

Om fakultativa regler

En studie av svensk och unionsrättslig reglering av
skönsmässigt beslutsfattande i processrättsliga frågor



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av

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Abstract

On discretionary rules in civil procedure – A study of Swedish and EU regulation of the exercise of discretion in procedural matters.

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Keywords: Judicial Procedure Act, civil procedure, flexibility, effectivisation, discretion, discretionary rules, classic discretion, interpretive discretion, national procedural autonomy, principle of loyalty, judicial review, judicialization, decentralization, fragmentation, europeanization.

Increased flexibility has been one of the most consistently pursued goals of civil procedure reforms in Sweden during recent decades, resulting in a near doubling of the number of rules intended to confer discretion upon the courts. Meanwhile, the Court of Justice of the EU (CJEU) has in its case law increasingly ventured into core areas of procedural law, suggesting *inter alia* that the legislative choice to confer discretion on the courts affects the effective enforcement of EU law.

The thesis examines recent development in civil procedure in Sweden. It argues that EU law influence is liable to hamper the Swedish reforms in fulfilling their purpose and that the effect of the reforms may instead be to further the impact of substantive EU law before Swedish courts. It also argues that the flexibility-driven reforms have structural effects on the allocation of normative powers between the Union and the Member State, as well as between the legislative branch and the judiciary.

The CJEU has repeatedly if not consistently used the existence of discretionary powers of the national courts to further the impact of EU law. In doing so the Court has gone beyond what is required by the minimum principles of effectiveness, equivalence and effective judicial protection, and beyond what would have been required by the Member States, had the national rules governing the matter been of mandatory rather than discretionary character. Increased judicial discretion in national procedural regulation thereby strengthens the effectiveness of EU law. The thesis therefore suggests that an EU law perspective should be adopted in further reforms of civil procedure. It also outlines a strategy for the application of discretionary rules in Swedish courts, which is intended to safeguard the fundamental principles of national civil procedure while ensuring conformity with EU law requirements.

The exercise of judicial discretion in lower courts is at least in theory subject to full judicial review in appeal courts. In practice, however, the thesis shows that the willingness of appeal courts to review discretionary decision-making depends on the construction of the rule. In this respect the thesis distinguishes between classical and interpretive discretion, arguing that the latter appears to give rise to a more thorough review while the former presents courts of first instance with a larger degree of autonomy. This finding presents the legislator with a tool for the future construction of discretionary rules.

Lastly, the thesis points out that the development towards increased judicial discretion entails that legal control of the procedure is transferred from political to judicial actors. This judicialization in turn leads to decentralization as the power is distributed to all national courts as a matter of case management. However, it also leads to europeanization as the CJEU delivers judgments that constrain the national courts' exercise of discretion. As a consequence, the holistic perspective on civil procedure is lost, as neither the lower instance courts nor the CJEU has the necessary overview of the systemic impacts of their decisions.

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