SPECIAL WORKSHOP 81
Balancing Judicial Discretion: Between the Legislative Policy, Open Axiology and Precedential Practice

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The Jig-Saw Puzzle For Rainy Days: How to Put Together The Sources Of Law And Forms Of Law, Legal Rules/ Legal Norms And Legal Principles... To Get A Homogeneous Picture Of Law?

Have you ever seen a homogeneous picture of law? Because this is what we are looking for and trying to create as a jig-saw puzzle. For millennia, for centuries, again and again. Confusion in the use of the terms (back to their meanings), on the problem of relationships there is a need to reset the game. Law is one entity: from the point of view of its (presumed homogeneous) structure it is containing terms of the same degree with respect to all of the variables.

Sources of law – how much do we need the term (or - which one of its different senses is making "most sense")? Especially the third question of Edwin Charles Clark (discussed e. g. by Roscoe Pound): Where, if one wishes to know the law must he go to find it? In what forms is it expressed?

Although it does not look like on the first view this contribution is in the line with my previous one from the IVR World Congress in Lisbon (On Precedents in General and in a Statutory Legal System), focusing on more general problems and the attempts to solve them correctly.

Tadeusz Biernat
(Andrzej Frycz Modrzewski Krakow University)

The rule of law standards as the sources of judicial discretionary power

The aim of the paper is to examine multidimensional relationship between: the rule of law standards and the law making processes in the statutory law order and the quality of law; the quality of the statutory law and the judicial decisions; the rule of law standards and the principle of the judicial decisions. As emphasized in the Resolution Parliamentary Assembly Council of Europe 1594 (2007) 1, the principle of the rule of law, despite a general commitment to this principle, the variability in terminology and understanding of the term, both within the Council of Europe and in its member states, has elicited confusion. In particular, the French expression *Etat de droit* (being perhaps the translation of the term *Rechtsstaat* known in the German legal tradition and in many others) has often been used but does not always reflect the English language notion of "rule of law" as adequately as the

expression *prééminence du droit*, which is reflected in the French version of the Statute of the Council of Europe. The rule of law is a practical legal concept. It is increasingly included in national and international legal texts and case-law, especially the case law of the European Court of Human Rights. The rule of law constitutes a fundamental and common European standard to guide and constrain the exercise of democratic power. The fundamental question is if the rule of law constitutes the background of the judicial discretionary power and the legitimate judicial decisions?

Leszek Leszczyński
(Maria Curie-Sklodowska University, Poland)

General Reference Clauses and the Axiology of Judicial Discretion

Paper deals with legislative construct of the general reference clause, being the quite universal method of regulation in statutory law orders, being part of not only civil but also public and, to the some extent, penal law. A legislator, forming the clause (rules of rightness, good customs, social interest, good of the child, etc.) enlarges the scope of judicial discretion. Since the main part of that discretion results from the natural sources (that make it inevitable), the clauses enlarge it through adding axiological context to such features like the openness of the legal language, complexity of the structure of regulations or dynamics of the social environment of the law.

Such enlargement, being an element of legislative policy, does not determine however neither the values and norms that should be taken into account nor the actual scope of the discretion in the processes of application of law. Legislator, irrespective the motives pushing him to the creation the clauses, marks through their names nothing more than the type of values (moral, political, economic) and their dimension (social, group, individual), doing this however in a general way. Even if some determinants arise from the placement of the clause in the regulation (branch of the law, part of the normative act, etc.), it is the judge who is entitled to indicate the detailed (matched with the facts of the decided case) axiology as well in the field of the interpretation of the clause itself and of using the clause in the process of building of the normative base of final decision as in the building of the content of the final decision of the application of law.

The above pointed assumptions lead to the analysis of the factors influencing the axiological choices resulted from the clauses both in the context of the adaptation of the extra-legal axiology to the legal order and of the relation of this activity to the use of legal principles ("axiological edge" between the "extra-legal" and "intra-legal" criteria) seen in the context of necessary self-limitation of the scale of judicial discretion (taken additionally in the context of the types of the application of law and jurisdictional level, the presence of precedential practice, type of legal branch, kind of the political regime, scope of social stability, etc.).

Tomasz Guzik
(Jagiellonian University, Poland)

Economic Justification of Judicial Discretion

Economic Analysis of Law provides valuable tools to examine legal institutions as well as various legal-theoretical concepts. In this report the author will use economic approach to assess the feature of usefulness of judicial discretion. What is more, the reporter will try to defend the thesis, that judicial discretion is justified mainly because of economic reasons. Consequently, this paper will be divided into three parts.

First, the nature and functions of judicial discretion will be presented. The author will show – using Polish civil and penal law – basic features of this legal institution in Polish law. This legal framework will be the basis for further considerations. In the next part the reporter will provide two self-prepared legal cases. One case will concern civil law, the second one – penal law. They will be used to analyse functions of judicial discretion. The author will apply specific economic models to evaluate the impact of judicial freedom in passing sentences on quality of those sentences. Economic efficiency will be the criterion that will be used to assess this institution.

In the last part of this report there will be discussed the results of economic analysis of judicial discretion. The author will try to assess this legal institution not only by using the criterion of economic efficiency, but also in terms of widely understood justice, because in reporters view justice is one of the most important features of law. What is more, there will be also discussed, whether economic reasons can be treated as strong and valuable arguments for defending the main thesis of this paper.

In final part author will also try to defend the usefulness of judicial discretion by referring to other arguments. For instance this institution can be justified from systemic or procedural point of view. What is more, it can be ethical to give judges a wide discretion in pronouncing sentences. In the end, the author will think about limits of judicial discretion – whether judges should have wide or narrow discretional powers. Therefore, the last part of the report will be a huge discussion about value of judicial discretion in legal decision making.

Adam Szot
(Maria Curie-Sklodowska University, Poland)

The perverse impact of the precedent on the discretionary reasoning of a judge in civil law countries

Students entering legal studies in Poland believe that an Anglo-Saxon judge has more freedom (wider range of discretionary power) than a judge in a *civil law* country because the first one benefits from precedents rather than rigid legal proviosione. The speach will not deal with the comparative question of which of these judges has more freedom – its aim is to answer the question whether the use of a precedent by a judge in a *civil law* order is a manifestation of his discretionary powers and how this affects the freedom of decision in the process of applying the law.

The main thesis is that reaching to precedent is a manifestation of the judge's discretionary power but at the same time (perversely) it limits that power or at least directs the way in which it is exercised. There are two levels of discretionary power here to be analized - one

related to the precedent itself, i.e. reaching, reconstructing and using it for decision-making and/or argumentative purposes, and the other is the influence of the precedent on the court's reasoning in the course of the trial. This issues will be analysed in relation to the process of applying the law in decision-making apprach. In this perspective, the use of precedent by a judge manifests itself in several aspects - validation, reconstruction, decision making and argumentation which will be analized in a detalied way.

Marzena Kordela
(Adam Mickiewicz University in Poznań, Poland)
Inter- and Extra-legal Axiology

Acceptance of the general theory of legislator`s rationality results in the acceptance of his rationality in every particular dimension. Axiological rationality at the law application level should presuppose the clear standpoint of the both inter- and extra-legal system of values. In my view a legislator as a rational axiologist follows his own axiological system. Such a system consists of three subsystems. The first one comprises values that are legally binding (by virtue of the formally defined acts of their enactment). Only this kind of values creates a source of what is called in legal sciences inter-legal axiology. The next two subsystems: reference values and universal values are of extra-legal character. In the process of exercising judicial discretionary power this structure of inter- and extra-legal axiology must be taken into account to fulfil the rule of law core principles: legalism and proportionality.

Bartosz Liżewski
(Maria Curie-Sklodowska University, Poland)
The axiological level of human rights standards - the necessary discretion of the Strasbourg Court and its limits

Human rights are based on values that are always linked to assessments made by individuals, groups of people, larger communities or even whole societies. The axiology of human rights in the Council of Europe's protection system has several dimensions, i.e. regulatory matter, the process of interpretation, the level of social axiology and the control system. They are closely connected with each other. The binding factor for these dimensions is the European Court of Human Rights. Paradoxically, the axiology of human rights is both a source of discretion of the Strasbourg Court and a source of its limitations. Not only human rights as a specific catalogue should be considered in terms of values, but also all actions (including their determinants) that serve to determine their content and ensure effective protection of these rights. When setting standards for the protection of human rights, the Court sets the axiological level of protection of these rights. This process cannot be based on unlimited discretionary power. In such a situation, it would be a dictatorship of values. The Court's discretion is limited. The standard of protection is based on an assessment of the current level of axiology in European societies. The Tribunal formally creates standards of protection. In fact, it should discover and specify them. At the same time, it must also leave the Member States a margin of appreciation that takes account of the specific nature of local relations. This

makes it possible to create minimum standards of protection acceptable to all European countries.

Paweł Kłos
(Maria Curie-Sklodowska University, Poland)

Enforceability of a mediation agreement - between the autonomy of the parties and judicial discretion

A mediation agreement is a document whose executability is ensured, inter alia, by a decision in the judicial process. The paper will deal with the decision-making process of the judge, who in the EU is one of the entities obliged to ensure the executability of these settlements. His decision will be made on the basis of the legality of the settlement and will take into account the principles of fairness, justice, ethics and state policy requirements. In case non-legal axiology, the discretion of the judge allows, in many cases, the possibility of approving a mediation settlement agreement. When assessing the legality of a mediation agreement, the judges should take into account the principles derived from ethics (social and professional), logical morality, customs, etc., as well as the rules of the mediation agreement.

Yachiko Yamada
(Chuo Law School, Japan)

The Function of Precedents concerning Reform of the Japanese Civil Code

In Japan court precedents play important role, although Japanese legal system genealogically belongs the Civil Law system. Then in Japan the bill of the Civil Code (law of obligation) was enacted at 26th May 2017 and the Civil Code (law of obligation) come into effect 1th April 2020. The new Civil Code basically constructed under accumulation of case law. At the same time, it is said not to be perfectly clear the relationship between the new rules and precedent.

I will focused the situation where new some rules are introduced into new Civil Code and then some rules are integrated into the new rules. Correctly saying, such new rules not ignore on superficial level of texts of the Civil Code. However the discussion already has raised whether such integration lead to a conflict between precedents and new rules in contract law areas. I will try to analysis how to consider role of precedents in the legislative process of private law.

Piotr Szczekocki
(Maria Curie-Sklodowska University, Poland)
Axiology of judicial enforcement law: view on the Polish enforcement procedure application and bailiffs discretion

The functioning of judicial enforcement proceedings has been conducive to the implementation of law and values upheld and fostered by law in various respects, already since the ancient times.

The paper aims to present the axiological determinants of enforcement proceedings as a specific kind of the decision-making process in which the sphere of assessments and values contributes to the law axiology issues in general and provides an important source for building the legal order, especially shaping the enforcement law system in the legal practice.

The philosophical aspects of the judicial enforcement law have been overlooked both in the legal doctrine statements and in the relevant court decisions so far. Nevertheless, in the enforcement proceedings these issues are the focus of the enforcement law axiology, especially values and goals pursued in these proceedings, and the actions of institutions applying enforcement law are directed at implementation of a number of these values. Assuming that judicial enforcement bodies are functioning in the broadly understood process of law application and that the actions undertaken by them have a decision-making character (of varying degrees), while the enforcement law sources are not free from gaps and extralegal structures, such an approach poses an additional question about the discretion of these bodies in the aspect of their decision-making freedom and its limitations.

I would like to focus on three issues in my paper. Firstly, my goal is to indicate the philosophical and legal determinants of judicial enforcement, including their axiological dimension which is strongly exposed by praxeological values in enforcement proceedings, for which effectiveness in the most important from the perspective of reaching the goals of these proceedings. Secondly, I discuss the sources of enforcement law as the “carriers” of values, both these inside law and those functioning outside law, and their place in the judicial enforcement proceedings. In these sphere, the role of previous judicial decisions in enforcement cases is interesting, as well as the function fulfilled by them in the decision-making process of a bailiff in the Polish legal order. Thirdly, I attempt to answer a question about the presence and possible functions and limitations of discretion (decision-making freedom) of an enforcement body in the process of enforcement law application.

Stanisław Wielopolski
(Jagiellonian University, Poland)
Judicial discretion of the Polish Constitutional Court and Supreme Court and Its Theoretical Consequences

In the set of three positivist thesis given by H.L.A. Hart, there are Social and Judicial Discretion Thesis. Since the positivist method is concerned on a description of a legal system, it indicates a general description of law as it is, instead of as it should be. In my presentation I will try to face the problem (from a descriptive point of view) that in Polish legal system there

is, on one hand, a limited number of legal sources given by the Constitution (CRP) and the practice of following previous interpretations, on the other. The latter Hart would name social practice under the rule of recognition, identified by judges, officials, and other legal practitioners. I will argue that from a theoretical point of view, there is no necessity of a conflict between mentioned statements. Although there could be a risk of a conflict between the practice of following previous interpretations and the principles of legal certainty and unity. This conflict can be derived from lack of universal, written rule, which imposes a duty for judges to align their rulings to former ones, given by higher courts, such as Constitutional Court (CCRP) or Supreme Court (SCRP) of the Republic of Poland.
Social Thesis indicates that social practice performed by judges, officials, and citizens is necessary for the existence of a law. Though Judicial Discretion thesis indicates the power of law creation, that could be under some necessary provisions given to judges. It, therefore, shows another problem, that is a question, if the social practice in Poland allows to use arguments from previous sentences as res iudicata and simply follow what the Constitutional Court or the Supreme Court ruled in Its sentences.
Since vagueness, ambiguity or indeterminacy of legal language is a fact that we cannot simply deny, the more problematic thing is how to deal with its practical consequences such as legal gaps. I think we cannot simply follow Ronald Dworkin and say, that there is one right answer, and the task of finding it rests on the back of Hercules Judge. The CCRP, as it is a negative legislator, has a great influence on the legal system, for instance, to declare statute as incompatible with CRP. But it is not the only consequence of judicial decisions of this special court. In my opinion, more important is the powerful influence of the interpretations of words or provisions of law stated in this sentences, which is spread into other courts decisions. On the other hand, there is no written rule, but merely the practice of citing and using former interpretations in latter sentences.

Giovanni Pesce
(Italy)

Discretionary power of public administration and control of public dept

Discretionary power, a central feature of administrative power, comes into play when Administration is called to ascribe a meaning of a specific pact choosing among several possible meanings, and it is a way of balancing between public and private interests.
The purpose of this speech is to enquire whether the European and national rules may limit the discretionary power while expanding the administrative one.
After the twentieth century, devastated by wars, public deficit and debt, most State models circumscribed their markets to the detriment of the global one, turning the old economic models into new ones after the 1958 Treaty of Rome and, after the phase following the Maastricht Treaty of 1992, and the crisis of 2008, the final concept is that the Eu Members States should restructure the public finances, facing the increase of the public goods and services demand and with the rested rights.
First of all, the administrative law was created to protect citizens from excessive authority. As a consequence of the entry into force of the European law, the system gradually led to a crisis

of government entities. Today, the watchword is the exercise of administrate powers that are compatible with the public debt. The intergenerational equity and the protection of the creditors of the State have to find a reasonable compromise.
Consequently, examining the past and the future of the public debt, is clear that there is a mountain of public debt accumulated for half a century and over in a large part of Eu countries, thanks to which many States have mortgaged Nations.
Looking retrospectively, there should be an use of all the tools required to reduce the burden of debt and the interest accumulated from the past and the public administration must ensure the sustainability of public debt and the rights of creditors.
For the future, we can predict that the administrative law will be again in charge of the regulation of public authorities, society and economy, as well as competent and foresighted public officials.
A solution for the past and the future could be to try to understand the meaning of the economic theories that can influence public spending powers.
In fact, any theory has produced a decrease of the level of debt, so the necessary way forward for the consolidation it is to create primary budget surpluses, and to practice this measure without creating recessionary effects.

Katarzyna Hanas
(Maria Curie-Sklodowska University, Poland)
Judicial discretion and the welfare of the child

The welfare of the child is a common criterion in many Polish normative regulations pertaining to different branches of law. It is both a tool for the law-making and the executive bodies, employed to direct the law-applying bodies towards ensuring full protection to the child. The Polish legal system includes normative acts in which: a) the welfare of the child is an essential part of the legal provision, b) the welfare of the child does not exist in the form of a normative construct, but the linguistic context of the normative acts indicates the non-legal values that should be considered when assessing the situation of the child, c) there are other constructs whose scope is to a certain extent similar to the welfare of the child, *e.g.* "the welfare of the student", "the welfare of the minor", "the welfare of the under-age." My speech is focused on analysing the judicial discretion in the aspect of the welfare of the child as observed in the Supreme Court's judicial decisions in civil and family cases, juvenile cases, and the ruling of Supreme Administrative Court and Constitutional Tribunal. In the course of my investigations, I undertake to determine the essence of judicial discretion in cases predominantly focused on establishing the current and postulated situation of the child, so that the final ruling would be the most favourable for the child. From the viewpoint of law theory, it should be remembered that "the welfare of the child" is primarily a general reference clause. Furthermore, the justifications of judgments indicate that judges the welfare of the child as the directive (and therefore a tool for interpreting legal provisions), the presumption (the basis and the point of departure for further argumentation), the purpose (what is sought for), the value (a feature or a set of characteristics appropriate to a given person), the premise (a certain objective fact) and the exception (departure from the rule) - which translates into the interpretation of the provisions.