that it is disproportionate in view of his or her personal circumstances [...].

G) The Principle of Proportionality as a Limit of Discretion

[ECtHR, Judgment of 2016/04/21, no. 46588/15 \(Ivanova and Cherkezov v. Bulgaria\)](#):

53. [...]. Naturally, if in such proceedings the national courts have regard to all relevant factors **and weigh the competing interests in line with the above principles** – in other words, where there is no reason to doubt the procedure followed in a given case – the margin of appreciation allowed to those courts will be a wide one, in recognition of the fact that they are better placed than an international court to evaluate local needs and conditions, and the Court will be reluctant to gainsay their assessment [...]).

54 The Court cannot agree with the position, expressed by some Bulgarian administrative courts, that the balance between the rights of those who stand to lose their homes and the public interest to ensure the effective implementation of the building regulations can as a rule properly be struck by way of an absolute rule permitting of no exceptions [...]. **Such an approach could be sustained under Article 1 of Protocol No. 1, which gives the national authorities considerable latitude in dealing with illegal construction [...].**

G) The Principle of Proportionality as a Limit of Discretion

[ECtHR, Judgment of 2016/04/21, no. 46588/15 \(Ivanova and Cherkezov v. Bulgaria\)](#):

54. [...]. But given that the right to respect for one's home under Article 8 of the Convention touches upon issues of central importance to the individual's physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, the balancing exercise under that provision in cases where the interference consists in the loss of a person's only home is of a different order, with particular significance attaching to the extent of the intrusion into the personal sphere of those concerned [...]. This can normally only be examined case by case. Moreover, there is no evidence that the Bulgarian legislature has given active consideration to this balance, or that in opting for a wholesale rather than a more narrowly tailored solution it has taken into account the interests protected under Article 8 of the Convention [...]). On the contrary, the Ombudsman of the Republic has repeatedly expressed concern in that regard [...]).

G) The Principle of Proportionality as a Limit of Discretion

[ECtHR, Judgment of 2016/04/21, no. 46588/15 \(Ivanova and Cherkezov v. Bulgaria\)](#):

55. Nor can the Court accept the suggestion that the possibility for those concerned to challenge the demolition of their homes by reference to Article 8 of the Convention would seriously undermine the system of building control in Bulgaria [...]. **It is true that the relaxation of an absolute rule may entail risks of abuse, uncertainty or arbitrariness in the application of the law, expense, and delay.** But it can surely be expected that the **competent administrative authorities** and the administrative courts, which routinely deal with various claims relating to the demolition of illegal buildings [...], and have recently showed that they can examine such claims in the light of Article 8 of the Convention [...], **will be able to tackle those risks, especially if they are assisted in this task by appropriate parameters or guidelines.** Moreover, it would only be in exceptional cases that those concerned would succeed in raising an arguable claim that demolition would be disproportionate in their particular circumstances .

G) The Principle of Proportionality as a Limit of Discretion

Principle of Proportionality as a Limit to Legislation:

- In some states: constitutional principle which binds parliament
- A legal interference in fundamental rights is considered as unconstitutional if it does not respect principle of proportionality
- Guideline for interpretation of laws permitting an interference in fundamental rights.

G) The Principle of Proportionality as a Limit of Discretion

Backlash of Limiting the Power of the Legislative for the Administration

	Strictly Bound Administration	Discretion
Legal Basis	<ul style="list-style-type: none">• Did parliament respect the principle of proportionality• Did the administration “choose” an interpretation of the legal basis which respects the principle of proportionality	
Application of the legal basis by administration	<ul style="list-style-type: none">• No review of the administrative decision concerning the principle of proportionality	<ul style="list-style-type: none">• Does the administrative measure respect the principle of proportionality (principle of proportionality as a limit of discretionary powers)