

THE JURISDICTIONAL PRACTISE OF THE EUROPEAN COURT OF JUSTICE AND ITS EFFECT ON THE ADMINISTRATIVE SYSTEM OF THE MEMBER STATES

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ABSTRACT: *The discretion is one of the most interesting part of not just of our legal system, but nearly in each other. Why can I stated that? In my opinion, the base and the origin of the discretion has a lot more meaning and side, not just legal. Every person's life is a series of decisions, where we have to takes into consideration different alternatives. To choose the option for us, it is very important to analyze them in certain aspects. When we are dealing with the role of discretion in the EU Administration System and Jurisdictional Practice, we do not make else, than just taking into consideration the EU's and the legal aspect's, that's why it have to be formulated and developed from different scientific side's also, e.g. legal, economic, social.*

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Within the topic of discretionary power we have chosen and examined the operation of European Court of Justice. This court is in a special situation and can use its discretionary power in a unique way considering other national courts.

These specialities arises from the EU's special situation. The European Union was established to promote the cooperation between European States. It is a supranational institution. The EU obtained this kind of power from the States. The States confer their competence on the EU and after that The EU can make decisions in connection with issues arising in these competences.

Let me show what kind of competences these are:

The main aim of the establishment of the EU was to create a great power next to Russia and the USA. It was available with economic cooperation. On the other hand the

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States did not want to give up their autonomies but it was favorable in the field of economy. Although the competences have been expanding, these are mainly economic competences. The Treaty on the functioning of the EU defines exactly these competences. These are the exclusive competences.

The basic foundation of the economic cooperation is the free movement of goods, services, capital and people. The States are obliged to guarantee these freedoms. Most cases before the court are in connection with the violation of the freedoms.

So returning to discretionary power...Via the legal cases in connection with the violation of freedoms I would like to show that in similar cases the Court judged in different way.

We can speak about the discretionary power of the EU Court, but just in a small scale.

1. THE EUROPEAN COURT OF JUSTICE (Torma, 2012)

The court was established in 1952 by the Treaty of Rome. Its establishment influenced the birth of Community law to a large extent. Community law like any other legal system of the Member States has become an integral part of the legal system of the member States but has remained independent of national jurisdictions. Community law needs effective judicial protection to ensure its implementation and observation.

The European Court of Justice guarantees this protection.

The treaties and its modifications define the tasks and the structure of the Court. The Court operates in Luxemburg. The European Court of Justice comprises 28 members, one judge from each member state. The judges hold office for a renewable term of six years. Every three years, half of the judges are replaced, which ensures the continuity of the jurisdiction. The number of the members always orients to the number of the member states. Although the number of the members is even controversial, it can ensure the legitimacy and expresses the equality of the member states.

The court is helped by eight advocates-general, whose job is to present opinions on the cases brought before the court. Each advocate-general is appointed for a term of six years, which can be renewed. Their opinion must include the list of acts that the advocate general responsible considers to be applicable in the given case. They must also submit specific recommendation for the Court's decision, which are not binding on the court. The governments of EU countries agree on whom they want to appoint.

The court consists of three institutions, which are the following:

The first is the Court.

- If the Court becomes increasingly overloaded with cases, the General Court helps the Court's work. The Court of General was established in 1989. It facilitates faster and more effective jurisdiction and relieve the Court by assuming some of its task. Its primary Duty is the uniform interpretation of community law. Furthermore, the 'General Court' deals with cases brought forward by private individuals, companies and some organizations and cases relating to competition law.
- The Treaty of Nice introduced the possibility to set up judicial panels with special competences. As a result, the EU Civil Service Tribunal was established in 2005. This Tribunal rules on disputes between the European Union and its staff. The newly specialized court, composed of seven judges, is called upon to adjudicate in disputes between the European Union and its civil service, a jurisdiction until 2005 was

exercised by the General Court. Its decisions will be subject to appeal on questions of law only to the General Court and, in exceptional cases, to review by the European Court of Justice. It is composed of seven judges, who are appointed by the Council for a period of 6 years. The judges are usually the former judges of the Court or the General Court.

2. THE TASK OF THE COURT

The EU is a special community. All of the Communities need rules and law in order to operate. That is why each community needs an organ which ensures the implementation and observation. In the case of breaching law the Court's task to solve the problem and administer justice.

The Treaty of Rome precisely determines the task of the European Court. It is necessary because the EU has no competence in every legal case, which can be observed in the Member States. It determines the following: *...The Court and the first instance Court- in accordance with their competence- ensure the respect of law under the interpretation and implementation of this Treaty.*

Nowadays the Treaty about the operation of European Union lays down the tasks of the Court, which are as follows:

The most important task is to ensure that Community law is uniformly interpreted and implemented in each Member State. The court provides that the Member States fulfill their obligations arising from the Treaties. It supervises the observance of Community law and monitors and ensures that the EU institutions act in line with their competences as stipulated by the Treaties.

The Court has to give its opinion on the compatibility with Community law of any international agreement to be concluded by the EU or the member state

It judges the legal disputes between the institutions of EU. It supervises the legality of the provisions of the EU institution.

The Court of Justice has played a fundamental role in the development of European integration by executing its duties pursuant to the Treaties. (Künnecke, 2007)

The Court has to fulfill its tasks according to the provisions of Treaties. The Treaty of Rome defines exactly these tasks, because that Treaty is dealing with the functioning of the European Union.

3. WHAT DOES DISCRETIONARY POWER EXACTLY MEAN?

In a state the legislative power is usually the Parliament which creates laws and rules. The Court has to decide according to these laws. In theory we should say that the judges just simply apply the laws to the actual case. But it is not true, because in practice the judges a kind of legislative power. We all know that the laws in special cases can be unfair. Because of these the judges has the right to take into consideration other legal solutions and choose at their own discretion. E.g. the court often applies higher Courts' former decision. And this is what we call discretionary power. So the exact definition is the following: The discretionary power means that the judge has the right to choose from more legal solutions at the discretion of his own. So the judge has to find the best legal

solution and from the solutions he/she can choose the most appropriate. The judge can decide which the best is.

Of course, discretionary power in the case of the EU court works in a unique way. It arises from the division of the competence between the EU and the Member States. There are exclusive competence, shared competence with the States and third competence that stayed within the scope of the States. The court cannot make decision in the cases where competence stayed in the Member States' scope.

The EU's most important aim was to create economic union. In order to achieve this aim the Member states accepted the free movement of capital, labour, goods and services. Although member States do not apply direct „obstacles” such as customs but lot of problems come from this agreement.

So in most cases the EU court deals with the guarantee of free movement of goods capital labor and services. The Court has made different decisions in similar cases. So the court used its discretionary power and decided its own discretion.

For each of the four I would like to show examples where the cases were similar but the court adjudged in different way.

4. FREE MOVEMENT OF LABOUR/ PEOPLE

The case of van Duyn: in 1974 Yvonne van Duyn (a Dutch woman) wanted to go the UK in order to work for the Scientology Church. The Home Office denied her entrance to the UK for this aim. The reason of the rejection was that the activity of this Church was considered to be dangerous to society. The Dutch women turned to the Court. Because under the provisions, the Member State can deny the entrance if the reason of the rejection is in connection with the conduct of the person who asked for permission.

In this case, it is not acted about that person, it is about society (Scientology Church), which activity is forbidden.

The judge accepted the Home Office's decision. The Court explained: If somebody belongs to a forbidden religion denominations can be a reason to deny the permission.

In another case, in the Adoui and Cornuaille case two French women wanted to travel to Belgium in order to work in a French Bar as bartenders. The French competent authority denied the residence permission because this bar was morally suspicious. The question before the court was that under the restrictions it is possible to deny the entrance to the state.

As we have mentioned before, the court should take its decision according to the quality of the person who asks the permission. In the former case the court took into consideration, to what kind of society does the person belongs, or should belong.

Now, in this case the Court decided that the conduct of the person cannot be so sufficiently serious that it can be the reason of rejection of the permission.

The question of rejection depends on public safety and public order. It is interesting that belonging to a religious denomination can be the reason of rejection, but working as a prostitute cannot.

5. THE FREE MOVEMENT OF GOODS

In 1979, Henn and Darby wanted to transport sex movies into UK but the English authorities confiscated the goods and started a criminal procedure against them. Henn and Darby reported the case to the EU court and they referred to the UK limiting the free movement of goods. The UK referred to the protection of the public morals before the Court, which can be the reason of limitation.

The EU court accepted the English decision because it does not realize perceptible restriction.

In another case in 1986 the situation was very similar but it ended up with another decision.

Mister Cogenate wanted to sell erotic objects in England. The English authorities also denied this activity. They referred to the protection of public morals again. Now in this case it was not acceptable. The court declared in its decision that England realized the limitation which was not legal under the EU provisions.

If we take into consideration the rules the Court should have decided in the same way. Is the cases realize the limitation rule or not? And if it was realized it can be legal regarding to the protection of the public morals or not?

But the Court takes into consideration other facts such as English rules etc... that is why it could make different decision. It also depends on their discretionary power.

The free movement of services

It is difficult to make difference between labour and service. The difference is that the services are just temporary.

Let us introduce the Schmidberger case

In 1998, Eugen Schmidberger had an international transporting company and he and his employees used the Brenner motorway for transportation via Austria. On 12 June 1998 there was a demonstration for environmental protection held on the mentioned motorway through 20 hours. During that period Schmidberger could not transport on the Brenner Motorway which caused damages for him. He asked the Austrian State to refund his damages at first. Of course, the State did not want to fulfill his claim. Thus Schmidberger turned to the EU court. He stated that Austria and the State's authorities violated the freedom of services. However Austria asked the rejection of the lawsuit and referred to the freedom of expression as a fundamental right guaranteed by the Constitution, which is more important than the freedom of services between Member States.

The court rejected the Austrian pleading and obliged the State to refund Schmidberger's damages.

For the reason to make a comparison, We would like to mention the case of Omega Spielhallen.

The Omega Spillhallen has operated an installation, called laser drome inspired by the Star wars movie. This game simulated killing people, the game was banned by the German police, it has referred that the game violated respect for human dignity guaranteed by the German constitution.

Omega Spilhallen took the case before the EU Court. They referred the violation of freedom of services. However, like in the case mentioned before, it has referred, that the human dignity is a fundamental right and the laser drome game can cause a violent habit in people's which tends to imitate the death of the people playing with this kind of installations.

The Court did not declare the responsibility of the German authorities and the violation of freedom of services, because the court admitted the priority of fundamental right.

It is interesting because in both cases fundamental rights were referred to, but the decisions are different.

6. DISCRETIONARY POWER IN OTHER FIELD, FOR EXAMPLE IN THE ADMINISTRATIVE FIELD

Discretionary powers exercised by administrative and legal authorities are permissive, and not binding. These powers are granted to these officials by statute or delegation. Discretionary powers do not impose an obligation on a decision-maker to exercise them or to exercise them in a particular manner.

Administrative agencies must exercise discretionary powers in accordance with legal requirements. Discretionary power must be used reasonably, impartially and avoiding oppression or unnecessary injury.

Generally, administrative agencies are given broad discretion to exercise their administrative authority. Generally, statutes expressly confer the right to exercise discretionary power to administrative agencies. However, administrative agencies' duties necessarily include the right to exercise discretion. Reason for granting discretionary power to administrative agencies is because they possess experience and specialization in a particular area. This experience and specialization helps agencies in making decisions in the agencies' area of expertise.

Administrative agencies are provided with discretionary power to ascertain place and time to hear and decide matters that come before it. Agencies have the power to prosecute or enforce matters through civil or criminal process.

Administrative law judges have discretion to abstain from participating in a legal proceeding due to a conflict of interest of the adjudicator. Abuse of the discretionary power can be alleged only to reverse a decision and not to allow it. In addition to that, an adjudicator has power to decide whether or not to impose a sanction.

In *Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos.*, 498 U.S. 211 (U.S. 1991), the US Supreme Court stated that an administrative agency enjoys wide discretion in ascertaining the best way to handle related, yet discrete issues in terms of procedures and priorities. Administrative agencies exercise wide discretion in selecting the methods to attain the legislature's goals. Administrative agencies can adopt rules and policies to carry out duties delegated by legislature. The rules and policies should be consistent with statutory provisions. This discretion is allowed to administrative agencies to adapt their rules and policies to the demands of changing circumstances. Administrative agencies' discretionary power extends to deciding remedies for infringement of agency policies. Administrative agencies have specialized knowledge and power to achieve legislature's objectives. Hence, the agencies have discretion to develop appropriate enforcement policy to attain statutory obligations. Administrative agencies can also decide on appropriation of funds available, efficiently and economically to accomplish its policies.

7. CONCLUSION

The professionally supported answer - why the EU Court needs discretionary power – is the following:

In the continental jurisdictional systems the written law is the basic of the decisions. However, there are even gaps in the legal system. And if there is law under which the case can be solved, a law can be interpreted in many different ways. As we return to the mentioned Schmidberger and Omega's cases, for instance there are also fundamental rights in the cases, but the protection of human dignity may be more important and more supported than the protection of the freedom of express.

A judge always meets with the whole case with all of its details. He/she can see that to make a fair decision within the legal limits is very complicated. On the one hand he/she has to met with the rules, on the other hand he/she has to be fair and create justice. Because sometimes applying the same law creates injustice.

The interpretation is the task of the Court. These interpretations are binding to the laws. As I have mentioned before the court is a kind of legislative power as well which arises from the Treaties. The Treaties admit that the creative legal activity of the Court is not contrary to the will of the legislature.

That is why we can speak about the discretionary power of the European court of Justice, which earns bigger and bigger task/position in the daily routine of the mechanism of EU, especially in the Court.

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