

КРИМІНАЛЬНИЙ ПРОЦЕС ТА КРИМІНАЛІСТИКА

УДК 347.98

JUDICIAL DISCRETION AND HUMAN RIGHTS IN CRIMINAL PROCEEDINGS

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The article is dedicated to the particular issues of the criminal justice administration with the discretionary powers application of the court in conjunction with the institute of Human Rights.

The role of the principle of the human rights equality in the course of criminal proceedings in terms of judicial discretion is established in such institutes as investigative actions, precautions to criminal proceedings and the imposition of compulsory medical measures.

Human rights and the admissibility of their restrictions under the discretion of the judge is characterized by considering the presence of competitive social and legal values and by taking into account the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and the practice of the European Court of Human Rights.

The criteria required for the competing values consideration in situations that allow judicial discretion are offered.

The legal mechanism for the human rights protection and restoration in case of improper application of the judicial discretion is found. The shortcomings to further improvement of the law enforcement are revealed.

Keywords: administration of justice, legal values, principles of law, access to justice, fair trial, public interest.

Nowadays the theme, related to the research of human rights, is becoming more and more topical in view of the dynamics of social relations, and correspondingly, filling the existing rights with a new content. This dynamics is associated with both negative forms (internal and external military conflicts, forced displacement of people, processes of mass migration, protection of privacy, etc.) and positive forms (globalization of social processes and their impact on the international legal standards formation in interrelation with national legal relations, the development of information technology, access to public information). «Human rights» are becoming particularly relevant in Ukraine as a result of the military conflict, threats and violations of human rights. «Human rights» play an extremely important role in administrating justice as one of the main forms of state activity. In fact, under to the Constitution of Ukraine, human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State, and the human being, his or her life and health, inviolability and security are recognized in Ukraine as the highest social value.

Actually, the particular importance of human rights at the constitutional level as well as in law enforcement, requires from lawyers a detailed understanding of judicial discretion in the context of human rights and freedoms.

Human rights should be taken into account in each situation by the court while applying discretionary powers. Currently, the issue of the relationship between the discretion of the court and human rights, which may cause difficulties in law enforcement is left ambiguous. This article attempts to resolve certain issues aimed at improving law making and enforcement practices from the perspective of judicial discretion.

According to the recent studies of domestic and foreign legal doctrine, comprehensive studies on interplay of court discretion and human rights are almost absent. A few authors only briefly examined some aspects of these legal phenomena synergy. Mainly, the issues related to human rights beyond the discretionary aspects haven't been studied yet. Particularly, these are researches of the following domestic scholars: P. Rabinovych, M. Havronyuk, Yu. Sulzhenko, A. Bushchenko, O. Goncharenko, O. Grischuk etc.

Certain attention to the judicial discretion in the administration of justice was paid by P. Kuftryyev, V. Vapnyarchuk, A. Makarenko, B. Runner and some other scholars.

The objective of this article is to clarify the characteristics of court discretion in the context of human rights, their points of intersection and in providing suggestions regarding improving of law enforcement and regulation of criminal justice.

The newly-adopted law of Ukraine «On the Judicature and Status of Judges», of June 2, 2016 (Article 1) establishes the provision that the court administrates justice on the basis of the rule of law, provides for anyone the right to fair a trial and respect of other rights and freedoms guaranteed by the Constitution and laws of Ukraine and also international treaties ratified by The Supreme Rada of Ukraine (Supreme Council of Ukraine). This rule gives the reason to claim that the human right to an access to justice, the right to a fair trial determines the responsibility of the state in the face of independent court to make a fair decision, even in those situations where legal regulation of a particular situation is absent or is insufficient. In this context N. A Huralenko claims that the judge finding no legal rules for resolving the legal disputes, faces a choice: either completely abandon the legal investigation of the dispute or to apply absolute (natural) law and to put it in the basis of his/her own decision. However, nowadays the court is not able to deny dispute resolution to the subject of law on the basis of incompleteness, ambiguity or absence of the law. Otherwise, it equals to denial of justice and automatically leads to the other – illegal, shadow adjustment, or even to slowing the social relations development [2, p. 164].

Landmarking to the understanding of the outlined issue is the Decision of the Constitutional Court of Ukraine of November 2, 2004 No 15rp / 2004. In this decision, the Court gives the interpretation of the rule of law, pointing out that the rule of law is the domination of law in society. The rule of law requires the state to implement its standards in law-making and law enforcement activities, including the laws adoption, that should be soaked with the ideas of social justice, freedom, equality and so on.

In its Decision the Constitutional Court also cites another statement, that necessitates the application of judicial discretion in respect to the context of the notion of «justice» - one of the fundamental principles of law that is crucial in defining it as a social relations regulator and one of the human rights measurements. The Court notes that sometimes the law may be unfair, including restrictions on the freedom and equality of individuals [5]. In fact, if there is a reasonable doubt about the unfairness of legislation, the legal obligation to adopt a fair decision with the application of judicial discretion rests with the judge.

Generally known human rights (main) characteristics are:

- universal value;
- independence of borders;

– integrity, equality and non-discrimination.

In the modern sense of the UN (Office of the High Commissioner for Human Rights), human rights are rights inherent to all people, regardless of nationality, place of residence, sex, national or ethnic origin, color, religion, language or any other status[12]. However, equality of rights does not mean their actual identity and the absolute uniformity of legal procedures. According to the legal position of the Constitutional Court of Ukraine of April 12, 2012 r. No 9-rp / 2012, the equality of all people in their rights and freedoms concerns the necessity to provide the legal possibilities, both of material and procedural nature, to implement rights and freedoms identical in content and scope [4]. However, under the p. 2, Art. 10 of the Criminal Procedural Code of Ukraine, certain categories of persons (minors, foreigners, persons with mental and physical disabilities etc.) have additional guarantees in respect to the criminal proceedings.

Moreover, the Recommendation of the Committee of Ministers (European Council) № R (80) 2, of 11 March 1980, regarding the administrative authorities discretionary powers implementation indicates that the purpose of the principle of equality is to prevent unjust discrimination, by ensuring equal treatment of persons who are in the same situation *de facto* or *de jure*, when it comes to the implementation of certain discretionary powers [3, p. 445].

In this aspect, the Criminal Procedural Code of Ukraine establishes additional guarantees of the rights of certain categories of persons and at the same time gives the court the right to discretion regarding a number of issues, such as:

- participation of a physician in the interrogation of a minor (p. 1, Art. 226);
- participation of a physician during the investigation (search) actions involving a minor (p. 1, Art. 227);
- application of the special trial procedures (in absentia) (p. 3, Art. 323);
- distance court hearing with the purpose of minor witness rights protection (p. 4 Art. 354);
- the applicability of bringing persons to court (by force), other than minors, pregnant women, the disabled of the first and second groups, a single person having children under six or disabled children, and persons who under this Code may not be interrogated as witnesses (p. 3, Art. 140);
- exceeding the maximum amount of bail, against a person who is suspected in committing a grave or especially grave crime (p. 5, Art. 182);
- taking into account the state of diminished responsibility, as the basis for the application of compulsory medical measures (p. 2, Art. 504);

Human rights are absolute by nature, but regarding some of them exceptions are permitted in order to ensure the public interest. In this case, an individual interest and the public interest are the competitive values and the judge is authorized with a considerable share of discretion and on the basis of the statutory conditions to make a fair decision. In particular these competing values may be:

- 1) the right to freedom and precautions in criminal proceedings;
- 2) the right to privacy and the investigation actions that violate individual privacy;
- 3) the right of ownership and property seizure in the interests of criminal proceedings and so on.

An important stipulation is that the restrictions shall be «necessary in a democratic society»: It is not sufficient that such a restriction belong to the exceptions provided for in paragraph 2 of Art. 10 of the European Convention on Human Rights. Moreover, it is not enough that the interference in human rights be justified by the fact that its subject belongs to any particular category or is a subject to legal rules formed in general and unconditional terms. The Court shall ensure that the intervention, under the facts and circumstances of a particular case, is, in fact, required [6, p. 97].

In the field of judicial discretion A. Barak (a judicial practitioner, scholar and lawyer) claimed that the competition of values should be balanced on the basis of the reasonableness standard. Judge's assertion that one value takes precedence over another, based on his or her subjective point of view, isn't sufficient. He or she shall substantiate their allegations with rational explanations [1, p. 138].

The European Court of Human Rights in its case law states that, although the national court has some discretion as to choosing arguments in a particular case and admission of evidence in support of the parties, the authority is required to justify their actions by reasoning their decisions (See. judgment «Suominen against Finland» (Suominen v. Finland), № 37801/97, p. 36, of July 1, 2003) [10]. Another purpose of the reasoned decision is to demonstrate to the parties that they have been heard. In addition, a reasoned decision gives parties the opportunity to challenge it and get a review by a higher authority. Only reasoning of judicial decisions may provide public control over the administration of justice [9].

In our opinion, the dilemma of choosing from the competing values should be resolved by taking into account a certain set of criteria that should be applied in the aggregate, namely:

- original nature of the one of the values (what value is original (initial) and independent from the other);
- dependence of one of the values (when without one value others - cannot exist, for example, the right to individual security cannot be effectuated in a society where there is a collective threat);
- nature and duration of negative effects and the possibility of their elimination.

In the process of historical development of the human rights doctrine, a number of absolute rights have been singled out. Either violation or their restriction is prohibited. Such rights are not global and we find differences in the various jurisdictions. Observing the European legal system, the absolute rights are the following:

- prohibition of torture, inhuman or degrading treatment or punishment;
- prohibition of slavery;
- the right not to be convicted for the behavior that was not illegal when committing a crime;
- the right not to be subjected to more severe punishment than the one predicted at the time of the crime commission;

The last two types can be combined in a general prohibition of the retroactive legal norm application, that worsens the situation of the individual.

Judges often have to use discretion when deciding the relationship between the public interest and the interest of the individual [8, p. 325]. Special attention to the differentiation of these concepts has been paid to by the European Court of Human Rights in its practice. Thus, in the judgment «James and Others v United Kingdom» (James and Others v. The United Kingdom), of February 21, 1986, Series A № 98, the Court states that the concept of «public interest» necessarily has a broad interpretation. The court, considering natural the wide limits of discretion granted to legislators, in order to implement social and economic policies, respects the viewpoints of legislators as to «public interest» when these decisions are based on a sound reasoning.

In determining a «necessity in a democratic society», the States enjoy a margin of appreciation, the extent of which depends on the scope of the public sphere that is in a conflict with the guaranteed right. The European Court of Human Rights assesses proportionality of restrictions applied to the freedom of expression, in respect to any legitimate aim sought to achieve. Any disproportionate interference will not be considered «necessary in a democratic society».

Thus, the judge in the administration of justice, regarding the issue of priority of private and public interest, enjoy a wide margin of discretion. However, this does not guarantee absolute legality and fairness of the application of discretion by the court. In this respect, some means of liability and ways to restore the violated rights in case of discretion abuse must be foreseen.

Summarizing the mentioned above, it should be noted that discretion of the court shall always be applied with consideration of human rights. In some cases, such as, the prohibition of tortures, inhuman treatment or humiliation of people's dignity or punishment, prohibition of slavery and the prohibition of retroactive law that aggravates the situation of individuals, human rights are absolute and no compromises concerning their restrictions or violations are allowed. In other cases, judges in the administration of justice, often have to find balance between the personal and the public interests, with the application of discretionary instruments. While considering competing values, judges shall apply such criteria as originality, dependence of values and consequences of their violation. Detailed motivation of judicial decisions is also important in order to provide human rights and the legitimate use of court's discretion.

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Стаття: надійшла до редакції 01.03.2017

прийнята до друку 22.03.2017

РОЗСУД СУДУ ТА ПРАВА ЛЮДИНИ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

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Досліджено окремі проблеми правосуддя у кримінальному провадженні із застосуванням дискреційних повноважень суду у взаємозв'язку з інститутом прав людини.

З'ясовано роль принципу рівності прав людини під час здійснення кримінального провадження з погляду суддівської дискреції у таких інститутах, як слідчі дії, заходи

забезпечення кримінального провадження та застосування примусових заходів медичного характеру. Мета принципу рівності – не допустити несправедливої дискримінації, забезпечивши однакове ставлення до осіб, які перебувають в однаковій ситуації де-факто чи де-юре, коли йдеться про реалізацію певного дискреційного повноваження.

Охарактеризовано види прав людини та допустимість їх обмежень за розсудом суду за наявності конкуренції суспільно-правових цінностей із урахуванням Конвенції про захист прав людини та основоположних свобод і практики Європейського суду з прав людини. За своїм характером права людини є абсолютними, однак щодо окремих з них допускаються винятки задля забезпечення насамперед публічного інтересу. В такому разі інтерес окремого індивідуума та публічний інтерес постають конкурентними цінностями, щодо яких саме судді належить прийняття рішення, на підставі встановлених законом умов, але й зі значною долею дискреції. Європейський суд з прав людини у своїй практиці ствердив, що хоча національний суд має певну свободу розсуду щодо вибору аргументів у тій чи іншій справі та прийняття доказів на підтвердження позицій сторін, орган влади зобов'язаний виправдати свої дії, навівши обґрунтування своїх рішень

Запропоновано критерії, необхідні для врахування судом, у разі зважання на конкурентні цінності у ситуаціях, які допускають розсуд суду, зокрема: первинність однієї із цінностей (необхідно враховувати, яка цінність виникла первинно та незалежно від іншої); залежність однієї із цінностей (наприклад, право на індивідуальну безпеку, не може бути реалізоване в суспільстві, де існує колективна загроза); характер та тривалість негативних наслідків та можливість їх усунення.

З'ясовано правові механізми захисту та поновлення порушених прав людини у разі неправомірного застосування судом дискреційних повноважень та виявлено їх недоліки для подальшого вдосконалення. Зокрема, важливим аспектом забезпечення прав людини при здійсненні дискреційних повноважень суду є обов'язок детальної мотивації та обґрунтування судового рішення. Детальна мотивація судового рішення також є необхідною для його перегляду судами вищих інстанцій, задля забезпечення однозначного розуміння дискреційних моментів суддею вищестоящего суду.

Ключові слова: відправлення правосуддя, правові цінності, принципи права, доступ до суду, справедливий судовий розгляд, публічний інтерес.