ДЖЕРЕЛА ТА ІСТОРІОГРАФІЯ ДИСКРЕТОЛОГІЇ ЯК СВІТОГЛЯДНОЇ ЦІННОСТІ СУДДІ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

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Анотація. Стаття присвячена становленню судового розсуду й історіографії досліджень цього феномену у кримінальному провадженні. З'ясовано, що дискреція, як комплексне, інтегроване юридичне явище, пройшла ті самі віхи еволюції юридичної думки, що і праворозуміння в цілому. На цей процес юридичної думки впливали і позитивістське праворозуміння і природниче, і соціологічне правознавство, і інші течії онтології права. Дискреційні повноваження судді розглядаються крізь його світоглядні цінності, які мають бути органічно вбудовані в суспільні цінності. Адже наявні позитивно-правові норми не завжди гнучко реагують на виклики суспільства. І законодавець не в змозі передбачити і детально відобразити всі можливі шляхи вирішення спірних питань у законі. Тому він обмежується встановленням загальних правил, які з одного боку, дають можливість судді врахувати індивідуальні особливості як вчиненого злочину так і особи злочинця, а з іншого, виключають судове свавілля. Якщо законодавець зводить оціночні поняття у праві до мінімуму, – право перетворюється на жорстокий каральний механізм. На прикладі радянського права доведено, що відсутність суддівського розсуду перетворило радянський суд на впорядковану форму розправи. З цієї ж причини не здійснювалися у радянському правознавстві дослідження суддівського розсуду, а існуючі знаходилися під тиском тогочасних ідеологічних установок. На сучасному етапі розвитку науки, право на розсуд при вирішенні кримінальних справ розглядається як важлива складова повноважень суду. Тому, суддя має бути високоморальною людиною, здатним приймати рішення на власний розсуд за законами релігії й природи, опиратись на здоровий глузд та інтереси держави. У здатності судді прислухатись до власного серця при прийнятті судового рішення вбачається вплив природного права – права справедливості.

Ключові слова: дискреційні повноваження суду; кримінальний процесс; природне право; суддівський (судовий) розсуд; світоглядні цінності судді.

SOURCES AND HISTORIOGRAPHY OF DISCREDITOLOGY AS WORLDWIDE VALUE OF JUDGE IN CRIMINAL PROCEEDINGS

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Abstract. The article is devoted to the establishment of judicial discretion and historiography of the research concerning this phenomenon in criminal proceedings. Found, that discretion in general, as a comprehensive, integrated legal phenomenon experienced the same milestones of evolution of legal

thought, that thinking in general. This process was influenced by neolithic legal thinking, natural and sociological jurisprudence and other trends in the ontology of law. The discretionary powers of the judge are considered through his worldview values which must be organically embedded in public values. After all, the existing positive legal norms do not always flexibly respond to the challenges of society. And the legislator is not in a position to predict and reflect in detail all possible ways of resolving disputed issues in the law. Therefore, it is limited to the establishment of general rules that on the one hand, enable the judge to take into account the individual characteristics of both the offender, the offended, and on the other side, exclude judicial arbitrariness. If legislators reduces evaluation concept of the right to a minimum – the right turns into a brutal punitive mechanism. The example of Soviet law proved that the lack of judicial discretion turned the Soviet court ordered to form sentences. For the same reason, judge discretion wasn't studied in Soviet jurisprudence and the present ones were under the ideologies pressure of that time. At the present stage of scientific development, the right to discretion in deciding criminal cases is seen as an important component of the powers of the court. Therefore a judge must be a highly moral person and be able to make decisions on his own terms according to the laws of religion and nature, to rely on the common sense and interests of the state. The ability of a judge to listen to his own heart at the time of making a judgment sees the effect of natural law – the right to justice.

Keywords: discretionary powers of the court; criminal procedure; natural law; judicial (court) discretion; ideological values of a judge.

The development of modern state processes has led to the activation of scientific research on issues related to the justice system as a whole, the legal status of the court, its role and significance in a democratic society. In the practical realization of Ukraine as a rule of law the leading role is to play its own judicial branch of power. The priority tasks of which are not formal but the actual provision of an effective mechanism for the protection of fundamental human rights and freedoms. In the context of another judicial reform, the question of the theoretical understanding of the legal status of the court, its role and significance in the system of state power, the possibility of the influence of judicial institutions on the course of social phenomena and especially on the powers of the court regarding the discretion in the application of law and the interpretation of legal norms, become of particular relevance. In the fast-moving changes of legal regulation, lack of stability in the system of law which, unfortunately, typical Ukrainian law, the legislator is unable to predict and display all details possible solutions to disputes in the law. However, such predictions are not appropriate, since achieving the goal of legal regulation is ensured, including through its flexibility. It becomes meaningful enforcement discretion value at which its subject in the cases determined by law has the right to choose to resolve legal issues.

A special role in the enforcement of judicial discretion plays discretion as tool for solving specific cases. It judicial discretion based on the basic principles and concepts of law, justice, legality, equality key to the stability of the legal system justice of judicial decisions, guarantee sustainable development.

Judicial discretion is a necessary means of judicial enforcement by which the courts reach relevant results. The phenomenon of judicial discretion is reduced not only the practical application of ready knowledge of legal rules and principles of law, but also contains philosophical value in the form of personal beliefs, perceptions and intentions of the judge.

The application of Judicial discretion allows taking into account all circumstances of the case, providing individualization of punishment/s, establishing social justice that implements all the requirements of the legislator's including those who did not find detailed regulation in the materials of law. On the other hand, judicial discretion as a phenomenon of legal reality may have negative consequences. The lack of certainty of law multiple meanings of some terms, concepts as well as a variability punishment under criminal law. The lack of detailed and strict rules under the criteria of sentencing, significantly impedes enforcement process. All this leads to an instability in the provisions of legal regulations and differences in judicial practice which also sometimes induces court errors.

For a long time the doctrine of judicial discretion has been criticized and not recognized in practice. It was believed that every legal problem has one legitimate solution. Disorganization of social life, lack of market relations, the typical nature of the emerging conflicts situations, etc. generated so routine legal practice so it nullifies the need for such delicate and complex tools like judicial discretion. However, in today's conditions of reforming procedural legislation of Ukraine, it is seen as an actual investigatory of the procedural status of the court, in particular, the study of those powers that in the theory of justice were called discretionary.

Issues of justice discretionary (discretion) where the subject of study of both domestic and foreign scholars in various spheres of legal science. These are such scholars as: Maksim Bavsun, Aaron Barak, Yuri

Baranov, Alexander Boner, Boris Gavrilov, Julia Gracheva, Yuri Groshevyy, Rita Danelyan, Mykola Zakurin, Volodymyr Kantsir, Oksana Kaplina, Mykola Kravchuk, Pavlo Kuftiriev, Anastasiya Makarenko, Vitaliy Marchak, Olga Papkova, Anastasiya Pivovarova, Vladimir Podmoskovny, Mykola Pogoretsky, Miroslav Rysnyi, Alexander Rogach, Ivan Titko, Albert Haidarov and others.

The research of scholars is the basis of modern understanding of the issues of judicial discretion in general and criminal proceedings in particular. This is because a clear idea of judicial discretion and its specific characteristics in legal science are important for law enforcement activities. Court activity is associated with varying degrees of discretion that allows taking into account when considering a particular court case and its individual circumstances. There is another side to this issue, unlimited judicial discretion could lead to judicial ambiguity. One way or another, the scope of judiciary discretion, even in typical litigation, may be considerably diverse. This does not mean that judicial discretion should be excluded completely.

In legal literature the phenomenon affects various synonymous terms such as «judicial discretion», «law enforcement» [13, 22]. The use of the term «judicial sight» which outlines the process corresponding mental, intellectual activity of the court (judge)»[10, 126], which comes from the Russian word «usmotret» and means «sight», «seen» and the word «nagliad» is interpreted as «oversight», «to understand something». Therefore, Mykola Kravchuk’s statement that the use of the term as a synonym for the word «judicial discretion» and «judicial sight» is justified is quite helpful.

The problem of judicial discretion refers to the legal problems that inevitably arise in any legal system. The phenomenon of discretion and its contemporary understanding formed under the influence of legal understanding in various specific historical epochs. This process was influenced by neolithic legal thinking, natural and sociological jurisprudence and other trends in the ontology of law. Discretion in general, as a comprehensive, integrated legal phenomenon experienced the same milestones of evolution of legal thought, that thinking in general.

In order to clarify the essence of judicial discretion, it is necessary to study the historical aspect as a whole. Let us turn to the foundations of Roman law, which was subjected to the powerful influence of the ancient Greek, near-Jewish, Jewish, and other bases of law, having borrowed from a large number of ideas, principles and other specific legal bases. But only in the Roman antiquity civilization, the legal right has become a comparable independent phenomenon. It has become a self-dependent subject, which can be studied even nowadays, abstracting from the concrete historical conditions, culture and the state in which it was formed. So as early as in ancient Rome, arbitration and arbitrators tend to resolved disputes between neighbors and relatives. From juries and justices, they differed in that they acted at their discretion and themselves determined the amount of the penalty. At the second stage the judge either awarded to the execution or justified the defendant. The basis of judicial discretion at this time lay judge's moral qualities, the idea is built on the rule of law (positive law or common law) and morality (natural law or civil law), was considered its own, and in their absence – his arbitrariness [18, 7].

The people’s courts of ancient Rome as the oldest form of justice were based solely on the will the discretion of the whole community and activities at the discretion of the judge was closely associated with the emergence of private law.

Private legal disputes in ancient Rome were solved in the legislative, formula and extraordinary order. In the legalization form of the civil process at the stage of «injudicious» (examination of the actual circumstances of the case), the judges were not bound by any formal requirements regarding the assessment of evidence and exercised their powers of justice exclusively at their discretion. However, the extraordinary order of the judiciary instead provided for fairly significant restrictions on free judiciary discretion.

In ancient Rome during legal norm understood not only an act of the will of the legislator, but Praetor's generalization of judicial practice and a brief summary of the case. According to S. Shevchuk, this norm was by nature similar to the principle in the modern sense of its legal nature, especially in cases of «expanded» interpretation of the provisions of the law, that is, in the implementation of pretorn lawmaking. For example, in accordance with the Roman XII Tables, the owner of the four-legged animal was liable for the damage caused to the animal. After the Second Carthage War, African ostriches were brought to Rome and the question arose whether there was a possibility to file a lawsuit against the owner of the animal if the ostrich was damaged. The Roman pritor answered this question affirmatively [27, 280].

The final combination of the requirements of natural law and the norms of positive law was the codification of Justinian (527–566 p.), which was a legal collection, built on the Greek concept of natural intelligence and the Roman sense of harmony. In the basis of court watch at that time the moral qualities of a

judge, whose opinion, built on the rule of law (positive law) and morality (natural law), was considered his glance and in their absence his arbitrariness [22, 495].

Thus, Roman law was rather non-uniformly positioned on discretion, and the right of judges to judge in different periods of the development of Roman law suffered from significant changes, from total freedom to rather rigorous determination. Therefore, the only response to the nature of discretion under Roman law does not exist, concludes Paul Kuftiriev [18, 7].

The person who carried out the justice and state regulation in Egypt was to be a highly moral man. Despite the existence of positive legal norms, she had to make decisions on her own terms according to the laws of religion and nature, relying on the common sense and interests of the state, to possess natural and legal features: lack of words, nobility, the ability to administer justice and to reconcile people. The influence of natural law was also seen in the judge's ability to listen to his own heart, which could not force a person to sin. Only a judge who had been given the above mentioned characteristics, could deliver justice and bring happiness to people [13, 22]. Thus, even in ancient times, at the time of the first civilizations, the question of judicial discretion was already violated and studied by contemporary scholars.

Analyzing the content of the Short Edition of the Russian Truth, one can find elements of discretion in the prince's court, which was ruled exclusively at the discretion of the prince, or at the discretion of the prince and the boyars. Subsequently, functions of discretion were given to subjects such as the thyuns and the posadiks – as authorized representatives of the prince's power.

Such studies allow us to conclude that in the early stages of the formation of written sources of law, in fact, the discretion served as a unified form of justice, since the rules of law (in the positivist sense) in fact, as such were not, or not regulated all spheres of legal relations. It was during this period that the discretion of the subject of justice (khadi, tsar, prince, thiune, praetor, boyar) actually was justice – the boundary of which were only moral-ethical, religious, customary notions of justice. That discretion in the early stages of formation of the legal system was virtually unlimited and not bound by the written norm (through its absence as such) Judicial discretion in Rus was considered sacred right of the subject of law enforcement and was unlimited.

In the chronological section of the late 15th and 16th centuries, there was an occurrence of Zaporozhye and the Ukrainian Cossacks as a whole, also concerned the judicial system. The highest military, administrative and judicial body of Sich was the general military council, the right to participate in which all the Cossacks had without exception. The military judge was the second person after the ataman of the Cossack and sometimes replaced him under the name of «commanding officer of the ataman». Mykola Kravchuk observes that judicial discretion in the administration of justice was also known to Zaporozhye Cossacks. The judges in the Zaporozhian Cossacks were all the military officers that is the ataman the judge, the clerk, the military commander, the long-distance, the calf colonel, and sometimes the entire Kish. Punishments and executions in the Zaporozhian Cossacks were appointed different, depending on the nature of the crimes. Punishments were accordingly appointed at the discretion of the judges. Hence, the Hetman had the right to decide each case at his own discretion, whether in the first instance or after the sentence of the lower courts. His verdict was final [13, 22].

From a legal point of view, it was an interesting creation of the courts of justice during the Middle Ages in the United Kingdom, that guaranteed «royal justice» and their successful activities. The right to justice was embodied in the decisions of the highest official of the Crown after the King for complaints. The decisions of the courts made for the kingdom in accordance with the right of justice (the powers of which were given to the lord – the Chancellor Westminster Statute 1285), which has never been fixed in the normative act, however, represented a set of requirements of mercy, wisdom, integrity and conscience. In other words, says Stanislav Shevchuk, a set of moral requirements for legal acts, which obliged not only morally, but also legally, because according to the precedent doctrine the right to justice – a set of rules formulated by the court of the Lord – the Chancellor – was used by the courts of the kingdom in the resolution of similar cases. The complainants asked the king to consider their cases in substance and to show mercy «in conscience and in essence». Although the right to justice was an addition to the general or statutory law, it also had an essential feature: the right guaranteed by the general and statutory law was considered invalid if it contradicted the unequivocal power and content of the right to justice [27, 70–71].

The ideas of the French Enlightenment of the 18th century, reflected in the speeches, activities and writings of the figures of the French revolution during the late 18th century, as well as in its legislative acts, directly influenced the theory of judicial discretion. Thus, it is interesting to highlight the principle of limiting the judicial discretion in determining the extent of punishment under the current system proposed by

Jean-Paul Marat, a prominent figure in the French Revolution, in a well-organized society there will be no grounds for admitting judicial discretion in determining the punishment making it civil law [13, 23].

Filling gaps in legislation on the basis of the study of judicial practice in Germany and France led to the emergence of a «free law» school on the verge of the 20th century, represented by Eugen Ehrlich, German Kantorovich, François Jeny, Ernst Fuchs.

In written in 1888, the work of Eugen Ehrlich, who worked in Chernivtsi University and was later recognized as the «father» of sociological law school, said that very often the legislation delegated discretion to the courts to make decisions because it contains concepts and terms are ambiguous for understanding – such as «unfair enrichment», «actions against good morals», «the nature of things», etc. [28, 513].

In the early 20th century, in Russian legal literature, we also find the notion of judicial discretion. Gregory Demchenko believed that the judge in applying the law does not act as a slave or soulless automaton, but as a conscious and free mediator between the dead norm of law and the variety of the rapid flow of life of human society. The Judges always have to interpret the law in its application or create a rule deciding matters which the legislators did not think, so no decision proposed or even wanted to offer (making this common law) [6; 7].

Problems with discretionary power of the court were the object of special attention on the verge of 20–21 centuries, but its justification they started getting back in the 19th century. So, in Articles 12 and 13 of the Charter of criminal proceedings (1864) Russian Empire, whose action and spread of contemporary Ukraine, the courts had to decide the case «for accurate understanding of existing laws», and in cases of incomplete, unclear or contradictory laws must were justifying their decisions «the general content of the laws». At the same time, «it was forbidden to stop the decision of the case from the grounds of incompleteness, ambiguity or contradict the law», otherwise «for breach of this rule the guilty were liable as an illegal inaction of the authorities» [24, 121].

In the critical stages of the history of society, the updating of the law cannot be a one-stage action, its birth and development is gradually, allowing its compensation to social norms, which by their nature are not legal. Nevertheless, the courts and in such circumstances consider and resolve legal conflicts, make decisions that are subject to execution.

Substantial changes, and not for the better, gradually took place in Russia and other states that arose on the territory of the Russian Empire as a result of the revolutionary events of 1917. The proclaimed slogans in their content differed significantly from the practice of state-legal construction, based on the domination of communist ideology and the leading political force – the Communist (Bolshevik) party. One of the most important and first legal acts of the Soviet judicial system was Decree No. 1 and Decree No. 2 of the court. Decree No. 1 proclaimed the abolition of all existing judicial institutions in Russia, and by Decree No. 2, district courts were established as courts of first instance for civil and criminal cases that were not subordinate to the jurisdiction of local courts under Decree No. 1.

Decree No. 2 allowed the courts to apply pre-revolutionary laws, but only in part which was not abolished by decrees of Soviet power and which did not contradict socialist justice. Article 8 of Decree No. 2 expressly emphasized that in the judicial proceedings, the courts are guided by the Statute of the courts of 1864 (with the reservation «because they have not been canceled by decrees ... and do not contradict the right of the working classes») [5].

In rare cases, pre-revolutionary laws in the field of criminal law guided even revolutionary tribunals [5].

Decree No. 3 formally allowed the possibility of applying the rules of pre-revolutionary legislation in the manner prescribed by Decree No. 2. The final ban on the use of courts of «old» norms was followed only on November 30, 1918, when the All-Russian Central Executive Committee approved the Provisions on the People's Courts, in the note to the article 22 which explicitly contained a ban on references in decisions and sentences to «the laws of the fallen governments» [5].

In 1920 Russia passes legislation reform including the Criminal Procedure. In the thesis on the reform of the Criminal Procedure Code was noted that in reviewing its rules should make the criminal process was flexible, devoid of any «formalities» and at the same time provide two main objectives: the brutality of repression against the class enemies and maintenance through court social and legal discipline among the working class, involving the latter in the maximum degree to the school of public administration, which for us is the court [25, 35]. It was supposed to simplify the provisions of the Criminal Procedure Code that regulate the activity of the court, because judges were not in able to deal with its bulky and numerous articles [1, 211]. This was important in view of the fact that the judiciary was completed with the workers and

peasants who had no legal training. The court ordered regarded as a form of reprisal [3, 1445–1447]. Therefore, the question of judicial discretion never carried out.

Ukrainian Criminal Code of the Soviet Socialist Republic 1922 – the first codification act systematized the norms of Soviet criminal law, which was approved by 07.23.1922 and entered into force on 15.09.1922 year. In order to establish uniform criminal law and penal policy in all Soviet republics it was based on the Criminal Code of the Russian Soviet Federative Socialist Republic in 1922 [14].

In general, proceedings in the field of legal proceedings that began after the victory of the Bolshevik Revolution of 1917, were clearly destructive and eventually transformed the court into something completely opposite to the very concept of «justice». Courts became tools for implementing the policy of the Communist Party, their activities were frankly aimed at suppressing resistance to anti-popular politics and the practice of power structures under the pretext of fighting counterrevolution.

In his study, Pavlo Kuftiriev notes that in Soviet jurisprudence, the doctrine of judicial discretion has long been subjected to harsh criticism. It was believed that any legal problem could have only one legitimate decision. Excessive hyperbolization of formal regulation of public life, administrative and command mode of management, and as a consequence – in general, the typical nature of legal conflicts gave rise to the routine legal practice and made it superfluous and unnecessary to use such a complex legal instrument as a judicial discretion. [17, 400–407]. Therefore, the study of judicial discretion in Soviet jurisprudence was practically non-existent and the existing ones were under the pressure of the then ideological setups for «bourgeois» and non-compliance with certain ideological guidelines [11, 2–7]. The dominant science of the time was an approach that assumed that any legal problem could have only one legitimate solution, and there was only the only true mechanism of law enforcement, as the embodiment of the will of the ruling class [17, 403].

And only with the onset of profound socio-economic transformations in the former Soviet Union of Soviet Socialist Republics, the first conceptual studies of judge discretion begin to appear. Interest in this subject is determined by a number of factors [9, 17] among which V. Kantsyr calls:

A considerable amount of comparative studies of the Anglo-Saxon legal system, with its significant accentuation on precedent sources of law, have a significant role to play in judge discretion, as well as the fact that the discretion is the subject of scientific attention by lawyers and researchers in the continental legal system, and in the context of the global convergence of legal systems there is also interest in extrapolation of certain legal principles of foreign countries on domestic legal areas;

Interest in the phenomenon of judicial discretion also caused increasing role and importance of the court as an institution, as a branch of government, as the state authority in public life [12; 23; 19].

Practical requirements determining the principles underlying the rather complex intellectual and volitional and legal decision-making process by the judge in the case in terms of hyper growth in the number of regulations in Ukraine, their unsystematic, but sometimes even contradictory, where the discretion of the court in interpreting and applying the law the norm is not the only lever legal understanding and perception of law in society.

The presence of a significant number of legal requirements of pretty confusing implementation practices without defined models and mechanisms to implement them due to low legislative technique, which is observed during the last five years in Ukraine [18].

Today the right of discretion in deciding cases is an important part of the powers of the court. However, judicial discretion may not be unrestricted, otherwise it could turn into a judicial capriciousness. One of the main means of limiting the discretionary power of the court and therefore ensure the legality of their implementation is compliance with court conditions for the realization of discretion only on certain grounds.

It should be noted that with judicial enforcement, discretion is potentially possible not only because of conclusiveness in the legal act of the legislator. The legislator can distinguish, by their own volition, between direct judicial discretion (direct consolidation will of the legislator to provide discretion of the court), indirect base (deficiencies legislation, judicial discretion to occur with the tacit consent of the legislator) and auxiliary (general meaning, purpose and relationship of legal regulations and normative legal acts).

Consequently, judicial discretion, regardless of its interpretation, directly depends on the judge – his beliefs, personal qualities, thoughts. And these cases cannot be described in any normative legal act. Accordingly, it is impossible to assess how personal qualities of one or another judge, as well as the manner of his thinking, are in accordance with the requirements of competence. In other words, different judges (of different ages, experiences, views and beliefs) will make completely different decisions in the same situation on the same case and all of them will be legal. That is every judge will be with his mind.

Exploring the phenomenon of legal precedent, Aaron Barak points to the special role of judge's ideological values in the process. In his view, the interpretation gets a precedent that embeds the best precedent in the range of values of society. That is, the judge is guided by social values, mediated through his own ideological values. The scientist defines such fundamental values that govern an enforcement activity as the security of the state and public order and public safety. Moreover, public values can compete with each other, as well as public freedoms. Therefore, determining the priority of values in each particular case also occurs within the discretion of the court. That is why the judge must relate socially acceptable ideas about justice, morality, utility, and public interest [2, 202–203].

At the same time, when judges need to identify social values for their prioritization, he is looking for those values shared by members of society, even if they are not his own individual ideological values. This is a certain dualism of the axiology of judicial discretion, not only in the ratio of individual and social ideological values, but in the competition of social values among us.

Judicial discretion is an indispensable attribute of judicial activity in the administration of justice. With the development and improvement of legislation there is a gradual narrowing of its limits due to exhaustive legal regulation. But the removal of judicial discretion is not entirely possible.

However, it is not always advisable to formulate absolutely certain rules in the law. Georgian scientist G. Tkesheliadze on this occasion noted the following: «The basis of criminal liability is the composition of the crime, the features of which are foreseen in the disposition of the criminal law. Thus, the basis for criminal liability is precisely defined in the criminal law. When determining the punishment, such precision and certainty are absent. This is explained by the fact that each specifically committed crime and the person of the offender are so individual that the legislator is not able to establish in the law a specific measure of punishment, equally effective for all offenders who committed the crime. Therefore, it is limited to the establishment of general rules, which, on the one hand, exclude judicial arbitrariness, and, on the other hand, allow the court to take into account the individual characteristics of both the perpetrator and the offender. To this purpose, first of all, the relatively defined penalties provided for in the Special Part of the Criminal Code for certain types of crimes» [26, 91–114].

The question arises: how to act in court, if it is necessary to make a decision and the corresponding norm of law is not in any of the official sources of law? In such situations, one can speak of the freedom to choose a judge between several legitimate decisions, taking into account of course the legitimate interests of the participants in the trial. Of course, the freedom of the court cannot be absolute; otherwise it will turn into a judicial arbitrariness. And it is precisely at this stage that not only the professional but also the personal qualities of the judge, which include his value orientations, features of character, ability, legal consciousness, legal culture, social factors, etc., are manifested. It is no coincidence that the legislation pays particular attention to the requirements put forward by the judge, since society needs an independent, objective and impartial judge in the administration of justice.

In general, characterizing the evolution of discretonism, we can conclude that the rather complicated genesis of the emergence of the phenomenon of discretion in the works of eminent thinkers of law. Judicial discretion as a scientific concept has evolved from the unlimited over-expansion and actual substitution of the procedures of justice (in khadi-discretion of ancient times) to the complete denial of the freedom of judge's discretion as a result of identification with judicial arbitrariness (during the communist times) and, ultimately, the dialectical understanding of discretion, as categories corresponding to the concept of legality, which is in a state of «unity-opposition» to the latter.

The current stage of development of science is characterized by an increase in the quantitative study different aspects of the same phenomenon. Judicial discretion can be investigated according to the following criteria: by subject, by law, according to the form of court activity, on the basis of intellectual property, on the content of judge's judgment, etc. Specific classifications of judge discretion include works by such scholars as O. Papkova, A. Boner, L. Berg, D. Abuşhenko, N. Gromov, A. Yaroslavski, V. Antropov, A. Stupin, K. Schneider, R. Dvorkin , Yu. Starykh, P. Kuftyriev and others.

A. Makarenko notes: judicial discretion – a law enforcement intellectual and volitional activity of judges which is a measure under criminal law the freedom to choose one of the options judgment in a criminal case. To solve the problem of judicial discretion, it is necessary to clarify the reasons for such a discretion in imposing punishment as the normative basis for its implementation [21]. Legal basis of judicial discretion and certain aspects of its criminal proceedings devoted to scientific work of M. Rysnyi, I. Titko, A. Panasyuk, L. Moskvich, V. Marchak, A. Rogach, A. Kaplin, V. Vapnyarchuk and others.

Specialized scientific research on issues of judicial discretion in criminal specialization is a comprehensive study by Professor Y. Groshevoy concerning theoretical issues of forming a judge's conviction in criminal proceedings (1975) [4].

In 1998 V. Kantsyr defended his thesis for obtaining a scientific degree of a candidate of law sciences on the topic: «Problems of judicial supervision in the application of criminal legislation of Ukraine» [7].

The question of the judge's discretion in the theory of law is devoted to the study of Kuftyriev (2009) [16]. In his study, the scientist substantiated the essence of the concept of «judge's discretion», his characteristic features; has analyzed approaches to scientific classifications of judicial discretion; proposed a classification of discretion in the content of judging judgment.

In 2011 Drozdovich defended a thesis for a candidate’s degree in law sciences on the topic: «Formation of judge's internal convictions in the criminal process of Ukraine» [8]. In particular, the scholar defined the judge’s internal conviction as an element of the free assessment of evidence and showed that in this sense it is formed in the process of proof and relates to the actual circumstances of the case; It is confirmed that the psychological basis for forming the judge’s internal convictions from the point of view of social psychology is the primary way of proving, since the basis of the judge’s internal conviction is a psychological aspect that is the substance of any conviction; the necessity of specifying the legislative provisions regarding the exclusive competence of the court in carrying out a free assessment of evidence is substantiated; factors of formation of judge’s internal convictions are investigated.

The issue of judicial discretion in the course of sentencing in Ukraine is devoted to the study of A. Makarenko (2012) [20]. In particular, the legal nature of judicial discretion at the stage of the appointment of punishment and the genesis of the doctrine of judicial discretion in the history of criminal law was studied. The grounds of judicial discretion during the appointment of a punishment as the normative basis for its implementation the classification of such discretion is given. Described by judicial discretion in the context of types of legal behavior, particular attention is paid to the investigation of the institute of punishment in the context of the correlation of formal and discretionary principles. The issue of limitation of judicial discretion by illicit factors is covered.

Consequently, giving the court discretionary powers has a long history and contributes to the enforcement of justice. They are an essential and essential element of the judicial process [14]. It should be noted that the exercise of discretionary powers does not contradict any of the principles of law, especially the principle of legality. The court does not always have the opportunity to apply imperative legal rules. When the law cannot describe in detail the situation in which the court will act and decide, it is given the opportunity to exercise discretion when considering certain issues. The legislator therefore transmits to the court a decision on a number of legal issues that cannot be fully resolved by them, as this requires a special approach in each particular case.

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