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Economic Justification of Judicial Discretion

Ekonomiczne uzasadnienie swobody sędziowskiej

SUMMARY

The thesis of this article is that judicial discretion can be justified by economic reasons. Therefore, the work is divided into three parts. First, there are presented two basic approaches towards judicial discretion which are present in Polish legal literature. Second, there are introduced two self-prepared cases from two different areas of law which are penal and tort law. With the usage of economic tools, there is shown that giving judges decisional freedom can lead to economically efficient sentences. According to the second example, judge's discretional power to calculate the amount of compensation can be very important to maintain efficient tort.

Keywords: economic analysis of law; economic justification; judicial discretion

INTRODUCTION

Economic analysis of law provides valuable tools to examine legal institutions as well as various legal-theoretical concepts. In the article, I use the economic approach to prove the usefulness of judicial discretion and to show, why lawyers need it. Then, I try to defend the thesis that judicial discretion can be justified by economic reasons. This means, that I am focused only on the economic justification of judicial discretion. Consequently, this work is divided into three parts. First, I present basic issues connected with judicial discretion, especially I introduce main standpoints that occur in Polish legal literature. In the second part, I provide two self-prepared legal-economic cases from penal and tort law. These examples are the basis to show the importance of judicial discretion. In the last section, I discuss my approach to the presented problem.

BASIC ISSUES

The notion of judicial discretion can be understood differently. According to the dictionary definition, "discretionary" means "being left to discretion or to be decided according to own conviction, unspecified, not limited by regulations"[1]. In English dictionary "discretion" is described as "the freedom to decide what should be done in a particular situation"[2]. In Polish legal dogma, there can be distinguished two fundamental views: the "narrow" one and the "broad" one. According to the narrow approach judicial discretion (in this way I mean: decision which is made by judge) must find its basis and justification in legal articles[3]. Those legal provisions limit judge's choice, especially alternatives that he or she has[4]. They also limit his or her freedom to determine legal consequences and to make decisions on procedural matters[5]. Such an understanding of judicial discretion strongly limits judicial freedom in legal decision making, because the court has precisely defined legal and normative framework. On the other hand, the broad approach refers to every sphere of judge's activity, in which he or she is left with a very wide scope of freedom. This means, that he or she has a wide scope of freedom in decision making throughout the whole process of application of law: from the process of determining the validity of a given provision, through its interpretation and assessment of collected evidence, towards the subsumption of determined fact (state of affairs) to the legal norm and the choice of legal consequences, including the situation when the legislator uses terms that are under-defined or when there are general legal clauses[6].

In this article, I refer only to the narrow approach of judicial discretion. This is because my self-prepared cases concern the situation, in which a judge has to make decision in a precisely defined legal framework.

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[1] W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, Warszawa 1988, pp. 132 ff. (own translation).

[2] *Discretion*, www.lexico.com/definition/discretion [access: 5.01.2020].

[3] B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretyczno-prawne*, Toruń 2004, pp. 103 ff., 194.

[4] *Ibidem*, pp. 103 ff., 194.

[5] *Ibidem*, pp. 103 ff., 194.

[6] *Ibidem*, pp. 17, 104 ff.; W. Sanetra, *Swoboda decyzji sędziowskiej z perspektywy Sądu Najwyższego*, [in:] *Dyskrecjonalność w prawie*, red. T. Stawecki, W. Staśkiewicz, Warszawa 2010, s. 35 ff.

ECONOMIC APPROACH TO JUDICIAL DISCRETION

1. Penal law

In order to analyze prepared example, I have to make an additional assumption that criminals act as they were instrumentally rational egoists. Such assumption is really the basic one, especially if lawyer wants to conduct economic analysis of various legal cases[7].

Therefore, I assume that there is a criminal, who wants to make a bank robbery. He or she wants to steal $ 1,000,000. In addition, I presume, that in this factual state there is a penal law, which predicts a punishment between 5 and 15 years of imprisonment. The final punishment lays in judge's discretion. In economic analysis of law, there is famous inequality known since J. Bentham's works, which until today is used to analyze penal law. This inequality reads as follows:

$$G > P * L^{8},$$

where:
G – gain obtained thanks to committing a crime,
P – probability of punishment,
L – loss resulting from punishment.

The meaning of this inequality can be expressed by one sentence in the following manner: the criminal will commit an offence only if the product of the multiplication of the probability of punishment and the loss resulting from punishment is lower than gain obtained thanks to committing a crime.

This means that rational criminal calculates, whether the potential gain from committing a crime will be higher than the product of the two other, aforementioned factors. This inequality is a very useful tool used to design legal provisions of penal law. It is because this instrument indicates, that public entities has influence on two important elements, which can regulate the level of delinquency. It must be remembered, that public organs do not have impact on gain which criminals can receive through committing an offence. Nevertheless, the probability of being punished is the result of how public bodies[9] work and how effective in his actions

[7] For instance, see J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, pp. 18–19; J. Stelmach, *Spór o ekonomiczną analizę prawa*, [in:] *Analiza ekonomiczna w zastosowaniach prawniczych*, red. J. Stelmach, M. Soniewicka, Warszawa 2007, p. 14; R. Cooter, T. Ulen, *Law & Economics*, Boston 2012.

[8] J. Stelmach, B. Brożek, W. Załuski, *op. cit.*, pp. 144, 147.

[9] By using the term "public bodies" I mean such organs as police, prosecutors and other enforcement bodies.

is the criminal[10]. However, the state – thanks to judges – has full control over the last factor which is loss resulting from the punishment. In our case judge can decide, how much this loss will be. He or she has clearly defined borders of his or her discretion and he or she can independently choose whether it will be 7, 9 or 15 years of imprisonment. However, in order to conduct subsequent steps in this analysis, there must be made other presumptions. Thus, I assume, that the probability of being caught and punished is 0.5. According to the next assumption rational offender calculated, that one year of imprisonment for him is worth $ 200,000. So, aforementioned inequality now has the following form:

$$1{,}000{,}000 > 0.5 * (200{,}000 * x),$$

where:
x – years of imprisonment.
Therefore:

$$10 > x.$$

This means that for criminal it would be still profitable to commit a crime even if he or she was sentenced to 10 years of imprisonment. However, it would not be economically effective if the punishment was 11 of imprisonment or more. Consequently, thanks to presented example it is possible to make the following conclusions:

1. In such constructed case (all other assumptions constant), if the law predicted the punishment with upper border under 10 years of imprisonment, it would be profitable to commit a crime in every situation.
2. In such constructed case (all other assumptions constant), if the law predicted stiff (in other words: non-elastic) punishment for committing a crime – for instance only 7 years of imprisonment – it would be profitable to commit a crime in every situation.
3. In such constructed case (all other assumptions constant), judicial discretion plays notable role, because elasticity of law (those borders of choosing punishment) in the connection with judicial discretion still gives a chance to discourage criminal from committing a crime. This is because previous sentences can give him some instructions to predict what can be the punishment for committing such a crime. If there would be 100% similar cases, in which judges sentenced criminals to at least 12 years of imprisonment, it would be obvious for him or her, that this is not worthy to commit a crime.

[10] J. Stelmach, B. Brożek, W. Załuski, *op. cit.*, p. 144.

4. On the other hand, we can also put the probability of being punished of certain value of imprisonment. We can modify this inequality and calculate, for instance, that we have a 75% chance, that if we are caught, the judge will sentence us to 10 years of imprisonment. Then, we have only a 25% chance, that if we are caught, the judge will sentence us to 11 years of imprisonment.

In such modified case, the inequality reads as follows:

$$1{,}000{,}000 > 0.5 * (200{,}000 * 0.75 * 10)$$
$$1{,}000{,}000 > 750{,}000$$

$$1{,}000{,}000 > 0.5 * (200{,}000 * 0.25 * 11)$$
$$1{,}000{,}000 > 275{,}000$$

The above-mentioned mathematical formulas prove that in such adjusted case it would be still profitable for the offender to commit a crime.

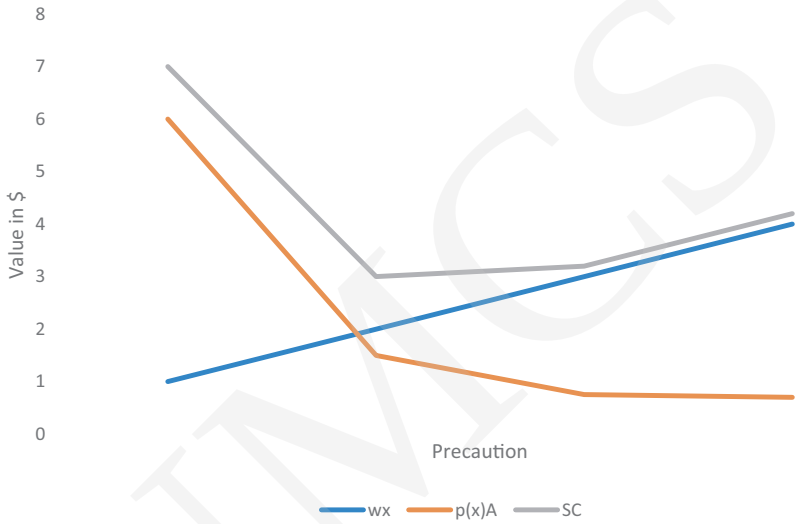
2. Tort law

Judicial discretion is present not only when the court has to convict the criminal. We can find it also in the civil law, for instance in the branch of tort law, which in essence is very similar to penal law. In this section, I want to show, how judicial discretion works in this sphere of law and that it plays a significant role in the process of redistribution of material goods in the case of the occurrence of the accident. To analyze those issues again I have to assume, that all entities – injurer, victim and judge – act as they were *homo oeconomicus* (especially as they were instrumentally rational entities). The case that I prepared concerns strict tort liability. According to economic analysis of tort liability I want to introduce the following terms, that can be illustrated in the consecutive graph.

Figure 1 illustrates the economics of tort liability and is similar to the drawing which is placed in R. Cooter and T. Ulen's work[11]. It presents, that committing an accident is the phenomenon which balances between two factors: motivation and costs. The term "motivation" expresses whether the entity wants to take precautions in order to avoid the occurrence of the accident. This notion is represented by the orange curve described by the formula $p(x)A$. This curve shows, that if precaution costs (motivation to avoid harm) are higher, the probability of the occurrence of the accident is lower. In turn, the blue curve represents precaution expenses and the fact, that if the individual is more cautious, he or she has to spend more money. Finally, there is the grey curve which shows the costs of the whole society. It is the sum of the orange and the blue curve. It has the "U" shape and the bottom of

[11] R. Cooter, T. Ulen, *op. cit.*, p. 200.

this curve is the point, which indicates the level of precaution that minimizes the expected social costs of the accident. In other words, this is a socially efficient level of precaution[12].



wx – precaution expenses (in $); *p(x)A* – expected loss, which is the probability of occurrence of accident multiplied by the value of loss; *SC* – expected social costs of accidents; *wx* + *p(x)A*

Figure 1. Economic analysis of tort liability

Source: Own work.

In the prepared case, I try to test the strict tort liability. Therefore, I presume the rule of law which is a strict liability with perfect compensation. This means, that whenever an accident occurs, the injurer must pay damages equal to the cost of the harm[13]:

$$\text{damages} = \text{cost of the harm} = A.$$

The injurer's expected liability is expressed by the formula $p(x_i)A$. This is the probability of an accident multiplied by the harm caused by it. In accordance with all the previous deliberations, the expected total costs that the injurer can bear under the rule of strict liability with perfect compensation equal to $w_i x_i + p(x_i)A$. This proves, that the injurer has an economic incentive to minimize costs as well as the probability of the occurrence of the accident[14]. In other words, the injurer will

[12] *Ibidem*, p. 201.
[13] *Ibidem*, p. 203.
[14] See also *ibidem*.

calculate and choose such x_i which will minimize the value of those factors. Thus, I can conclude, that if two requirements are met, i.e. there is the rule of strict tort liability and there is perfect compensation, consequently the injurer has appropriate incentive (motivation) for efficient precaution.

The concept of judicial discretion obviously can be connected with the notion of perfect compensation. This is the judge's role to calculate and to adjudge appropriate compensation. Aforementioned economic calculations show that perfect compensation plays a significant role in the economic system of strict tort liability. Therefore, the legal concept of judicial discretion gives judges a wide range of freedom to calculate compensation. So, it is judge's role to grant compensation, which is perfect. Consequently, it is optimal to give judges such freedom. There is a high risk, that other solution would not be sufficiently effective. Let's assume, that there is a legal rule according to which compensation is the multiplication of the lowest salary in a given country. What is more, when the accident causes medium harm, the legal rule precise, that compensation equals 5 * lowest salary. Finally, when the harm is high the compensation equals 10 * lowest salary. In this case, the judge has some indications on how to qualify what is medium and what is high harm, but it is his or her discretional decision to finally decide about this. Now, let's assume that in this case the lowest salary is $ 1,500. Imagine, that there is a car accident in which victim's automobile was totally destroyed. The value of the car is $ 30,000. In addition, the costs of recovery of the victim was $ 2,000. What is more, the costs of non-material harm are not included. Therefore, material harm equals $ 32,000 but the judge is obliged by the law to grant compensation of $ 15,000. On the other hand, we can imagine, that there is a car accident in which material harm equals $ 14,000 (costs of repair of broken car is $ 11,000 and the costs of medical recovery are $ 3,000). In such a situation for the value of harm was too high to qualify this as medium harm and simultaneously it was still too low to classify it as high harm, but the judge had to make some decision.

In the first example, the injurer has even too much motivation to be careful – from economic point of view precaution expenses that he should bear are economically inefficient, because the resulting profit (which in this situation is lower probability of the accident) is too expensive. In the light of the economic analysis of law, this is inefficient allocation of goods. On the other hand, victim gained the economic incentive to be less cautious – from his or her stand it was economically efficient to be the participant of the accident. According to the second example, it is justified to make the following conclusions. The injurer does not have enough economic incentive to make sufficient precautions. Due to that, the whole society loses because the probability of the accident is not as low as it could be – and because of that from the economic point of view it is not efficient allocation of goods. What is more, it is simply unjust, that there is no compensation for the harm that injurer had to suffer.

This simple case illustrates, that stiff legal rule which regulates how to calculate compensation is economically inefficient. However, we can empirically anticipate that in most cases this rule will be economically inefficient because there will be legal matters in which injurer's harm will be higher than awarded compensation or there will be actions, in which harm of aggrieved party will be lower than granted restitution. What is more, there is a very low probability, that there will be case in which such regulation could provide perfect compensation for the harmed party. In the Polish Civil Code judge has discretional power to calculate compensation under tort liability – from the presented point of view, it is allowed to state, that this is economically efficient solution.

ANALYSIS AND DISCUSSION

In the prepared cases, I had to make very strong assumptions. In the example from penal law, those presumptions read as follows:

- criminal and judge behave as they were *homo oeconomicus*,
- the value of probability of catching the criminal equals 0.5,
- the value of loss of being punished is $ 200,000,
- the value of gain from committing a crime equals $ 1,000,000.

I am fully aware, that those assumptions are very strong and that in real life it is hard to find exact values of those factors. However, it is also probable, that some criminals operate in this way. Nonetheless, it is only approximation of human behaviour. The main aim of this case was to demonstrate some mechanism.

According to this mechanism it can be said, that judicial discretion has a specific economic influence on legal practice. It would be possible to make all aforementioned calculations if we only knew all needed values. Though, the aim of this case was to compare situation, when we have stiff legal rules, with the situation when we have elastic law, which is provided by judicial discretion. To my mind judicial discretion is economically justified. In the case of penal law previous sentences have a strong influence on calculations of the offender. If judges are strict and severe, the possibility of committing a crime is low. If they are forgiving, such probability is high. This phenomenon can be observed in real life.

Judicial discretion also eliminates the risk of establishing strict, well-specified legal rules. Social life is highly unpredictable, thus we need elastic, general and abstract rules, which then can be specified through the process of their application – in the courtroom, by judges. This is why judicial discretion is a very useful tool and is needed in legal practice. In our case, if we established the punishment

on a strict level of 7 years, we would cause that in specific situations[15] criminals would feel free to commit an offence. The criminal law must be elastic enough, but at the same time it can not be too strict. This is because if the law predicted 100 years of imprisonment it would be too costly for the society, and it would be depreciated in the eyes of citizens. Here we have another problem of the penal law – whether it is humane to sentence people to such high punishments? Law should be not only economically efficient but also just. Nevertheless, this is an issue for different discussions.

Going to the analysis of the second case I had to make the following assumptions:

- judge, injurer and victim behave as they were *homo oeconomicus*,
- the more precaution expenses are, the lower probability of the occurrence of the accident is,
- judge is able to calculate and then to grant perfect compensation,
- I had to arbitrary assign values of suffered harm,
- in the arbitrary way, I invented two legal rules which describe how to calculate the compensation.

According to the assumption about human rationality – what relates also to the case from penal law – I have to clarify, that I treat this presumption as a normative postulate, rather than as empirical basis. In other words, in my analysis people should behave as instrumentally rational egoists. The *homo oeconomicus* model can be perceived as the approximation (and target) of human behaviour. The same concerns the possibility of calculation of perfect compensation. Perfect compensation is rather an exception and coincidence than a regular occurrence. Nonetheless, judges should strive to granting only perfect compensations.

Prepared case from tort law aimed to show that judicial discretion is legal mechanism, that can increase the likelihood of awarding perfect compensations in trials. It is very unlikely that thanks to stiff rule it will be possible to award perfect compensation. Therefore, judicial discretion plays a significant role in adjudication of such type of compensation. This is also strongly connected with the function of perfect compensation in the economic justification of strict tort liability. For this reason, it can be stated, that judicial discretion is important from the point of economic efficiency of tort law.

Finally, I must emphasize, that I will not discuss with the objections which concern methodology of this article. Despite the fact that I know both weaknesses and advantages of the Law & Economics, I decided to use its tools and methodology with full awareness. The heated debate about methodology of economic analysis

[15] These are circumstances in which criminal prices his life very low, or the possible gain from committing a crime is very high.

of law is present in other legal works[16], so – mainly because of size limitations – it is not justified to repeat here that debate.

The main aim of this article was to show, that from an economic point of view it is justified to provide judicial discretion in penal and civil law. I tried to prove, that this concept plays a notable role in providing appropriate level of general prevention as well as economically efficient model of tort liability. I deeply believe, that I succeeded.

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STRESZCZENIE

Tezą artykułu jest przekonanie, że dyskrecjonalność sędziowską można uzasadnić względami ekonomicznymi. Artykuł jest podzielony na trzy części. W pierwszej części przedstawione są dwa podstawowe podejścia do dyskrecjonalności sędziowskiej, które są obecne w polskiej literaturze prawniczej. Natomiast w drugiej – dwa samodzielnie przygotowane przypadki z dwóch różnych dziedzin prawa, które obejmują prawo karne i deliktowe. Przy użyciu narzędzi ekonomicznych wykazano, że przyznanie sędziom swobody decyzyjnej może prowadzić do efektywnych ekonomicznie

[16] See J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków 2004, pp. 143–154; R. Posner, *Economic Analysis of Law*, Boston 1986, pp. 3–26; L. Kornhauser, *The Economic Analysis of Law*, https://plato.stanford.edu/entries/legal-econanalysis [access: 26.05.2020]; J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Kraków 1999, pp. 184–190; T. Ulen, *The changing methodologies of Law and Economics*, [in:] *Encyclopedia of Law and Economics*, ed. G. De Geest, https://doi.org/10.4337/9781782547457 [access: 28.05.2020]; D. Friedman, *Law and Economics*, [in:] *The New Palgrave Dictionary of Economics*, London 2018, pp. 7642–7649.

wyroków. Zgodnie z drugim przykładem uprawnienia dyskrecjonalne sędziego do obliczenia kwoty odszkodowania mogą być bardzo ważne dla utrzymania skutecznej odpowiedzialności deliktowej. W końcowej części omówiono metodologię przeprowadzonych badań i wynikające z nich wnioski.

Słowa kluczowe: ekonomiczna analiza prawa; uzasadnienie ekonomiczne; dyskrecjonalność sędziowska