

ISMGE 2020**II International Scientific and Practical Conference "Individual and Society in the
Modern Geopolitical Environment"****IT TECHNOLOGIES AS A TOOL FOR THE IMPLEMENTATION
OF JUDICIAL DISCRETION**

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Abstract

The article analyzes the need to use IT technology as a tool to implement the judicial discretion. It outlines ways to increase the effectiveness of criminal proceedings based on computer decision support systems and considers issues that relate to judicial discretion during the implementation of criminal law in criminal proceedings. In the process of complicating social systems, the role and importance of information technology are growing as one of the tools designed to ensure the effectiveness of state functions. The indicated general problems of the criminal process science are directly related to contradictions in the application of judicial discretion at the stage of the trial. There is a need for a computer program that could act as a tool for solving issues. Such a program is based on the concept of "conditional probability", its essence lies in the consistency in decision-making to choose the optimal one under the given conditions. The listed problems and contradictions in criminal proceedings are proposed to resolve by legalizing the institution of the judicial discretion in the face-to-face and in absentia form of the trial stage and further determining its place in the structure of the criminal procedure scheme of the adversarial process in court.

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1. Introduction

The use of IT technology at the judicial discretion ensures the execution of actions and decision-making aimed at the effectiveness of the court. The development of such a program considers the list of procedural opportunities available to the judge. This list of conditions will determine the choice of alternative. In other words, the algorithm of the program considers various situations, which counts the probability of decision-making in a set of conditions. A computer program formalizes not only the choice provided by the legislator but also allows the court to present very complex mechanisms outside of consciousness: awareness of the legitimacy, appropriateness, public utility of the chosen decision.

The need to improve judicial lawmaking is associated with the development of the criminal process science. Improving any science requires scientific means, which include IT technology in modern society. The introduction of information technology is gradually changing the attitude of society towards the methodology of computer science (Marfitsin, 2015).

The fundamental rights of citizens enshrined in the Constitution are reflected in the Criminal Procedure Code of the Russian Federation. For fifteen years of application of the Criminal Procedure Code, the legislator has introduced about three hundred amendments that strengthened its ambiguity and inconsistency. The construction of its provisions is designing and develop without a planned scientific and theoretical component of such a construction, without considering empiricism of application. The constructive basis for the new law is the Criminal Procedure Code of the RSFSR, where the stages of the criminal process are the fundamental structure of the law. The existence and introduction of new types of court proceedings and related institutions as an additional load caused a “deflection” of the entire design of the Criminal Code Procedure of the Russian Federation, which resulted in an increase in unavoidable contradictions between the goals and objectives of criminal proceedings, its general conceptual provisions and the immediate stages of the criminal process. These paradoxes of law include the following list of contradictions.

2. Problem Statement

The current trial stage is burdened with various types of judicial proceedings and institutions, given the face-to-face meeting form. A trial in absentia is today considered the institution of criminal proceedings, which is both a theoretical and empirical fallacy. The fact that the evidentiary process is carried out only at the judicial stage of the criminal process both in face-to-face and in absentia proceedings explains this paralogism. Such a false installation of "the in absentia institution" inevitably leads to a camouflaged formal error in evidentiary verifying in absentia proceeding, since there is no institution for evidentiary verifying.

The legislator ensures the principle of equality of arms and adversarial litigation, provides the right to collect evidence not only to the subjects of the prosecution but also to the defence participants. However, the prerogative to evaluate evidence belongs to the prosecution and the court, which is natural for a mixed model of the current criminal process. At the same time, there is no legislative scheme and scientific model of the adversarial proceeding at the trial stage, although such a concept as the criminal procedure paradigm (conceptual scheme) slips in scientific papers (Azarova, 2011).

The study of the epistemological nature and legal foundations of criminal procedural evidence did not affect the essence of the adversarial process itself since the main emphasis of scientific research is on pre-trial stages of the criminal process. The absence of established conceptual provisions that will constitute the initial scheme of an adversarial trial creates the problem of the essence and the content of court decisions based on the results of the criminal procedural evidence.

According to scientists in the Criminal Code Procedure, the legislator recognized the priority of universal values, democratic rights and legitimate interests of citizens over the search for truth in a criminal case. As Balakshin (2015) correctly observed: “Meanwhile, this problem is much more complicated than it seems at first glance, and needs not just a thorough, but complex study ...” (p. 533). Indeed, this problem has not only a practical but also an epistemological character in the science of the modern criminal process. The rejection of the principle of comprehensiveness, completeness and objectivity in investigating the circumstances of a criminal case to establish the truth in a criminal case, raised many problematic issues, both in the theory of judicial evidence and in the concept of a legislative approach to solving this problem. Therefore, the new concept of subjective perception of the category of “truth” established by the court towards the evidence in a criminal case will serve as a hypothesis of “substantiation of evidence” at the trial stage.

3. Research Questions

Compared to Art. 69 of the RSFSR Code of Criminal Procedure, the wording of evidence in Art. 74 of the Criminal-procedural code of the Russian Federation resulted in a new optimal concept of criminal procedure evidence. Such a concept was the definition of “any information” instead of “factual data”, which in turn marked and reinforced the contradictions between the provisions of the criminal process science and the practice of investigative and judicial bodies. These contradictions are not only theoretical in nature but are also an epistemological paradox in relation to the dialectic of knowledge. Perhaps the establishment and definition of the initial conceptual scheme of the trial will solve this problem. This scheme should be based on a system of evidence as a criminal procedure category developed on new approaches to the scientific study of this problem, associated with epistemological categories of the concepts' definition (Tolstolutsky, 2011).

4. Purpose of the Study

General contradictions in the theory and practice of law enforcement, in turn, result in the particular problems of a criminal procedure nature. The indicated general problems of the criminal process science are directly related to contradictions in the application of judicial discretion at the stage of the trial (Barak, 1999). There is a need for a computer program that could act as a tool for solving issues. Such a program is based on the concept of “conditional probability”, its essence lies in the consistency in decision-making to choose the optimal one under the given conditions (Tolstolutskiy, 2003; Tolstolutsky, 2010).

The listed problems and contradictions in criminal proceedings can be resolved by legalizing the institution of the judicial discretion in the face-to-face and in absentia form of the trial stage and further determining its place in the structure of the criminal procedure scheme of the adversarial process in court.

5. Research Methods

The proposed institution of judicial discretion in criminal proceedings is based on a doctoral and legal interpretation, combining concepts, judicial discretion and judge's discretion.

At any historical stage in the development of human society, the judiciary is associated with the concept of discretion. The freedom to choose one of a certain number of decisions is enshrined in law, so the result of the judicial discretion should be the adoption of a reasonable, lawful and fair decision.

A general theoretical and epistemological drawback of scientific research is that the result of these studies, not mentioned here, defines judicial discretion in the criminal process as a thing in itself for the legislator and law enforcer. Simultaneously, according to Marfitsin (2003), the main trends in the study of this problem are judicial conviction and its mechanism for forming a criminal case at the final stage; the inner discretion of persons in assessing evidence; individual factors, including legal consciousness, affecting the forming process of the conviction and judge's discretion; procedural decisions as a means of implementing the discretion of the law-applier, as well as the problem of the subjective factor in criminal proceedings.

6. Findings

Let us consider these contradictions and the listed problematic issues of criminal proceedings from the formal science viewpoint.

It is common knowledge that the criminal process regulates the system of legal relations between competent state authorities on the one hand and citizens and other persons on the other, to implement the current criminal law. The science of the criminal process studies the laws governing the occurrence of such legal relations, the basic concepts and principles of its implementation at various stages of criminal proceedings. The main part of the criminal process science focused on the study of evidence and the development of new provisions in the theory of judicial evidence, as well as the legal relationship between participants in the process of proof, legal facts arising in the functioning of criminal proceedings.

Judicial discretion is a subjective and objective concept which is closely interwoven with the judicial investigation and a criminal case resolution. This concept is quite consistent with legal phenomena: the analogy of law and human rights, the internal conviction of a judge, the interpretation of the law, etc. The formation of a judge's discretion is based on his internal conviction influenced by legal consciousness and other subjective factors.

The mechanism for the formation of the judicial discretion system consists of the factors with its specific structure influencing decisions in the consideration and resolution of cases. Since the administration of justice takes place in society and under the influence of legal, philosophical, economic, political and other factors, judges come to legal consciousness that can be different in various socio-economic formations. It is typical for Russia at a given period of financial raw-mining functioning.

So, legal consciousness, inner conviction, motives are subjective factors of discretion in court. The listed elements relate to the concept of legal knowledge since the formation of these factors as elements of the discretion system is based on the current state law, order and criminal policy.

The simulated current construction of the Russian criminal process is closely connected with international criminal law and order, which also affects the category of justice.

We will summarize some of our research regarding judicial discretion in criminal proceedings.

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

Firstly, the structure of the regime is a system of criminal process stages formed by the relevant types of process, which include the stages of the prosecution process being pretrial proceedings (Criminal-procedural code of the Russian Federation, para 2) and the stages of the adversarial process related to court proceedings (Criminal-procedural code of the Russian Federation, para 3). Secondly, the court operates with its powers (Criminal-procedural code of the Russian Federation, art. 29) at the stage of initiating a criminal case (Criminal-procedural code of the Russian Federation, section 7), stages of the preliminary investigation (Criminal-procedural code of the Russian Federation, section 8) and the trial (Criminal-procedural code of the Russian Federation, section 9, chapters 36, 37, 38, 39). Thirdly, the content of judicial enforcement is to resolve the procedural, process-related issues of the stage by making interim and/or final enforcement decisions. Fourth, such activity expression is law enforcement discretion in the structural elements of the system, both in terms of specific procedural discretion (for example, Criminal-procedural code of the Russian Federation, art.258), and in law enforcement discretion in general (for example, Criminal-procedural code of the Russian Federation, art.255) on the one hand, on the other hand, the link with the discretion of the court in the adoption of interim and final decisions (Criminal-procedural code of the Russian Federation, art.5, paragraph 53) This form of court's law-enforcement is called systemic criminal procedural discretion. Fifthly, the basis of this system includes interdependent objective law-enforcement factors and their link with the subjective component as a combination of factors of such activity.

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

As already mentioned, the stage of the trial is central to the criminal process. At the same time, the question remains of the concept of discretion at this stage, the correlation of the legal proof regime and the procedural court's discretion on the adoption of law-enforcement decisions and the resolution of current procedural issues in the adversarial process.

The key process of this stage is the evidence process, in essence, a verification of the prosecution arguments and the guilt of the person facing criminal prosecution and the legality of such a charge. Since the charge legality at the trial stage is the main one in the adversarial process, the legislator established the legal regime, determined the limits of the issue consideration extending its permission to all stages of the criminal process trial (Berg, 2008; Ermakova, 2010).

Earlier we considered the theoretical issues of the judicial discretion at this stage as well as various aspects of such activities. This also includes discretion issues at the preparatory hearing part, in the oral hearing and the last word of the defendant. These limits are indicated as general conditions for a trial (Criminal-procedural code of the Russian Federation, chapter 35). Since these conditions are procedural in nature, it can be argued that this is a question about the procedural judicial discretion related to the procedural regime of evidence in a criminal case and determined the final law enforcement decision - sentencing.

Thus, the regime of evidence in conjunction with the general conditions for the adversarial process is the legal regime for regulating the procedural judicial discretion at the trial stage (Criminal-procedural code of the Russian Federation, chapters 36, 37, 38, 39). This statement is described as law enforcement discretion in the narrow aspect of such activities. Since this activity was initially a criminal procedure, the concept of the trial stage activity will accordingly sound as follows.

The judicial procedural discretion is a systemic element of the legal regulation of the trial stage including both the procedural issues of the stage and the process of evidence in the criminal case and acting as the law enforcement discretion of the court based on the results of this stage and subsequent stages of the adversarial process.

As the above definition shows, the legal regime of evidence at this stage ends with a final enforcement act that is a court sentence. Therefore, the judicial discretion at this stage is closely interconnected with the evidence process and the adoption of the final decision, while this link is direct and mutually constituent and considers the activities of the court in the criminal process.

Returning to the beginning of the first chapter, we note that we have already defined the concept of the judicial discretion algorithm. It remains to answer the question of what the judicial discretion algorithm contains at the trial stage (Azarova, 2018).

The decision of the sentence is the result of the court's activity following the results of the adversarial process, where the struggle of opposing parties occupied the main place of the criminal process. The court considers the stages of the struggle on the basis of its charge legality and the opposing arguments (Criminal-procedural code of the Russian Federation, art. 88).

All passed stages of the struggle: judicial investigation, oral hearings, the last word of the defendant, are subject to final assessment by the court based on internal conviction. In this assessment, the court based on the law plays a leading role (Criminal-procedural code of the Russian Federation, art. 15). The results of the struggle are in the form of a sentence that is a legal enforcement act (Articles 296, 297 of the CPC of the Russian Federation). Here, the interpretation of the criminal procedure law represents judicial powers implementation in the application of criminal law.

It means that implementing judicial powers at the trial stage, discretion is the basis for making the final sentencing decision (Criminal-procedural code of the Russian Federation, chapter 39), and this suggests that the stages of the trial stage together constitute the judicial discretion algorithm.

7. Conclusion

The ideal principles of the judicial discretion system should also include legal consciousness. There are several levels of legal consciousness: public, patrimonial (general professional), group

(narrowly professional), individual (judges). The latter is influenced by the previous ones but not always adequately with them. Individual legal consciousness is subjected to political, philosophical, moral and other views, which can also be social, tribal, group. Along with the factors forming the individual legal consciousness, the following elements are also cognitive, evaluative, and socio-psychological. Legal consciousness has not only a direct but also an indirect effect on the formation of the judge's discretion (Tolstolutsky, 2014). In particular, legal consciousness is one of the foundations of a judge's conviction, and the last affects the choice of discretion. But the conviction is influenced by other factors, such as the level of knowledge about the crime event, the interpretation of the semantic content of evidence from their qualitative and quantitative certainty of evidentiary value, etc.

The mechanism for the formation of the judicial discretion system consists of the factors with its specific structure influencing decisions in the consideration and resolution of cases. Since the administration of justice takes place in society and under the influence of legal, philosophical, economic, political and other factors, judges come to legal consciousness that can be different in various socio-economic formations. It is typical for Russia at a given period of financial raw-mining functioning.

IT-technologies are a tool to implement judicial discretion and its technical aspects, decisions making by technical operations (Gracheva, 2002). The limits of the judicial discretion come to the fore determined not by the physical criteria of the possibility of choice-making but by the criterion of legality and validity.

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