AEAJ, Meeting of the WG "Independence – Efficiency" on 16 May 2019, Darmstadt (Germany)

"The discretionary power of the judge" – Summary of the debate

The exercise of discretion by administrative authorities is a well-established concept of public law. How about the judicial branch? To what extent do judges have discretionary power? Which requirements and limits apply? With these key questions in mind, the AEAJ with its working group "Independence – Efficiency" met on 16 May 2019 to examine "The discretionary power of the judge". The workshop was organised under the umbrella of the 19th German Verwaltungsgerichtstag in Darmstadt. From Sweden to Greece and from Ireland to Azerbaijan 15 countries were represented. *Prof. Dr. Rasa Ragulskytė-Markovienė* (Vilnius) and *Holger Böhmann*, judge at the Federal Administrative Court Germany, moderated the debate.

In his introduction, *Böhmann* emphasised that the term "judicial discretion" needed to be clarified. It was a cross-cutting issue closely linked to the judge's self-conception. He considered the subject to be part of the debate on "good judging". The concept of discretion was familiar to the administrative judge with regard to the exercise of discretion by the administration and its control by the administrative court. On the other hand, he considered it questionable whether and where a court had any room for manoeuvre at all. If there was judicial discretion, it remained to be discussed to which standards the exercise of discretion was tied.

The first speaker, *Prof. Bartosz Wojciechowski*, has already received his doctorate on the subject of judicial discretion. Today, the subject occupies him both practically and theoretically – as a judge at the Supreme Administrative Court Poland and as a director of the Centre for Theory and Philosophy of Human Rights of the University Łódź. He developed his concept of judicial discretion in light of the philosophical debate between Hart and Dworkins.

This approach was challenged in the subsequent discussion. *Böhmann* asked, whether he had to be a philosopher in the first place in order to be a judge. In his opinion, the speaker's understanding of judicial discretion was quite broad. He questioned whether the interpretation of indefinite legal concepts really meant the exercise of judicial discretion. There were, after all, recognised methodological guidelines leaving no room for judicial discretion. Furthermore, only strict methodology was decisive with regard to the weighing of interests and principles, the admissibility of evidence and its assessment. Instead, *Böhmann* offered a narrower understanding of judicial discretion. Examples could be found with regard to procedural regulations expressly granting discretion to the court, decisions on costs as well as orders on the joinder and separation of cases.

The speaker defended his extensive understanding of judicial discretion. Only as an omniscient Hercules could a judge make the right decision without resorting to judicial discretion. Every interpretation had semantic and functional contexts. According to *Wojciechowski* this led to the question which of the contexts was more important, as the interpretation of "good faith" illustrated. Notwithstanding methodological rules, a judge should refrain from a syllogistic application of law. This applied to balancing of principles, too, in cases where only two decisions were possible. One principle was by no means always of higher priority. This could be conceived of as judicial discretion.

This line of argument did not seem quite convincing to all participants in the following discussion. *Dr. Edith Zeller* (Vienna) replied that the judge did not have to be an omniscient Hercules from a

Kelsenian-positivistic point of view either. Already the interpretation of the wording left room for other contexts. In addition, the rules of interpretation could themselves be interpreted broadly, e.g. in the case law of the supreme courts. *Stephan Groscurth* (Berlin) pointed out that different interpretation methods could lead to different interpretations. Here, the speaker's broad understanding of the term raised questions as to whether the choice between the interpretations was at the discretion of the judge and how this related to legal certainty. From the point of view of Italian administrative law, *Dr. Rosa Perna* (Rome) also presented a concise understanding of judicial discretion in line with *Böhmann's* definition.

Ragulskytė-Markovienė attempted to mediate by emphasising that in the light of Eastern European experience, judicial discretion could also be understood as freedom in decision-making. In her view, freedom referred, for example, to the way in which a case was conducted, the clarification of the facts of the case and the summoning of witnesses. The structure of a decision was also a matter of discretion. The court, for example, might base its decision to annul an administrative act on the substantive illegality of the act, although according to national law an incorrect administrative procedure could have justified the annulment already. The possible deviation from the case-law of higher instances should be considered as an example of judicial discretion, too. Following on from this, *Nike Landsberg* (Freiburg) said that it depended on the prior understanding of judicial discretion whether this also included the freedom to decide how a case should be decided. Other participants remained more sceptical. *Dr. Julian Nusser* (Strasbourg, Karlsruhe) questioned the analytical content of the broad understanding of judicial discretion, since a decision without any commitment to standards meant arbitrariness. *Dr. Almut Neumann* (Berlin) argued that the possibility of the judge not to follow higher levels of jurisprudence could be described more accurately as material independence. In addition, *Zeller* referred to the context under Union law according to which the first instance could ask the Court of Justice of the European Union (ECJ) for a preliminary ruling – irrespective of the domestic relationship to the higher court.

In his answers, the speaker maintained that the judge exercised judicial discretion beyond the interpretation of the law according to methodological rules, since the court necessarily had to incorporate ethical and moral contexts as well as political and economic objectives. In the discussion, he cited as one example the derivation of a principle of discrimination in labour law by the ECJ in the *Kücükdeveci* ruling (see judgment of 19 January 2010, C-555/07). In every "hard case" in the sense of Hart, there was always more than just one solution. The judicial discretion had to be distinguished from administrative discretion, of course. However, the judge could also exercise discretion when reviewing discretionary decisions of the administration. The justification was important when balancing the arguments. Arbitrariness only existed if the judge, in exercising his discretion, did not put forward any justifiable reasons. The speaker certainly considered the possible deviation from appeal courts to be an example of judicial discretion. From a pragmatic point of view, of course, the higher court should be followed. If, however, its decision was not formally binding, it was only an argument. This also applied to ECJ's decisions, which in turn had to be interpreted.

The second speaker, *Judge Colm Mac Eochaidh*, examined the topic from a comparative law perspective. As former judge at the Irish High Court and since 2017 as judge at the General Court of the European Union, he spoke in light of his practical expertise gained in both legal systems.

He confirmed *Böhmann's* assumption that the judge in common law, with his pragmatic approach, was more flexible in the exercise of judicial discretion. The judge not only applied common law, the

speaker said, but the court made law. Unlike the United Kingdom, however, Ireland has a written constitution setting limits. At the same time courts derive individual rights from the constitution. However, if Irish law implements EU law, the Irish judge had less discretion, as he stated in response to an inquiry by *Dr. Werner Heermann* (Würzburg). Here the obligations under Union law applied as in the other Member States. *Anne Gosset* (Luxembourg) used a decision on family reunification under asylum law to illustrate how her court had to "stretch" the corset of positive law in order to arrive at a decision that was recognised as correct. *Katrin Kohoutek* (Darmstadt) was surprised by the speaker's statement that Irish judges could partially extend the time limits for legal actions or appeals. *Groscurth* and *Britta Schiebel* (Berlin) also pointed out that an extension of the deadline could aim for material justice but could mean arbitrariness.

The speaker explained that the Irish law expressly provides for an extension of the time limit in accordance with an appropriate consideration of the circumstances. On the other hand, he had found the French-influenced rules of procedure of the General Court to be quite strict. He certainly recognised the advantage that strict time limits were predictable. However, there was no threat of arbitrariness even in the case of an extension at the discretion of the court, since the court had to justify it with reasons. As discussion continued, *Ragulskytė-Markovienė* identified the judge's decision to make a reference for a preliminary ruling to the ECJ as an example of judicial discretion. In Lithuania, her court had to examine whether damages should be paid for failure to refer the matter to the ECJ. In this respect, the speaker referred to the case law of the ECJ, which does not further question the necessity of a reference for a preliminary ruling.

In summary, the controversial discussion of the first presentation revealed a number of ambiguities known from the Hart-Dworkins debate in legal philosophy. The narrower "law" is understood exclusively as the sum of all set legal rules, the earlier judges embark on judicial discretion. Consequently, there can only be extra-legal standards for the exercise of judicial discretion – simply by virtue of the restrictive definition of law. In contrast, on the basis of a more comprehensive understanding of "law", it is not a matter of judicial discretion if judges decide cases that are regulated incompletely or by contradicting rules according to methodological guidelines.

The interested discussion following the second presentation made it clear that the speaker, representing the only Common Law member state likely to remain, had offered the participants from Civil Law member states numerous new insights. Specific examples illustrated the Irish and ECJ judges' different and sometimes similar approaches to the discretionary powers of judges.

As a résumé, *Böhmann* stated that the respective definition of the concept of judicial discretion was crucial for the debate. As a result, the assessment of evidence might be understood as containing judicial discretion. On the other hand, the judge had no discretion with regard to the admissibility of evidence, for example.

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