World Academy of Science, Engineering and Technology
International Journal of Law and Political Sciences
Vol:14, No:02, 2020

Against the Idea of Public Power as Free Will

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Abstract : According to the common interpretation, in a legal system, public powers are established by law. Exceptions are admitted in an emergency or particular relationship with public power. However, we currently agree that law allows public administration a margin of decision, even in the case of non-discretionary acts. Hence, the administrative decision not exclusively established by law becomes the rule in the ordinary state of things, non-only in state of exception. This paper aims to analyze and discuss different ideas on discretionary power on the Rule of Law and Rechtsstaat. Observing the legal literature in Europe and Nord and South America, discretionary power can be described as follow: it could be considered a margin that law accords to the executive power for political decisions or a choice between different interpretations of vague legal previsions. In essence, this explanation admits for the executive a decision not established by law or anyhow not exclusively established by law. This means that the discretionary power of public administration integrates the law. However, integrating law does not mean to decide according to the law, but it means to integrate law with a decision involving public power. Consequently, discretionary power is essentially free will. In this perspective, also the Rule of Law and the Rechtsstaat are notions explained differently. Recently, we can observe how the European notion of Rechtsstaat is founded on the formal validity of the law; therefore, for this notion, public authority's decisions not regulated by law represent a problem. Thus, different systems of law integration have been proposed in legal literature, such as values, democracy, reasonableness, and so on. This paper aims to verify how, looking at those integration clauses from a logical viewpoint, integration based on the recourse to the legal system itself does not resolve the problem. The aforementioned integration clauses are legal rules that require hard work to explain the correct meaning of the law; in particular, they introduce dangerous criteria in favor of the political majority. A different notion of public power can be proposed. This notion includes two main features: (a) sovereignty belongs to persons and not the state, and (b) fundamental rights are not grounded but recognized by Constitutions. Hence, public power is a system based on fundamental rights. According to this approach, it can also be defined as the notion of public interest as concrete maximization of fundamental rights enjoyments. Like this, integration of the law, vague or subject to several interpretations, must be done by referring to the system of fundamental individual rights. We can think, for instance, to fundamental rights that are right in an objective view but not legal because not established by law.

Keywords : administrative discretion, free will, fundamental rights, public power, sovereignty
Conference Title : ICGALD 2020 : International Conference on Global Administrative Law and Democracy
Conference Location : Bangkok, Thailand
Conference Dates : February 03-04, 2020