DOI https://doi.org/10.36059/978-966-397-151-3/100-116

SPECIFICS OF IMPLEMENTATION OF JUDICIAL CONSIDERATION WITHIN JUDICIAL DISCRETION

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INTRODUCTION

The accepted truth says: "justitia est fundamentum regni" which means that justice is the base of the constitutional state. However the legislator is not able to regulate actions of the law enforcement officials in each specific life situation[1]. E. Kant in the work "Criticism of Pure Mind" notes that without implementation of consideration, it is impossible to learn any phenomenon, and for its implementation it is necessary to become proficient in transcendental analytics. The philosopher implies division of knowledge (concepts) into elements as a part of whole – "the ideas of aprioristic knowledge"[2]. During the research of the judicial consideration, the scientists are raising a question for themselves: what does the concept "judicial discretion" and "discretion of court" mean? Whether they appear identical? Whether there are expedient exercise of judicial discretion? In legal base the versatility of definitions of judicial discretion occurs, however most of them are almost identical according to their content and essence as they provide identical interpretation of the studied definition.

1. The concept of judicial discretion

The law professor Aaron Barack defined judicial discretion as the power provided to the person to choose between two and more alternatives, each of which is lawful[3]. A.A. Papkova emphasizes on the procedural form of the judicial discretion (or so-called institutional restrictions) and understands this concept as the motivated law-enforcement activity of the court that provided for by legal norms and means the choice of a solution of legal questions, and has general and special limits[4].

A.T. Bonner notes that under the discretion of public authorities, including vessels, it is necessary to understand activity that means the search of the most optimal solution in the legal plane[5].

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[1] Лугинец Э.Ф. Соотношение идеи «процессуальной свободы» и усмотрения следователя. Вестник Удмуртского университета, 2015. Т. 25. Вып. 4. С. 115.

[2] Кант И. Критика чистого разума. «Эксмо», 1781. С. 53.

[3] Барак А. Судейское усмотрение. Перевод з английского. Москва. Издательство Норма, 1999. С. 13.

[4] Папкова О.А. Усмотрение суда. Москва: Статут, 2005. С. 39.

[5] Боннер А.Т. Применение закона и судебное усмотрение. Советское государство и право. 1979. № 6. С. 35.

A.V. Yatsenko considers the judicial discretion as an element of legal status of the judge, along with the rights, duties and responsibility. Therefore, the researcher put into scientific turn the concept of "law-enforcement discretion" with what we completely agree, as there are no doubts about the substantial position of judicial discretion as an important component of law enforcement. However, distinguishing stages of implementation of the judicial discretion and characterizeg the first and second stages, the scientist notices that only at the third stage the judge is guided / begins to be guided by the sense of justice that performs gnoseological function[6]. We deny such opinion. The judge carries out judicial discretion based on legal consciousness, directly connected with it, and guided throughout all stages of implementation of discretion as law-enforcement activity.

There are number of scientists who deny the expedient application of judicial discretion in law-enforcement activity. Therefore, R. Dvorkin claimed that each lawsuit has only one solution, and the law covers various life situations that does not leave place for any discretion[7]. Along with it, the scientist claimed that the positive law has to be estimated also from a position of the moral bases following as a consequence of subjective rights and the principle of equality[8].

Thus, in legal base the versatility of definitions of judicial discretion occurs, however most of them are almost identical according to contents and the essence as they provide identical interpretation of the studied definition.

The judicial discretion is considered in modern jurisprudence as:

1) the principle of implementation of justice;
2) the power which allocated the judge;
3) powers of the court (rights and duties);
4) intelligently forceful activity;
5) activity of the court, as for decision-making;
6) the possibility of implementation of alternative choice in certain institutional limits.

Therefore, we suggest to consider the judicial discretion as: 1) powers on implementation of judicial function; 2) freedom of choice in the limits determined by the law.

Finding out the essence of the discretion, scientists generally apply the terms "choice alternative", "possibility of the choice", "freedom of choice" and others.

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[6] Яценко О.В. Суддівський розсуд як засіб забезпечення справедливості судочинства: дис. … канд. юрид. наук: спец. 12.00.10 – судоустрій; прокуратура та адвокатура. Київ. 2015. С. 43.

[7] Вартапетян Э.Г. Судейское усмотрение как необходимость. Актуальные проблемы российского права. 2007. № 1. С. 386.

[8] Кормич А.І. Історія вчень про державу і право: навчальний посібник. Правова єдність. Київ, 2009. С. 219.

According to the Ukrainian Academy explanatory dictionary the term "freedom" is used in many values depending on any given context. However, for our research the understanding of freedom as an opportunity "to behave at own discretion" and "to work without obstacles in any industry" will be the most distinctive[9]. The concept "discretion", in turn, is interpreted as "a conclusion, decision", "reasoning, reflection" and even "court". The phrase "to the (own) discretion" in accordance with the dictionary means "understanding something respectively to own decision"[10].

Aaron Barack suggests to consider freedom of choice at implementation of discretion in broad and narrow value. In the latter case the choice only between two options is allowed, in broad aspect – the judge has the right to choose from the whole range of alternatives or their combinations[11]. The freedom of choice does not mean an arbitrariness at all. It does not cancel social responsibility. Moreover, it provides understanding of consequences of the actions.

In our opinion, judicial discretion is an intelligently forceful process that occurs in the legal awreness of the judge during adoption of the judgment owing outcoming from determined by rules of law freedom of choice in case solution.

According to O. Rogach, after intelligently strong-willed criterion, the discretion can be internal and external[12].

The intellectual sign is that component that indicates the judge's relation as participant of trial to a specific situation which is considered in court session, the facts of the case, the made decision and also to consequences of such decision, as for the parties, the third parties, and for society in general. It is what belongs to the intellectual sphere of mental activity and provides awareness by the judge of the importance of correctness and objectivity of the made decision. The close connection of discretion and consciousness is having seen in this sense.

Considering the intellectual party of a judicial discretion, it is possible to draw an analogy to direct intention in criminal law doctrine. Consciousness and predictions make intellectual signs of intention, while the desire or the conscious assumptions of consequences – its strong-willed sign. The strong-willed (forceful) sign in criminal science means desire of approach of certain consequences of the action or inaction[13]. Thus, the strong-willed aspect of a judicial discretion directly provides adoptions of the judgment.

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[9] Свобода. Академічний тлумачний словник. URL: http://sum.in.ua/s/svoboda.

[10] Розсуд. Академічний тлумачний словник. URL: http://sum.in.ua/s/rozsud.

[11] Барак А. Судейское усмотрение. Перевод з английского. Москва. Издательство Норма, 1999. 376 с.

[12] Рогач О.Я. Зловживання правом: теоретико-правове дослідження. Ужгород: Ліра, 2011. С. 148.

[13] Положення про порядок та методологію кваліфікаційного оцінювання, показники відповідності критеріям кваліфікаційного оцінювання та засоби їх встановлення. Рішення Вищої кваліфікаційної комісії суддів України 03.11.2016 № 143/зп-16 (у редакції рішення Вищої кваліфікаційної комісії суддів України 13.02.2018 № 20/зп-18). 26 с.

2. Principles of judicial discretion

We consider that at decision-making "at discretion" the judge has to be guided to certain principles. The principles of implementation of a judicial discretion are fundamental (leading) bases which define requirements to specifics of implementation of judicial discretion. These are, first of all, the general principles of implementation of legal proceedings which are key at the implementation of judicial discretion (legality, equality of all participants before the law and court, ensuring validity of fault, competitiveness of the parties, etc.). However, it would be desirable to pay attention on the special principles that are not less important in essence and to contents.

So, except the basic principles of implementation of justice, the judicial discretion provides also such as:

1) The principle of justice – provides the choice of the most optimal and effective solution taking into account evidential information. Justice is a basis of judicial knowledge and represents a dialectic combination of moral factors and the letter of the law at adoption of the judgment.

2) The principle of expediency – in decision-making process the judge have to avoid acceptance of the final decision until the procedural moment of the end of proceedings.

3) The principle of planning – ability to differentiate evidential information according to its value on business.

4) The principle of professional optimism – provides aspiration taking into account the tool value of the law to carry out justice, promotes belief in effectiveness of the right.

5) Principle of prudence. We consider prudence in this aspect as an ability to make the justified decisions of rather specific legal situation. Prudence is nothing else than a common sense that is based on objective assessment of all facts of the case and formation of a logical conclusion taking into account appropriate judgment of legal reality on the basis of the current legislation and the moral principles that were created in society. Prudence provides wise and rational behavior at which the judge in the best way realizes the knowledge, skills.

6) The principle of active adaptation – ability to implementation of legal proceedings with a speed and ease that means the ability to apply quickly professional knowledge.

7) Principle of the moral obligation to the state and society. It is told about need of implementation of judicial discretion taking into account the feeling of a moral imperative of the judge to judge by conscience. The moral imperative of the judge is not equivalent to his professional duty.

According to P. Kuftirev, the judicial discretion is the principle of justice that consist of guarantees on investment of the judge with powers to choose an optimal variant of the solution of matter in the limits determined by rules

of law taking into account the leading legal bases and the facts of the case[14]. From the given definition is follows that the scientist identifies the concept "judicial discretion" and "judicial discretion" identical. However, according to us, hardly these legal categories are identical.

There is a certain divergence. On the one hand, the judicial discretion is out of a judicial discretion as it is not enshrined properly in the legislation. On the other hand, the judicial discretion is the tool for implementation of discretion of court. To avoid such contradictions, it is necessary to define a concept of a judicial discretion not only on doctrinal, but as well at legislative level.

3. Discretionary rights and duties of judges

We confirm above-mentioned also with data which contain in the Order of the Ministry of Justice of Ukraine of 24.04.2017 No 1395/5 where it is given generalized determination of discretion, as for activity of any public authorities: "It is set of the rights and obligations of public authorities and local government, the persons authorized for performance of functions of the state or local government that give an opportunity to define at own discretion in whole or in part the type and contents of the decision management which is made, or a possibility of the choice at discretion of one of several versions of the management decisions provided by the normative legal act, the draft of the normative legal act"[15]. Proceeding from an above-mentioned definition, the judicial discretion is powers that are carried by the legislator to maintaining any given court. That is the judicial discretion (discretion of court) is a set of the rights and obligations of the court as public authority, during performance of judicial function on legal proceedings implementation, to make the judgment at discretion, in the limits determined by the law[16].

From here one more conclusion follows: if judicial powers (discretion) include the rights and duties, means the last it is undoubtedly possible to call discretionary.

The concept "discretion" is mentioned in the resolution of the Supreme Court of Ukraine. So, according to Article 106 of the Constitution of Ukraine the President of Ukraine has the discretionary (independent) right to make the decision in the limits determined by the law. Therefore, discretion is

[14] Куфтирєв П.В. Суддівський розсуд у теорії права : автореф. дис. … канд. юр. наук : спец. 12.00.01 «Теорія та історія держави і права, історія політичних і правових учень». Київ, 2009. С. 6.

[15] Наказ Міністерства юстиції України Про затвердження Методології проведення антикорупційної експертизи від 24.04.2017 № 1395/5 URL: http://search.ligazakon.ua/l_doc2.nsf/link1/MUS29196.html.

[16] Коцкулич В.В. Дискреційне право судді чи його моральний обов'язок? Матеріали 72-ї підсумкової наукової конференції професорсько-викладацького складу юридичного факультету (26 лютого 2018 року, м. Ужгород). Ужгородський національний університет; за заг. ред. С.Б. Булеци, Я.В. Лазура. 2018. С. 31–33.

considered in the resolution as an opportunity at discretion (without coordination) to define contents of the decision or to choose one of several solutions[17].

On this basis discretion of court is a subjective legal possibility of court to make decisions with application of a discretion, choosing from several lawful solutions of the case the most correct (taking into account the facts of the case). Among signs of discretion such as:

1) is regulated in rules of law;
2) it is carried out within discretion and appears their element;
3) is the independent right of the judge, that is does not demand permissions, coordination and is not subject to the ban;
4) connected directly with implementation of a judicial discretion;
5) the subjective right of the judge during implementation of a judicial discretion interdependent substantially legal status of the judge (objective right for adoptions of the judgment).

If with discretion the situation is clear, then definition "discretionary duties" is absent not only at the legislative level, but also separately is not allocated and is not explained by scientists (despite the fact that the judicial discretion is defined by most of modern researchers as the powers of the court which include the rights and duties).

We understand a measure of his appropriate behavior as discretionary obligations of court that is shown in implementation of a judicial discretion with observance of the oath of the judge. In other words, discretion of the court – the right to carry out a discretion, and a discretionary duty – establishment of requirements for appropriate realization of the right for a judicial discretion.

Therefore, the discretionary duty of the judge defines requirements to the process of generation of judgments in legal awareness of the judge at implementation of judicial discretion by it for the sake of acceptance of the right judgment. In our opinion the discretionary duties of the judge is the need to implement judicial discretion in compliance of accurately certain framework – assumes existence of limits of implementation of a discretion (if the right is freedom, a duty – legal restrictions).

By the way, proceeding from contents of other resolution of the Supreme Court of Ukraine accepted on the same day, September 13, 2016 it is worth paying attention to the term "discretionary behaviour"[18]. The fact that we did not meet any normative legal act in which it would have given a definitive explanation. In the resolution this legal category is used rather as a simple phrase, but not a legal phenomenon.

[17] Постанова Верховного Суду України від 13 вересня 2016 року № 21-1044а16. 4 с.
[18] Постанова Верховного Суду України від 13 вересня 2016 року № 21-1928а16. С. 4.

It is necessary to differentiate the concept "discretionary behavior" and "legal behavior" of the judge. If the legal behavior characterizes actions of the judge in judicial and extrajudicial activity, then the discretionary behavior is a manifestation of quality characteristics of sense of justice at implementation of discretion of the judge. Respectively, the last legal category is narrower according to contents, than legal behavior as does not concern activity of the judge out of court.

4. Properties and limits of the judge's discretion

Justice admits as it if its purpose and consequences is fair protection of subjects. Some scientists, analyzing a ratio of this legal category with legal proceedings, defend other position. In particular, they note that justice is a wider concept[19]. We support opinion that legal proceedings implementation does not mean yet administration of justice as the decision that contradicts rules of law and not a right judgment.

For the Romano-German legal system the application of the term "judicial discretion" as regardless of whether the case is considered jointly or individually, the judge acts not on its own behalf, but on behalf of the state will be expedient. In turn, the concept "judicial discretion" is typical for Anglo-American legal family as the sociological approach is have been directed to the study of aspects of judge activity, research of his social function, moral criteria, legal behavior. According to us, irrespectively of the type of a legal system, the judge carries out the powers on behalf of the state as the representative of public authority – court. Therefore, it is not the reason of differentiation between judicial and judicial discretion behind above-mentioned criterion.

We support the scientists stating the difference between categories "judicial" and "judicial" discretion" because already from morphology of definitions follows that adjectives "judicial" and "judicial" are derivative of various words. Therefore, a judicial discretion is exercised by the judge, and respectively judicial is carried out by the court. From given, we draw a conclusion that the judicial discretion is much wider and more generalized legal phenomenon as represents a set of "judicial discretion" during joint decision of lawsuit.

According to N. Slotvinskaya, the level of a judicial discretion in the countries with the Anglo-Saxon system of the right is extremely high. The judgment, being a source of law, provides settlements of the uniform public relations in the future[20].

[19] Малишев Б.В. Судова правотворчість як засіб досягнення мети правосуддя. «Вісник Вищої ради юстиції». 2011. № 1 (5).С.48.

[20] Слотвінська Н.Д. Порівняльно-правова характеристика судової нормотворчості. Порівняльно-аналітичне право. 2016. № 1. С. 32.

Implementation of a judicial discretion in Japan which aims at search of such facts of the case which provide the conclusions of the settlement agreement is interesting. For this purpose the rule of law moves in the light of consequences of its application, adverse for both parties. As V. Rozhko, as a rule, the party notes that he wishes to conclude the settlement agreement, it is found guilty. If one of the parties is the foreign person, then the judicial discretion has the signs typical for the Romano-German system of the right[21].

In the states with the Romano-German legal system the judicial precedent is not an official source of law, however the phenomenon of "the accepted judicial practice" providing recognition of the judgments by an element of interpretation of rules of law works. The judge looks for essence of each case casuistically, depending on a specific life situation. There is a decentralization of the right, and the Romano-German legal family aspires to the live right (precedent). Under such circumstances the rule of law is filled with subjective signs.

The Ukrainian state does not recognize the judgment as a source of law. However, according to the law of Ukraine "About Ensuring the Right to Fair Trial": "The conclusion concerning use of rules of law which is laid out in the resolution of the Supreme Court of Ukraine has to be considered by other courts of law at use of such rules of law. The court has the right to recede from the legal position stated in conclusions of the Supreme Court of Ukraine with simultaneous targeting of the corresponding motives"[22].

Such legal status in a certain way simplified the implementation of the judicial discretion, lifted to new level the values of the legal positions of the Supreme Court. Along with it existence of collisions at conclusions of the Supreme Court is observed, the stated above legal provision of the law has no appropriate mechanism of realization yet.

Besides we consider that the judge "creates" the right irrespective of whether he is given the right to interpret precepts of law. Right creation has the consequence adoption of the judgment and is a result of activity of professional legal awareness of the judge.

Opinions and views of the judge of rather actual circumstances and decision-making is a reflection of his outlook, professional qualities, moral and ethical characteristics. The age and gender of the judge in some way can influence the formation of judicial opinion.

There are certain features of implementation of judicial discretion depending on instance of court. Also distinctions of a judicial discretion at decision-making are observed jointly and individually.

[21] Рожко В.В. Проблема суддівського розсуду в правових системах Японії та Китаю. Науковий вісник Львівського державного університету внутрішніх справ. 2015. № 1. С. 68.

[22] Про забезпечення права на справедливий суд: Закон України від 30.09.2016 р. Відомості Верховної Ради України. 2015. № 18. № 19–20. Ст. 132.

The implementation of judicial discretion also differs depending on a legal proceedings. So, for example, the limits of implementation of judicial discretion accurately have been set in criminal law. As the Criminal law is characterized by lack of gaps, limits of application of any given sanction of concrete criminal rule are discretion limits in criminal proceedings (though deviation from the general rules of the legislative technology of the criminal law is in some cases observed).

Considerable part of scientists notice that the discretion takes place where there are legislative collisions and as well at application of analogy of the right (when balancing legal principles) and analogies of the law.

The judicial discretion also takes place in legal rules of law as value definitions that generally contains in hypothesis. Value definitions, on the one hand, are characterized by generalization of concepts and lack of concrete definiteness, on the other hand – they leave the place for implementation of judicial discretion and give the chance to judges independently settle public relations that are not regulated by the law according to the facts of the case.

In Civil and Economic law the situation with application of judicial discretion is ambiguous. So, by consideration of disputes on contracts the court has to carry out assessment of degree of a specification of provisions of the relevant Code. Under such circumstances the interpretation of the principle of freedom of the contract as provisions of procedural codes contain only essential conditions of contract matters[23].

In general, the discretion provides a legal regulation of the choice in the civil legislation and of possible behavior during realization of the subjective rights of participants of the civil relations. The implementation of judicial discretion is provided by the civil procedural code concerning proofs, participation of the parties and the third parties, the price of the claim, contents of the decision and court costs.

We agree with V. Zaborovsky's position that the judicial discretion should be perceived in aspect of independence of the judge during implementation of its powers on the basis of internal belief. Therefore, the scientist emphasizes that the independence should be understood in the context of independence of procedural activity[24].

It is expedient to distinguish such from signs of the judicial discretion:

1) it is an evaluative activity;

2) irrespective of the of type of a legal system it’s to a certain degree a rule-making activity of the judge;

[23] Савчин М.В. Свобода суддівського розсуду у світлі обгрунтованості рішень суддів апеляційної та касаційної інстанцій. Судочинство, 2016. URL: http://yvu.com.ua/svoboda-suddivskogo-rozsudu-u-svitli-obgruntovanosti-rishen-sudiv-apelyatsijnoyi-ta-kasatsijnoyi-instantsij/.

[24] Заборовський В.В. Правовий статус адвоката в умовах становлення незалежної адвокатури України: монографія. Ужгород. Видавничий дім «Гельветика».2016. С. 51.

3) it is present at any form of implementation of legal proceedings;

4) it is characterized by relative freedom of choice which provides limits of implementation of such discretion;

5) the implementation of judicial discretion is directly characterized by independence of judges in procedural aspect.

Fair there is an opinion that implementation of judicial proceedings is a key stage of process. Existence of a discretion are reduced by commitment of legal regulation and does unambiguity of practice of application of the procedural legislation more indistinct. It can lead to a miscarriage of justice. Therefore always there have to be limits, a framework in which the judge can use the "procedural freedom" provided to him. In this case, the judicial discretion is freedom, however in a certain framework (legislatively resolved limits).

According to K. Ermakova, the necessary restrictions guaranteeing applications of this institute within ensuring legitimacy and expediency of the judgment are limits of a judicial discretion. The scientist allocates legal and moral and legal limits of implementation of a judicial discretion. Legal limits are characterized by legal principles and norms, and moral and legal are created on morally ethical concept, is standardly fixed, however optional[25].

P. Kuftirev defines the borders of judicial discretion as a frame condition of legitimacy of the choice of the most optimal variant of the solution of a legal question, according to legal principles, ideas, purposes of law and specific circumstances of the case[26].

L. Berg notes that borders of the judicial discretion –legal frameworks that established by authorized subjects by legal means which accurately limit scope of the right[27].

To reduce subjectivity during adoption of the judgment, it is necessary to enter a judicial discretion into a framework of certain material and procedural (procedural) restrictions. Procedural restrictions are defined by order of conducting judicial proceedings, respect for the fundamental principles and the constitutional requirements. Their essence is shown that the court has only two tasks – implementation of justice in the established form and creation in this regard of necessary conditions for performance by the parties of their procedural duties and implementation of the rights granted to them.

From given, we concluded that the limits of judicial discretion are standardly resolved frameworks of the right of the judge for freedom

[25] Ермакова К.П. Пределы судебного усмотрения: дисс. ... канд. юрид. наук: 12.00.01. Москва, 2010. С. 8.

[26] Куфтирєв П.В. Суддівський розсуд у теорії права : автореф. дис. … канд. юр. наук : спец. 12.00.01 «Теорія та історія держави і права, історія політичних і правових учень». Київ, 2009. С. 12.

[27] Берг Л.М. Судебное усмотрение и его пределы (общетеоретический аспект): дис. … кандидата юридических наук: спец. 12.00.01 «Теория и история права и государства; история учений о праве и государстве». Екатеринбург, 2008. С. 109.

of choice in solving the case. So, such are features of limits of a judicial discretion:

1) provide freedom of choice of case solving;
2) are legal restrictions for such freedom;
3) are imperative, statutory defined in legislative instructions;
4) are established for ensuring adoption of the most optimum judgment taking into account the facts of the case;
5) their existence provides at the same time independence of judges during adoption of the judgment and protection against a judicial arbitrariness by establishment of a legal framework of their activity.

In the context of a research of judicial discretion it is worth paying attention as well to other legal category – internal belief of the judge. Applications of the term "internal belief of the judge" is often carried out within administration of justice and takes place not only at direct adoption of the judgment, but also at all stages of implementation of trial, and first of all – at assessment by court of proofs.

We consider that by consideration of a ratio of categories "internal" and "personal" it is necessary to consider the factor the given definitions are actually coincide by essence and contents, however the term "internal" is more abstract, generalized while the personal belief is subjective as it is formed within of the specific judge during consideration of any given circumstances of each case.

Modern scientists consider internal belief not only as the method of assessment of proofs, and as the principle which consists in lack beforehand of certain techniques of assessment and their sequence but is based on objective laws of logic and thinking and also subjective categories of lawfulness, conscience, emotions (feelings)".

Formation of internal belief is result of rational assessment of the actual facts of the case, precept of law, feelings and moods of rather obtained information, synthesis of all data. Besides, the judge influences by the behavior of the parties in court, the criminal past of the defendant and extrajudicial factors (mass media) carries out influence. The internal belief should be considered not just as feeling of confidence, conviction. The judge perceives any legal phenomena through a prism of already developed and settled views, the ideas, concepts. Here the sense of justice of the judge which is a basis, guidelines when forming internal belief is important.

The internal belief is a process of perception of rules of law and the actual facts of the case that is characterized by a peculiar individual course and matters during adoption of the judgment. Formation internal belief has to be carried out taking into account the principle of free assessment of proofs, competitiveness of the parties, judicial independence and impartiality.

The term "internal belief of the judge" is enshrined in Article 94 of the Code of Criminal Procedure of Ukraine. The investigative judge, court on the

internal belief which is based on a comprehensive, full and impartial investigation of circumstances of criminal proceedings, being guided by the law, estimate each proof in terms of accessory, admissibility, reliability, and body of evidence – in terms of sufficiency and interdependence for adoption of the relevant proceeding decision. Any proof has beforehand no established force[28].

The current state of development of legal concepts convinces that the internal belief in a certain way leans on an intuition, however does not feed it with the fundamental principle at all. The intuition at adoption of the judgment will matter only at a research of this concept of dependence with rational opinion. The factor of an intuition should not be ignored as it can be the indicator of incompleteness of thinking. After the judge checked himself in the light of criteria of compliance of the law and the principles of morals, he has to provide advantage to the rational opinion. There are a lot of chances in favor of the fact that the intuition is an accumulation of certain subjective factors. In the end result the judicial discretion has to be displayed in rational opinion, but not in objective feeling. In it the main criterion of implementation of activity which has taken into account when performing judicial function.

In our opinion, the internal belief of the judge cannot be based only on intuition as the last is the insufficient basis for adoption of the fair judgment. Confidence in correctness of the made decision which is based on comprehensive assessment of evidential information and also is carried out according to the current legislation – here that is the key to implementation of effective justice.

As manifestation of internal belief, irrational at formation, legal emotions and experiences which together with an intuition are elements of legal psychology of the judge.

Adoption of the fair decision is possible only in case the judge penetrates into essence of a legal situation, will consider it on all aspects, but the law will not be guided by a dry formalistic statement "there is a law". In this aspect judicial cognitive activity – continuous process which includes two stages: transition from precept of law to the facts and vice versa.

Therefore, the judge makes the decision taking into account subjective value orientations. The absence or negative manifestation of the last calls into question existence of internal belief of the judge and also a judicial discretion which, along with awareness in the law and legal realities of public life, existence of legal experience, is the important key to adoption of the fair judgment.

[28] Кримінальний процесуальний кодекс України від 13.04.2012. Відомості Верховної Ради України. 2013. № 9–10. № 11–12. № 13. Ст. 88.

The ratio of internal belief and judicial discretion and also their interdependence in the context of legal consciousness of the judge was considered by scientists insufficiently. In domestic jurisprudence the due attention is not paid to problems of differentiation of these legal categories. As it was noted above, legal consciousness of the judge is a basis of formation of internal belief. Besides, as the set of the ideas, concepts, legal feelings, moods and experiences, it is used during realization of the provided right of the judge to implement judicial discretion.

Legal consciousness is an element of internal belief. Such position is supported by a considerable part of criminalists. We, in turn, will try to prove opposite. The fact is that legal consciousness (as well as consciousness) is the constant phenomenon that provides understanding of the right by the judge while the internal belief is present at assessment of proofs and formation of judicial opinion. Therefore, the belief is formed in sense of justice, on the one hand, and with another – legal views, positions, concepts, feelings, moods (legal consciousness) are its basis.

The ratio of a judicial discretion and internal belief is traced through a prism of logic of subjective thinking of judges.

Erudite A. Yatsenko suggests to exclude the concept "internal belief" from the existing normative legal acts, having set legal category of a judicial discretion at the legislative level. The researcher proves such position by the fact that the belief is the constant relation of the judge to certain circumstances. Besides, the internal belief has no standardly certain framework[29]. We not absolutely agree with such opinion, and that is why.

We consider that the internal belief is formed in legal consciousness of the judge, and judicial discretion is the right of the judge granted by the law to choose one of solutions of the case on own beliefs. The specified categories interconnected, however nevertheless differ on essence and to contents. If the judicial discretion generally is legal category, then internal belief, in our opinion – morally – ethical. However, both are followed by existence of certain processes of thinking at lawfulness of the judge.

The internal belief is based on individual vision of business and therefore different judges can give differently assess the facts of the case, characterize participants of the trial and even to make different decisions, each of which will be lawful. It is impossible to exclude from a scientific turn a concept of internal belief as decision-making directly depends on confidence, conviction of the judge about justice of such decision.

In this context, according to us, the range of opinions of the judge is important and the features of generation of his judgments. In this regard we

[29] Яценко О.В. Суддівський розсуд як засіб забезпечення справедливості судочинства: дис. … канд. юрид. наук: спец. 12.00.10 – «Судоустрій; прокуратура та адвокатура». Київ. 2015. С. 49.

consider it necessary to provide at the legislative level a universal algorithm of formation of knowledge concerning the facts of the case. Such methods of assessment of evidential information have to include logic of creation of versions that in the end result to bring the judge to the most optimum legal decisions.

Therefore, one of conditions of the lawful decision of a dispute in court is realization of the rights in such a way that does not contradict the legislation, does not violate the right of other persons and also corresponds to moral foundations of society.

A. Selivanov notes that the judicial discretion has to be used minimum. Specified is a condition of avoidance of a miscarriage of justice[30]. Existence of a judicial discretion can lead to abuse of judges of their rights and even to delegation of a part of legislative functions to judicial authority. On the other hand, the possibility of application of judicial discretion is a necessary criterion of development of the constitutional state and a guarantee of ensuring efficiency and optimality of judgments.

According to us, the judicial discretion is necessary, however it is important legislatively to provide a certain mechanism of its application, and it is possible thanks to:

1) the application of direct effect of the Constitution of Ukraine;

2) the greatest possible legislative regulation of all public relations. The last, in turn, has to be provided by continuous updating of the legislation according to new legal realities. It will minimize applications of judicial discretion (limits of implementation of a discretion have to be very narrow);

3) to improvement of the legislative equipment that is provided with such factors:

- the norm has to be stated succinctly, clearly, consistently;

- if the law grants the right to make the judgment at discretion, then the corresponding precept of law has to surely contain a clear boundary of implementation of such discretion;

- limits of a discretion have to be not the narrowest but sufficient, on the one hand, it will not limit the lawfulness of the judge, and with another – it will avoid judicial arbitrariness;

4) direct explanation in the law of evaluative definitions.

[30] Селіванов А.О. Судова влада має пройти реформу поновлення свого авторитету і довіри. Сучасні виклики та актуальні проблеми судової реформи в Україні: матеріали Міжнародної наукової конференції, м. Чернівці, 26–27 жовтня 2017 року. За загальною редакцією Щербанюк О.В. Чернівці. 2017. С. 44.

CONCLUSIONS

The analysis showed that the judicial discretion represents the special legal phenomenon and is present at every constitutional state. Generalizing the aforesaid, we will emphasize that the judicial discretion should be considered not only as the right of the judge "to judge", but also as his duty to carry out the powers within the current legislation. Confidence in correctness of the made decision which is based on comprehensive assessment of evidential information and also implementation according to the current legislation, is the key to implementation of effective justice.

At the same time implementation of justice aims at the idea of justice and is based not only on performance of the functions according to the operating precepts of law, but also on the settled moral principles that are traditionally put by society. The specified factor is an attribute of the appropriate performance of the powers by judicial authority. Legal proceedings that is carried out without these aspects, in essence and to contents is not justice.

SUMMARY

The author examined the specifics of the implementation of judicial consideration within judicial discretion. It is established that the judge carries out judicial discretion based on legal consciousness, directly connected with it, and guided throughout all stages of implementation of discretion as law-enforcement activity. It is determined that he judicial discretion is considered in modern jurisprudence as: the principle of implementation of justice; the power which allocated the judge; powers of the court (rights and duties); intelligently forceful activity; activity of the court, as for decision-making; the possibility of implementation of alternative choice in certain institutional limits. The author proposed a classification of the basic principles of judicial discretion: the principle of justice, the principle of expediency, the principle of planning, the principle of professional optimism, principle of prudence, the principle of active adaptation, principle of the moral obligation to the state and society. It is established that if with discretion the situation is clear, then definition "discretionary duties" is absent not only at the legislative level, but also separately is not allocated and is not explained by scientists (despite the fact that the judicial discretion is defined by most of modern researchers as the powers of the court which include the rights and duties). It is justified that it is necessary to distinguish such from signs of the judicial discretion: it is an evaluative activity; irrespective of the of type of a legal system it’s to a certain degree a rule-making activity of the judge; it is present at any form of implementation of legal proceedings; it is characterized by relative freedom of choice which provides limits of implementation of such discretion; the implementation of judicial discretion is directly characterized by independence of judges in procedural aspect.

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