

# Judicial discretion as an element of developing judicial law

Ekaterina Azarova  
Volgograd State University,  
Institute of Right, Chair Criminal  
Procedure and Criminalistics  
Volgograd, Russia  
[aes130804@yandex.ru](mailto:aes130804@yandex.ru),  
<http://orcid.org/0000-0001-5130-1653>

**Abstract**—The article reveals the content of the concept of “court discretion in criminal proceedings”. The issues that concern the discretion of the court in the process of criminal proceedings are considered. It is proposed by legal empiricism to determine the proper degree and extent of court discretion in criminal proceedings. Judicial discretion is a functional system, which includes, on the one hand, enforcement of discretion at all stages of pre-trial and judicial proceedings, on the other hand, procedural discretion at a specific stage of the criminal process. This is because each stage of criminal proceedings is relatively independent and ends with the issuance of an interim or final decision on an unlawful (lawful) legal fact (criminal case). The current scheme of criminal justice suggests that the criminal procedure discretion as a system of objective and subjective factors is based on the general legal regime of all stages of pre-trial and judicial proceedings of the criminal process.

**Keywords**— *courts discretion, trial, judicial opinion, judicial conclusion*

## I. INTRODUCTION

The activity of law enforcement agencies is associated with such a measure as discretion because the freedom to choose one of several decision options is enshrined in law. The end result of the court, as the enforcement discretion of the subject of the criminal process - is the adoption of a reasonable, lawful and reasoned decision.

At the same time, like any phenomenon, criminal procedure discretion has its negative side, therefore the possibility of neutralizing these negative factors is directly dependent on the degree and depth of not only theoretical but also a practical understanding of the laws that exist in the field of application of enforcement in criminal legal proceedings.

On the one hand, even limited freedom to choose one of the solutions can lead to violations of the rule of law, adversely affecting it. On the other hand, a limitation of discretion or its complete exclusion may deprive the court of the opportunity to take into account the individual characteristics of the criminal case under consideration, which will adversely affect the correctness of the decision. Therefore, the main issue is to determine the proper degree

and extent of judicial discretion in criminal proceedings through legal empiricism.

The concept of what constitutes judicial discretion and its limits is of great importance for the criminal procedure since the activities of the judiciary involve a discretionary measure that allows taking into account the individual characteristics of the criminal case at the pre-trial and trial stages.

The need to consider the practical application of judicial discretion and its limits is predetermined by two groups of factors. The first group - the study of this problem will allow showing the dependence of this legal phenomenon on the dominant type of the criminal procedure paradigm and establish its doctrinal-legal and practical significance. The second group is the analysis of the main features of this phenomenon and the opportunity to define discretion in court and its algorithms, which is especially important for the practical activities of investigative and judicial bodies.

This is due to the fact that the Code of Criminal Procedure of the Russian Federation has a significant number of legal norms in which the resolution of procedural issues, as well as the production of a procedural action with direct indication or semantic content of the relevant provision, is transferred to the discretion of the investigator, investigative body, the prosecutor and the court. Therefore, in the context of the adversarial nature of the Russian criminal proceedings and the ambiguous approach of the theory of the criminal process to the court's exercise of the procedural activity in the criminal process, the problem of the court's discretion at the stages of the criminal process is relevant. Enforcement practice has a great influence on the formation of judicial rule-making. Its results show that the courts often arbitrarily interpret legislation, which leads to the adoption of opposite decisions under the same factual circumstances of the case.

Of course, this does not increase the authority of the judiciary. In our opinion, it is indisputable that the decisions made by the courts of Russia in similar cases should not contradict each other. This applies to the court decisions of different constituent entities of the Russian Federation, and to the decisions of the lower and higher courts, and to the decisions of the same court. In this regard, we believe that the formation of a theory of judicial law is a necessary way

of responding to existing differences in judicial practice. Consideration of empiricism of the discretion of the court is due to the fact that this phenomenon in the criminal process is closely connected with the protection and realization of the rights and freedoms of man and citizen, with the implementation of the appointment of criminal proceedings in general.

## II. MATERIALS AND METHODS (MODEL)

One of the main parts of enforcement is discretion. In the process of formalizing new public relations in modern Russia, the legislator cannot reflect all the possible behaviors in the law in detail. Accordingly, the law enforcer is given the opportunity, on the basis of the situation, to act at his own discretion thereby making a decision on the legal issue. A special role in enforcement discretion is the discretion of the court. Court discretion is an integral part of the structure of the criminal procedural paradigm since the court's perception of the "truth" of circumstances to be proven in a criminal case, as interpreted by the opposing parties to the adversary process, is possible only through the prism of evaluating these circumstances at its discretion, in order to verify evidence on a specific criminal case.

One of the grounds for judicial discretion is the analogy of the law which allows the court using the relevant norms of the Code of Criminal Procedure of the Russian Federation. In explaining the rights and obligations of the complainant or the offended, and, if necessary, the legal representative, the representative, the court uses the analogies of Article 268 (in relation to the victim) and Article 42 (victim) of the Code of Criminal Procedure.

In accordance with the discretion of the court, in accordance with the analogy of the law, the rights of the complainant at the court hearing include the following list of rights:

- to give explanations;
- to provide materials, by analogy to the evidence;
- to file petitions and formulate objections;
- to have a representative (part 10 of article 42 of the Code of Criminal Procedure);
- to participate in the judicial debate (confirmation of the analogy of the law is the right of the final remark of the complainant );
- to affirm the claim (by analogy);
- to have knowledge of the records of the court proceedings and submit comments on them;
- to appeal against the court ruling;
- lodge complaints against court decisions;
- exercise other powers provided for by the Code of Criminal Procedure of the Russian Federation.

The main question that arises in the analogy of Part 4 of Art. 125 and art. 42 of the Code of Criminal Procedure of the Russian Federation, the right to provide any materials - evidence here can be discussed. Here, in our opinion, most likely the court should use the analogy of law at its discretion, i.e. Chapter 6 of the Code of Civil Procedure of

the Russian Federation (Evidence in civil proceedings). Modern legal science proposes to classify the limits of judicial discretion. So, A.A. Berezin proposes to divide the limits of judicial discretion into subjective and objective.

According to the author, the subjective margin is that relating to the personality of the law enforcer, his sense of justice. A.A. Berezin gives special importance to the objective margin of judicial discretion, enshrined in regulatory legal acts. In his opinion, it is impossible to influence legislatively the legal awareness of the subject of law enforcement, therefore, it is proposed to improve only the objective margin of discretion.

In general, if such a classification is taken as correct, it should be noted that the author unduly minimizes the meaning of subjective margin. Legal awareness and the general level of the legal culture of the judge, in our opinion, is quite significant in the work of the judge. We are convinced that in addition to a high level of legal literacy, a judge must have a high level of legal culture in the general sense of the word. Often, it's not the knowledge of legal norms, but the "inner core", moral attitudes are a deterrent from committing a crime.

The criminal procedural discretion of the court, as a functional system, includes both the enforcement discretion at all stages of pre-trial and trial proceedings and the procedural discretion directly at a specific stage of the criminal process. This is due to the fact that each stage of criminal proceedings is relatively independent and ends with the issuance of an interim or final decision on an unlawful (lawful) legal fact (criminal case). The current scheme of criminal proceedings allows us saying that the court's legal discretion (criminal procedure) as a system of objective and subjective factors rests (as a superstructure) on the general legal regime (as a basis) of all stages of the pre-trial and judicial proceedings of the criminal process. Since each stage of the criminal process solves its specific tasks, respectively, at a particular stage, its own specialized legal regime is established, i.e. the legal regime of the stage of criminal proceedings, which is the basis for the formation of the procedural discretion at this stage. This suggests that the system of court discretion is closely interrelated with the general legal regime of criminal justice, special regimes of pre-trial and judicial proceedings (accusatory and adversary proceedings) and specialized regimes of the stages of criminal proceedings.

Therefore, it can be argued that the specific categories of the criminal justice regime are the basis for the formation and operation of the court's discretion system, i.e. the discretion of the court depends on the type of proceedings, the category of the stage of the general legal regime of the criminal process.

As an intermediate conclusion, we say that the criminal process as a general legal regime of functioning seizes pre-trial and judicial proceedings, which are special specific procedural regimes, and all categories of stages of specific specialized procedural regimes of criminal justice.

Consequently, the law enforcement discretion of a court in a criminal proceeding encompasses all elements of procedural discretion at the stages of both judicial and pre-trial proceedings. These elements include the resolution of

procedural issues at a particular stage, as well as the making of both intermediate and final law enforcement decisions.

. In a broad sense, the procedural discretion of the court is characterized as an element of the legal regime of criminal proceedings. In a narrow sense, the procedural discretion of the court covers the procedural regime of evidence in decision-making at the trial stage. Since the trial of a criminal case in the court of first instance takes a central place among the stages of the criminal process, and that constitutes the discretion of the court at this stage, we define the concept of a discretion system in the criminal process, i.e. with the criminal procedural discretion of the court in general and its private understanding.

So, let us ask ourselves what constitutes the discretion of the court at the trial stage and how it relates to the criminal procedure system of court discretion at all stages of the criminal process.

In the general sense, judicial enforcement is basically a criminal procedural discretion of the court. Therefore, as the basis for the analysis, we will involve the already mentioned work by A. Khaydarov, who proposed the following definition of discretion in a criminal proceeding: "Judicial (judicial) discretion in the judicial stages of a criminal proceeding is an integral component of the criminal procedural activity of a judge (court) carried out in the event of a problem stage or its stage and requiring permission as a condition for further movement of the criminal process or suspension and termination, the content of which is choosing by a judge (court) the most appropriate procedural decision or procedural action based on his inner conviction and conscience in accordance with the permissions of the criminal procedure law, as well as taking into account the principles of the legal system of Russia, generally accepted principles and norms of international law, in the interests of realizing the purpose of criminal proceedings

.In itself, the definition of the concept of discretion, cited above, is not entirely flawless, but it also has its merits confirming our hypothesis that there is a criminal procedural discretion of the court in the enforcement of the judiciary in the criminal process.

The first thesis of the definition is that discretion in judicial stages is an integral part of the criminal procedure of a judge is only partially correct since such activity is also widespread at the stage of pre-trial proceedings. The antimony of this thesis is that the criminal procedure of the judge is limited to judicial proceedings, while the criminal process retains its mixed form, i.e. includes both accusatory and adversary proceedings. In the accusatory (pre-trial) process, the criminal procedure of the court, although limited to the control function in the sphere of violation of the rights of participants and subjects of the process, remains essentially criminal and procedural.

The following thesis includes the statement that such activity is carried out under the following conditions, to which the current problem situation or another situation which arose during the criminal procedure of the judge at some judicial stage or its stage, applies. Further, the author explains that such situations include the conditions for further movement of the criminal process, its suspension or termination.

This statement is an objective and momentary expression (in a latent form) of the legal regime of judicial proceedings without specifying the content of the regimes of its stages in the criminal process. This is due to the fact that in this concept (the author's definition) judicial proceedings are replaced by the concept of judicial stages of the criminal process, despite the fact that in the system of stages of the criminal process there is only one stage called judicial - this is the stage of the trial. In this case, the subjective interpretation of the form and content of the criminal process, as an expression of paralogism, leads to objective confirmation of the essence of the functioning of the legal regime of criminal proceedings, which is proved by the logic of constructing a scheme of the criminal law regime of proceedings and stages of the criminal process.

The movement of the criminal process is regulated by the regime of conducting the stages of the criminal process, the suspension of such a movement at a specific stage (for example, the suspension of the preliminary investigation), the end and transition to the next stage or the end of the final stage of the criminal process. This is confirmed by the content of the general criminal procedure regime, the regimes of proceedings in the form of accusatory (pre-trial) and adversary (judicial) processes and the corresponding categories of specialized stages as separate types of parts of criminal proceedings (see the structure of the Code of Criminal Procedure of the Russian Federation).

Thus, the scheme of the criminal procedure regime is a structure that excludes both the general regime of movement by conducting stages in order to implement the criminal process, which exists in two forms of the procedural mode, and the procedural regime of each stage to resolve the tasks of a specific stage and objectives of criminal proceedings.

### III. RESULTS AND DISCUSSION

The objective margins of judicial discretion are expressed in the laws of the surrounding reality, and their real existence is beyond doubt. The above margins can be attributed to the judicial discretion, enshrined in the rules of law, formally defined and objectively existing. Also, the laws of logic, etc., also belong to the objective margins. The common feature of the objective margins of judicial discretion is their formal fixation in reality, the inherent property of objectivity.

Thus, we believe that at this stage it is possible to talk about increasing the role of judicial discretion in all aspects - from the improvement of current legislation to the consistent strengthening of public confidence in the judicial system and representatives of the judiciary. Judicial discretion as a problem of choice of possible options should be exercised in a procedural form and based on the principle of legality, be aimed at finding the optimal solution, based on the circumstances of a particular case. It should be within the boundaries of legal stability and the orderly development of the legal system as a whole. Judicial discretion should not limit the rights and freedoms guaranteed by the Constitution of the Russian Federation, infringe upon the legitimate interests of citizens and violate the established limits.

Judicial discretion should facilitate the adoption of a lawful, reasonable and fair judicial act. We believe that it is unacceptable to cover up "judicial arbitrariness" with

“judicial discretion”, and this requires further theoretical study based on practical experience gained in defining and legislatively fixing the limits of discretion as an element of judicial law.

In conclusion, it is possible to determine that the limits of judicial discretion are determined by the following factors: 1) the opportunities given to judges by their conviction to resolve questions, the answers to which are determined by law; 2) the possibility of clarifying the estimated categories of either activity, or its complete exclusion; 3) the opportunity to fill the existing gaps in the law; 4) moral and professional qualities of judges admitted administering justice.

#### IV. CONCLUSION

So, let us summarize some of our research on the discretion of the court in the criminal process.

We learned that the procedural activity of the court is a judicial enforcement activity that occurs during the functioning of the legal regime of criminal proceedings. This is due to the following reasons.

First, the structure of the regime is a system of stages of the criminal process formed by the relevant forms of the process, which include the stages of the prosecution process that are pre-trial proceedings (Part Two of the Code of Criminal Procedure) and the stages of the adversary process related to court proceedings (Part Three of the Code of Criminal Procedure). Secondly, the court carries out its activities in accordance with its powers (Art. 29 of the Code of Criminal Procedure) at the stage of initiating a criminal case (section seven of the Code of Criminal Procedure), the stages of the preliminary investigation (section eight of the Code of Criminal Procedure) and judicial proceedings (section nine, chapters 36, 37, 38, 39 Code of Criminal Procedure). Thirdly, the content of judicial law enforcement activity consists in resolving procedural issues of the stage, making appropriate interim and/or final law enforcement decisions. Fourthly, the expression of such activity is the enforcement discretion in the form of structural elements of the system, both in terms of specific procedural discretion (for example, Art. 258 of the Code of Criminal Procedure) and in law enforcement discretion in general (for example, Art. 255 of the Code of Criminal Procedure) on the one hand, on the other hand, the relationship with the discretion of the court in making interim and final decisions (paragraphs 532, 533 of Art. 5 of the Code of Criminal Procedure of the Russian Federation). This form of law enforcement activity of the court is called systemic criminal procedure discretion. Fifthly, the basis of this system is constituted by interdependent objective factors of law enforcement and their relationship with the subjective component, as a combination of factors of such activity.

Consequently, the criminal procedural discretion of the court in the operation of the legal regime of legal proceedings constitutes the law enforcement activity of the court through the exercise of its powers, in order to execute criminal law, which takes place in a particular stage of the criminal process, consists in resolving issues and making decisions based on subjective and objective factors of enforcement discretion.

As already mentioned, the trial stage is the central stage of the criminal process, at the same time there remains the question of the notion of discretion at this stage, the relationship between the legal regime of evidence and the procedural discretion of the court to take law enforcement decisions and the resolution of current procedural issues of this stage of the adversary process.

The main stage of this stage is the process of evidence in a criminal case and is in its essence a test of the arguments of the prosecution and the guilt of the person held criminally responsible as a defendant, and of the legality of such an accusation. Since the question of the legality of the prosecution at the trial stage is the main one in the adversary process, the legislator established the legal regime, setting the limits for consideration of the issue, extending its resolution to all stages of the court proceedings of the criminal process.

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