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Data: 06/11/2026 17:56:04

Introduction

Wprowadzenie

The aim of the volume[1] deals with the theoretical and practical analysis of the phenomenon of the judicial discretion and its balanced scale in the context of the autonomy and independence of the judiciary as well as of its general relation to the legislatures in the statutory law order.

The initial problems that might be examined deal with the essence and the sources of the judicial discretionary power seen in the light of the main legal constructs, institutions and practices. The considerations can be focused on both the features of universality, inevitability and usefulness of the discretion and its determinants, resulted from the combination of the natural factors (legal language, dynamics of social environment of the law, etc.) and the legislative policy opening the legal system (irrespective of these sources) through such constructs like various type of legal principles and general clauses as well as the semantic indeterminacy of the legal texts.

Both types of sources of discretion lead the judge and judiciary as a whole to the constant wandering between the intra-legal and extra-legal axiology, between reading the legislator's intentions and open references to the ethics (social and professional), political morality, religion, customs, etc. Judges, exercising the judicial autonomy must, therefore, estimate the direction and balance the scope of the discretion, the result of which may shift the boundaries of the legal order without participation of the legislator.

There must function, however, some factors limiting the scale of judicial discretion and making the legal order functional. Some of them are of the legislative character, other ones depend on the autonomous activities of judiciary. Taking independence of the judiciary as a model principle excluding any direct outside (especially political)

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Data: 06/11/2026 17:56:04

impact on the jurisdiction, the judicial dialogue and the stable lines of jurisdiction (seen also in various types of precedential practice) should be taken into account as the most important means of that limitation, balancing the flexibility with certainty and uniformity of the implementation of the law. The consideration of that issue should bring the answer to the question if the achievements of the judicial practice and its precedential unification appear to be the most valuable and effective (though not very rapid) means of the control of the size of judicial discretion.

Besides the general outlook of the judicial discretion, its detailed scope should be confronted with a comparative perspective. The type of political regime as well as the variety of branches of law (constitutional, civil, penal, administrative, human rights, etc.) and the particular types of the decision-making processes (mediation, constitutional review, judicial review of administrative decisions, etc.) seen in the light of the differences between the statutory and common law orders would allow to precise and deepen the problem of the optimal size of the judicial discretion in the light of the relation between legislature and judiciary.

Many problems that are mentioned above have been discussed at the special workshop "Balancing Judicial Discretion: Between the Legislative Policy, Open Axiology and Precedential Practice" organized during the 29th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) in Lucerne (July 7–12, 2019)[2]. The workshop has shown the diversity and the extent of the axiology of judicial discretion. In this volume, some authors have developed the workshop presentations. Some other ones "joined the team", enriching the field of the analysis from the theoretical and practical perspective.

First part of the volume starts with the pure theoretical analysis of the axiological constructs of the legal system (A. Bröstl, M. Kordela) and their role in the judicial application of law (L. Leszczyński, J. McClellan Marshall) as well as the analysis of the judicial discretion from the point of the legislative policy and the economic justification (T. Biernat, T. Guzik). In its second part papers present particular practices in that judicial discretion appears, with the focus on the judicial review of administrative activity (I. Hoffman, G. Pesce, H. Kaneko) and on the bailiff's activities in the enforcement of the law (P. Szczekocki) as well as on the role of judicial discretion in the reform of the civil code (Y. Yamada), in the treatment of the persons with disabilities (A. Martínez-Pujalte) and in using the construct of "the well-being of the child" ("the good of the child") in the various branches of law with the particular emphasis on the family law (K. Hanas).

Katarzyna Hanas, Leszek Leszczyński

[2] Special Workshop No. 81, "Balancing Judicial Discretion: Between the Legislative Policy, Open Axiology and Precedential Practice", chaired by L. Leszczyński and A. Szot (see *Dignity, Democracy, Diversity*, Lucerne 2019, p. 71).