

## ***The limits of enforceable discretion: European approaches***

### ***Межі здійснення правозастосовної дискреції: європейські підходи***

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#### Key words:

*judicial discretion, discretion, legal certainty.*

#### Ключові слова:

*судовий розсуд, справедливий суд, правова визначеність.*

The effective operation of the legal system, including the implementation of legal proceedings on the principles of the rule of law, is an important factor ensuring the effective and efficient functioning of legal instruments involved in the protection and defense of human rights. One of the full-fledged ways to achieve certainty in the context of the varied behavior of an authority or a person making law-enforcement decisions is the proper exercise of discretionary powers within the limits established by law. Judicial discretion should be one of the main means of implementing world and European democratic principles for the implementation of a fair trial.

A fundamental feature of the process is impartiality. The judge should treat the participants of the proceedings in the same way, giving them equal opportunity when considering. He is obliged to give the parties the right to state their arguments, and at the same time, he must have no, even remote, personal interest in the outcome of the case. Discretion must be based on evidence presented in court. The decision must be motivated. This requirement that the judge explained his decision is especially important. An idea that captures the thoughts of a person is one thing. Putting her words is a completely different thing. Many ideas are known, the failure of which was caused by the need to explain them, since they contained only internal strength, for which it was impossible to find a justification. The duty to state the motives is one of the most important problems faced by the judge when he seeks to apply discretion<sup>1</sup>.

It should be noted, that in various sectoral acts of procedural legislation it is emphasized that the ability of the court to choose a particular model of behavior in the exercise of discretionary powers is not free in its own subjective perception of freedom of discretion. Such discretion must certainly have certain limits of application. They are defined in a normative manner, while the generally accepted principles of justice, such as respect for human rights, humanity, clarity of the decision, its validity and motivation, rely on the basis. All this gives legitimacy to an act adopted within the limits of discretion, and also guarantees the legality of the final judicial verdict. Regarding the court, this is manifested in the demand by assessing the evidence and appropriately interpreting the law to choose the appropriate version of justice and take the only correct decision under specific conditions and circumstances, provided there is a certain body of evidence in the case. Otherwise, the choice of a variant of behavior under the same conditions may not correspond to the actual data and have signs of subjectivity or incompetence, which will cast doubt on the legitimacy of such a choice and the legitimacy of the decision made. This can lead to a loss of confidence in a particular court and the law enforcement system as a whole. In criminal proceedings, such a wrong choice of discretion results may violate the presumption of innocence of a person and cast doubt on his guilt (innocence) upon the results of consideration, affect the validity of any criminal charge against him.

In civil cases, the improper use of discretionary powers leads to the adoption of unfounded or improperly grounded court decisions or the wrong motivation of the verdict. Thus, judicial discretion must necessarily take place when conducting activities for the collection, analysis and procedural consolidation of evidence defining the legal basis of the case. Also, by implementing discretionary powers, a legal assessment of the evidence collected is carried out and, thus, an objective truth is established in the case. Such functions of justice is its mandatory element and constitutes an objective necessity. Equally important is the proper judicial discretion at

<sup>1</sup> Barak A. Judicial discretion: Per. from English Scientific / Ed. V.A. Kikot, B.A. Strashun; Introduction article M.V. Baglay. Moscow : Норма, 1999. P. 33–34.

the stage of motivation of the final verdict. It manifests itself in the form of the election of a possible and legal variant of law enforcement on the basis of legal consciousness, legal culture and the life experience of the subject of discretion. The researchers of this issue to the content of the specified behavior in the implementation of discretionary powers include such actions as the choice of the substantive law to be applied, the choice of the norms of procedural law that serve the application of this substantive law, authentication and legal significance of all legal norms, proper interpretation of norms for the purpose of their correct application<sup>2</sup>. But the main factor in this process is usually the adaptation of assessed and admitted factual data on the case to the content of specific legal acts, that is, a proper justification of motivation.

We have to admit that domestic legal proceedings are often sinned by the fact that a judicial verdict contains no motivation at all, but is limited to a formal list of relevant legal norms, if there are factual data (about which the court has no information) that could theoretically serve as motivation, or the reasons given are not relevant to the case. Therefore, even the presence of the motivation part does not mean that the decision in the case is motivated and justified. Therefore, indeed, very often there is the actual remoteness of the content of motivation from the circumstances of the case, established facts and prescriptions of legal norms. Meanwhile, compliance with the requirements for the motivation of law enforcement acts along with the implementation of the requirements regarding the rule of law is important in the implementation of judicial enforcement. Motivated application of legal norms at the same time is their legal application, and vice versa.

So, when the law gives the court the right to choose, it must make a decision that most closely meets the individual characteristics of a particular case. Thus, a mandatory consideration of the specific circumstances of the case when making a choice of one of the possible solutions can be considered a sign of judicial discretion. That is why the possibility of choice is not only a right, but also the obligation to make a choice so that the decision made is more consistent with the specific features of the case under consideration<sup>3</sup>.

The general problems of discretionary powers in the activities of the authorities have been the subject of research by numerous scientists. Recall the works of such scientists as M.I. Kozyubra, A.T. Boner, M.K. Zakurin, A.I. Senkov, M.A. Pogoretsky, O.O. Berezin, K.V. Pronin, M.B. Risny, A.I. Rarog, D.Yu. Khoroshkovskaya, S.V. Shevchuk, and others. Considerable attention the issues of determination of judicial discretion is given in the works of foreign researchers, such as A. Barak, J.J. Rachlinski, W. Waluchow, C.C. Goldstein, M.S. Scott, A.J. Wistrich, J.C. Hutcheson, K.A. Findley, J. Frank, H. Hart, C.C. Goldstein. However, research in this area continues to be quite relevant. At the same time, most of the above-mentioned scientific works have an insignificant in nature character of the considered aspects, not deeply penetrating into the real essence of such a phenomenon as judicial discretion, which manifests itself mainly in revealing general remarks. In turn, this draws contradictory conclusions regarding the role, content and legal boundaries of the exercise of judicial discretion. Consequently, the theoretical developments of the mechanisms of discretionary behavior of judges in the Ukrainian legal environment under the existing realities is the task of this work.

In legal science it is noted that discretionary powers should be used by a judge exclusively within the framework of the law, when each of the possible actions or decisions is legitimate. The boundaries of judicial discretion should be determined by such factors as the general provisions of the regulations, the goal pursued by law, the specific circumstances of the case, the principles of law, moral norms and laws of the functioning of society<sup>4</sup>. In other words, restrictions on discretionary power, as a component of the rule of law and a rule of law state, require first of all that the activities of the state as a whole and its bodies, including the legislative, are subject to the establishment and enforcement of human rights and freedoms<sup>5</sup>. The Chairman of the Supreme Court of Israel, A. Barak, defines judicial discretion as the authority granted by law to a judge who is empowered to choose between two or more alternatives when each alternative is legal. It is very significant that the author focuses on the possibility of choice, and not on freedom, independent of any factors. He says that discretion provides for "rather a zone of opportunity than just one position"<sup>6</sup>. Given these limiting factors, the term "discretion" itself acquires a conditional and limited character.

<sup>2</sup>Voplenko N.N. Realization of the right : studies allowance. Volgograd, ВолГУ, 2001. P. 32–33.

<sup>3</sup>Rarog A.I., Gracheva Yu.V. The concept, basis, characteristics and significance of judicial discretion in criminal law. Государство и право. 2001. No. 11. P. 94–95.

<sup>4</sup>Bonner A.T. Application of regulations in civil proceedings. Moscow, 1980. P. 47.

<sup>5</sup>Kozyubra N.I. Principles of the rule of law and the rule of law: the unity of the basic requirements. Scientific notes НаУКМА. Kyiv : Києво-Могилянська академія, 2007. Т. 64. Jurisprudence. P. 4.

<sup>6</sup>Barak A. Judicial discretion: Per. from English Scientific / Ed. V.A. Kikot, B.A. Strashun; Introduction article M.V. Baglay. Moscow : Норм, 1999. P. 13–15.

Therefore, each of the alternative options (decisions), among which the court has the right to make a choice, must exist on the basis of an absolute or relatively specific indication in the legal norm. In addition, all alternative court decisions must be legally permissible, that is, comply with the requirements of the law. It is precisely this position that the European Court of Human Rights takes, providing interpretations of judicial discretion in the consideration of specific cases. He points out that due to some uncertainty of the law and the objective need to assess specific factors and circumstances in the process, discretion is often a necessary phenomenon. This is particularly evident in the judicial assessment of such characteristics of interference with human rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms, such as the legitimacy of such interference, the existence of a legitimate aim and the need for a democratic society.

For example, in the case of "Hasan and Chaush v. Bulgaria" it is stated that the law must be sufficiently accessible and predictable, that is, formulated with sufficient accuracy to enable the person to determine the rules of conduct. In order to comply with these requirements, national legislation must provide for remedies for the arbitrary interference of public authorities with the rights protected by the Convention. The impact on fundamental rights, left to the discretion of the executive authorities, which have unlimited powers, will be contrary to the law – this is one of the basic principles of a democratic society, as reflected in the Convention. So, the law should sufficiently clearly explain the limits of such discretion granted to the relevant authorities, and the procedure for their use<sup>7</sup>. Since in this case the relevant legislation did not provide clear criteria for registering the leadership of denominations, which changed, and also did not provide any procedural guarantees of protection against the arbitrary use of discretionary powers, it was stated that the state's interference with the law protected by Article 9 Therefore, the ECHR clearly states that discretionary powers should not be used arbitrarily. And the court should control these decisions as efficiently as possible.

In the context of the determination of judicial discretion, taking into account the requirements for predictability and expectation of a decision, as already mentioned, the judicial assessment of the quality of the law is important. In particular, when considering the issue of compliance with paragraph 2 of Art. 8 of the Convention, the ECHR is not limited to referring to domestic law, but also speaks about the quality of the law, which must comply with the principle of the "rule of law". This provision implies that in domestic law there should be restrictive measures against arbitrary interference by the authorities in the exercise by citizens of their convention rights. Where the executive carries out its functions in secret, the danger of arbitrariness becomes especially apparent. Undoubtedly, the requirements of the Convention, especially with regard to the predictability of the law, cannot be unchanged in such a special issue as interception of information disseminated via communication channels for the purposes of a police investigation<sup>8</sup>. As the Court noted in the decision of the case "Malone v. The. United Kingdom" of August 2, 1984 a law that gives the right to act at its discretion, should indicate the scope of this discretion, although detailed procedures and conditions that must be respected do not necessarily have to be included in the substantive law. The degree of accuracy of the "law" in this regard will depend on the specific subject. Consequently, the law should indicate the amount of any discretion provided to the competent authorities and the method of its implementation with sufficient clarity, taking into account the legitimate aim of the event, to give the individual adequate protection against arbitrary interference<sup>9</sup>.

According to the general rule worked out by the European Court of Human Rights, the national law enforcement system has sufficiently wide possibilities for discretion in the administration of justice. For example, in the case of state intervention in human rights, the protection of which is provided for in Articles 8, 9, 10 and Article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, it must be established whether the interference was legitimate, pursued a legitimate aim and necessary in a democratic society. In other words, the question of the proportionality of such interference in conventional human rights is to be clarified. At the national level, these issues are resolved by the courts by applying judicial discretion. But still according to the ECHR, the democratic nature and reasonableness of such discretion should be under the control of the European Court. At the same time, the Court, in its decision of September 6, 1978, in the case of "Klass and Others v. Germany", notes that in determining the conditions under which the secret tracking system should operate, the legislature enjoys a certain discretionary right. There is no doubt that the Court should not substitute the opinion of national authorities with its opinion on which decisions would be best in this area. At

<sup>7</sup> Paragraph 84. Judgment in the case of the ECHR of October 26, 2000 "Hasan and Chaush v. Bulgaria", application No 30985/96. URL: <https://www.lawmix.ru/abrolaw/8137?page=4>

<sup>8</sup> Paragraph 30. Judgment in the case of the ECHR of April 24, 1990 "Kruslin v. France", application No 11801/85. URL: <http://www.echr.ru/documents/doc/2461408/2461408.htm>

<sup>9</sup> Paragraph 68. Judgment in the case of the ECHR of August 2, 1984 "Malone v. the. United Kingdom", App. No 8691/79. URL: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/1984/10.html&query=8691/79&method=boolean#disp2>

the same time, the Court notes, this does not mean that the state is granted an unlimited discretionary right to establish secret surveillance of persons within its jurisdiction. Realizing the danger posed by such a law, undermining or even destroying democracy under the pretext of its protection, the Court notes that the signatory state has no right, under the guise of countering espionage and terrorism, to take the measures it considers necessary<sup>10</sup>. The highest national body of constitutional jurisdiction, the Constitutional Court of Ukraine, adheres to this position. Guided by the above decision of the ECHR, he notes that the principle of the rule of law implies, in particular, that the intervention of the executive in human rights should be subject to effective supervision, which, as a rule, provides the judiciary. At the very least, this should be judicial review, which best provides guarantees of independence, impartiality and due process of law<sup>11</sup>.

However, despite the fact that the decision of the Constitutional Court is binding on all bodies, including the judiciary, and the decision of the European Court of Human Rights under Ukrainian law is a source of national law, domestic legal proceedings have so far chosen a completely different approach to assessing the legitimacy of discretionary actions one or another subject of authority. Motivating the decision, the courts refer to the Recommendations of the Committee of Ministers of the Council of Europe No. R (80) 2 on the exercise of discretionary powers by the administrative authorities, adopted by the Committee of Ministers on March 11, 1980 at the 316th meeting<sup>12</sup>, according to which discretionary powers should be understood as powers that an administrative body, when making a decision, can exercise with a certain discretion, that is, when such a body can choose from several legally permissible decisions which it considers best in these circumstances. At the same time, freedom of choice is interpreted by the courts as an absolute unrestricted right.

This approach is erroneous. This is also the position of the European Court of Human Rights, which has repeatedly stressed the need to regulate judicial discretion. In particular, the Court, resorting to the characterization of the law, emphasizes, "A law that provides discretionary rights should define the limits of the exercise of such a right, although detailed rules and conditions should be contained in the norms of substantive law. However, the Court recognizes the impossibility of achieving absolute confidence in the formation of laws and the risk that the search for certainty may cause excessive rigidity<sup>13</sup>. Therefore, in such circumstances discretion is often an objective necessity. But the ECHR has repeatedly stressed that legal discretion should be limited on the basis of the rule of law. At the same time, in some cases, decisions taken under discretionary powers, but with violation of the principles of effective protection of the rights and freedoms of citizens, were recognized by the ECHR as a violation of the Convention. For example, in the "Volkhi v. Ukraine" case decision, which addressed the question of the interference of state bodies with the applicants' right to respect their correspondence, which is guaranteed by paragraph 1 of Art. 8 of the Convention, the violation by the state of Ukraine of the principle of the proper quality of the "law" was established. This means that in national legislation there must be a remedy against arbitrary interference by state bodies with human rights.

One of the main signs of proper enforcement is to ensure a high level of substantiation and motivation of decisions that are made by the subjects of authority. This applies both to administrative law-enforcement bodies authorized to implement measures regulating the behavior of specific individuals in a certain territory in a separate area by making individual subordinate decisions, and judicial jurisdiction bodies administering justice applying the rules individually. At the same time, objectively law enforcement bodies exercise the discretionary powers granted to them by law. As already mentioned, their effectiveness is largely manifested through proper soundness and motivation of the decision. The presence of the necessary elements of motivation in enforcement decisions significantly reduces the burden on judicial instances when further appealing the relevant acts and finally, the flow of complaints to European judicial institutions. Indeed, analyzing the content of the contested decision, the judicial authority mainly investigates the affiliation of the substantiation and motivation of the operative part. And, on this basis, it establishes the result – the legality or illegality of the relevant document, since in fact it is impossible to justify correctly the erroneous decision. The unmotivated act is manifested in the distortion of the arguments of the person provided by him in the consideration of the case, ignoring his arguments. Often the improper motivation of the decision is connected with the substitution of the issue that was the subject of legal regulation, the silence of certain aspects that needed to be considered and resolved.

<sup>10</sup> Paragraph 49. Judgment in the case of the ECHR of September 6, 1978 "Klass and others v. Germany", application No 5027/71. URL: [https://zakon.rada.gov.ua/laws/show/980\\_093](https://zakon.rada.gov.ua/laws/show/980_093)

<sup>11</sup> Paragraph 6.3. Decision of the Constitutional Court of Ukraine dated December 13, 2011 in case No 17-rp / 2011). URL: <https://zakon.rada.gov.ua/laws/show/v017p710-11>

<sup>12</sup> Administrative procedure and administrative services. Foreign experience and suggestions for Ukraine. / Compiled by V.P. Timoshuk. Kyiv : Факт, 2003. P. 470.

<sup>13</sup> Paragraph 88. Judgment in the case of the ECHR of March 25, 1983 "Silver and Others v. The United Kingdom", applications No 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75. URL: [http://www.hrcr.org/safrica/privacy/silver\\_uk.html](http://www.hrcr.org/safrica/privacy/silver_uk.html)

The validity and motivation of the enforcement order is an indicator of the effectiveness of local lawmaking of the authorities by issuing non-regulatory legal acts (acts of individual action). Their reasonableness and motivation directly provides an opportunity to appeal such prescriptions. The design of the construction of relevant acts by all authorized subjects is almost the same: the reasoned conclusions reached by the law-enforcement body should be based on the facts established in the implementation of activities within the competence of the relevant body, references to these facts and their assessment, justification for the choice of applicable law and their interpretation. At the same time, the judicial authorities should also evaluate the motivation and the legality of the decisions and actions of administrative-public bodies. Therefore, the legal mechanisms introduced by the European Court of Human Rights regarding the principles of certainty in the application of legal norms by ensuring their motivation and reasonableness in the conduct of legal proceedings should equally be used by national courts, assessing the legality of law enforcement acts of the authorities.

The European Court considers the inadequacy of the assessment or ignoring of the necessary arguments and arguments when making a decision to the disadvantages of law enforcement motivation. For example, in the decision "Nechiporuk and Yonkalo v. Ukraine", the ECHR recognized that the reaction of both the court of first instance and the Supreme Court to the arguments of the applicant was extremely inadequate and inadequate. Ignoring the complainant's specific, relevant and important argument, the national courts failed to fulfill their obligations under paragraph 1 of Art. 6 of the Convention<sup>14</sup>. At the same time, the Court has repeatedly stated that, in accordance with its established practice, which reflects the principle associated with the proper administration of justice, the decisions of the courts and other dispute resolution bodies must indicate the grounds on which they are based.

Despite the fact that the national court has a certain discretion in relation to the choice of arguments in a particular case and the adoption of evidence in support of the positions of the parties, the authority must justify its actions by giving reasons for its decisions<sup>15</sup>. An important purpose of an informed decision is also to demonstrate to the parties that they have been heard. A motivated decision gives the party the opportunity to appeal against it and get its review by a higher authority. Only under the condition that an informed decision is made can justice and certainty of the law enforcement be ensured<sup>16</sup>. Thus, the ECHR notes that national courts, when evaluating the use of law by imperious institutions, should carefully check the validity, motivation, and then the legality of their acts.

As a rule, the European Court evaluates the degree of motivation of the decision of the national court in terms of the presence in it of sufficient arguments regarding the acceptance or refusal to accept the evidence and arguments which, in the opinion of the ECHR, are important, that is, those that were formulated by the applicant and at least could affect the outcome of the case. This, in fact, manifests discretion of the powers of the law enforcement authority. But such discretion obliges the court in each particular case to be extremely careful in evaluating all, without exception, evidence and arguments just to determine from them those that necessarily require special attention and taking into account in deciding the corresponding arguments "for" or "against" them adoption. The lack of justification for a discretionary decision of the law-enforcement body should be regarded as a violation of the law, proper justification of the decision of such a body is considered both expedient and legitimate.

The principle of effectiveness of the law upheld by the ECHR is that the parties have the right to submit comments that they consider important in the case. This right can be considered effective only if the remarks were "heard", that is, they were considered accordingly by the court. In other words, the "court" must conduct a proper review of the documents and evidence submitted by the parties (the decision in the case of "Kraska v. Switzerland"<sup>17</sup>). The right to be heard, in turn, gives rise to the right to be heard by the law enforcement body. A guarantee of the latter right is the requirement of motivation of a decision in a particular case, providing for the obligation to make decisions based on a study of facts and circumstances relevant to a particular situation, indicate the reasons for which the body considers the presence or absence of such facts to be established. Ac-

<sup>14</sup> Paragraphs 183, 185-196, 277. Judgment in the case of the ECHR of April 21, 2011 (final dated July 21, 2011) "Nechiporuk and Yonkalo v. Ukraine", application No 42310/04. URL: [https://zakon.rada.gov.ua/laws/show/974\\_683](https://zakon.rada.gov.ua/laws/show/974_683)

<sup>15</sup> Paragraph 36. Judgment in the case of the ECHR of July 1, 2003 "Suominen v. Finland", application No 7801/97. URL: [http://search.ligazakon.ua/l\\_doc2.nsf/link1/S0001074.html](http://search.ligazakon.ua/l_doc2.nsf/link1/S0001074.html)

<sup>16</sup> Paragraph 25. 15. Judgment in the case of the ECHR of July 18, 2006 "Pronina v. Ukraine", application No 63566/00. URL: [https://zakon.rada.gov.ua/laws/show/974\\_096](https://zakon.rada.gov.ua/laws/show/974_096)

<sup>17</sup> Paragraph 30. Judgment in the case of the ECHR of April 19, 1993 "Kraska v. Switzerland", application No 13942/88. URL: <http://echr.ketse.com/doc/13942.88-en-19930419>.

ording to the ECHR, justice must not only be perfect, but it must also be seen that it was done (decision in the “Delcourt v. Belgium” case<sup>18</sup>).

From the study we can draw conclusions. Given the objective nature of domestic legislation, the discretion of the powers of the bodies and officials of government institutions is a necessary phenomenon. At the same time, according to the established position of the European Court of Human Rights, the scope of such powers cannot be unlimited, it is determined based on the purpose of law enforcement, it must be based on the principles of the rule of law and take into account the requirements of proportionality of intervention. Respect for the reasonableness and legitimacy of the exercise of discretion requires effective judicial control. In the system of legal proceedings, discretion is exercised when evaluating the actual materials on the case, selecting and interpreting the applicable law. This is manifested in making a reasoned and lawful decision.

## Summary

In the study of the real content of the concept of discretionary powers of the authorities. The problems of the legal restriction of the free discretion of the respective subjects have been studied. It has been established that discretion must necessarily be carried out taking into account the principle of the rule of law, justice and the priority of human rights. Attention is paid to the systemic shortcomings of national judicial proceedings in this area. Examples are given of the legal approaches of the European Court of Human Rights in regulating these issues and exercising judicial control over the discretionary discretion.

## Анотація

У роботі проведено дослідження реального змісту поняття дискреційних повноважень органів влади. Вивчено проблематику правового обмеження вільного розсуду відповідних суб'єктів. Встановлено, що дискреція обов'язково має здійснюватися з урахуванням принципу верховенства права, справедливості і пріоритету захисту прав людини. Приділена увага системним недолікам національного судочинства у цій царині. Наведені приклади правових підходів Європейського суду з прав людини під час регулювання цих питань та здійснення судового контролю за правильністю дискреційного розсуду.

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