ABUSE OF THE RIGHT BY THE JUDGE IN EXERCISE OF DISCRETIONARY POWERS IN CRIMINAL PROCEEDINGS

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Annotation. *The article investigates the problem related to the imperfection of the normative and legal regulation of judges' exercise of their discretionary powers in criminal proceedings, which in practice creates conditions for judges to abuse their rights in criminal proceedings.*

The aim of the works is the study of the concepts of "abuse of right" and "abuse of powers", within which attention is focused on determining their distinctive or common features. At the same time, it is necessary to draw a conclusion about the possibility or impossibility of abusing of right by judges in criminal proceedings by specifying the methods of such abuse.

Methodologiy. The article uses comparative-legal, formal legal, historical, system-structural methods, analysis, generalization, induction, deduction, analogy and forecasting method.

The article investigates the concepts of "abuse of right" and "abuse of powers", disputed separate positions on the definition of these concepts, which are discussed by scientists in the legal literature. Attention is focused on specific actions that are ways of abusing judges' rights during criminal proceedings. Gaps in the legislative regulation of the exercise of powers by judges are highlighted and ways of solving this problem are proposed.

Results. At the same time, we made conclusion about the possibility of judges abusing their right in criminal proceedings, exercising their discretionary powers. In order to prevent the abuse of these right, it is advisable to restrict the broad limits of the discretionary powers of the courts by clearly defining in the rules of the Criminal Procedure Code of Ukraine their actions or inactions that must be committed (refrain from committing), or the decision that must be made in specific situations.

Key words: *abuse of right; abuse of right by judges; discretionary powers; criminal proceeding.*

1. Introduction.

The leading place among the subjects of criminal proceedings is occupied by the court. Such a provision is determined by the fact that it is the court that is entrusted with the decision of the main issues of the criminal process - the recognition of a person guilty of a criminal offense and the imposition of punishment. The court is the only state body entrusted with the function of justice in the state, which is carried out by judges. In criminal proceedings, the court is an active subject of it, and not just an arbitrator in the criminal process, which exercises judicial discretion in the course of the proceedings.

As noted by the Supreme Court, the concept of judicial discretion in criminal proceedings covers the powers of the court to choose between alternative, each of which is legal, intellectual-will power activity of the court to resolve disputed legal issues in cases defined by law, based on the goals and principles of law, general principles of judicial proceedings, specific circumstances of the case, information about the identity of the guilty party, justice and adequacy of the chosen punishment [1].

2. Analysis of scientific publications.

The issue of discretionary powers of judges was considered in their works by a some of scientists, in particular, A. Barak, Yu.M. Groshevy, V.V. Vapnyarchuk, M.K. Zakurin, O.V. Kaplina, M.B. Risny, O.Ya. Rogach, I.A. Titko, O.O. Torbas and others. The problem of abuse by judges within exercise of their discretionary powers has been partially worked out, but remains unsolved despite certain developments in this direction. At the same time, scientists [2, p. 173] see the specification cases of abuse of right by participants in the proceedings, in particular, the most active of them (the court, the prosecution and the defense), as perspectives for scientific developments regarding the abuse of right in criminal proceedings.

3. The aim of the work is the study of the concepts of "abuse of rights" and "abuse of powers", during which attention is focused on establishing their distinctive or common features. On the basis of such studies, it is necessary to come to a conclusion about the possibility or impossibility of judges abusing their rights in criminal proceedings and to propose ways of solving problems that arise when judges exercise their discretionary powers.

4. Presentation of the main material of the study.

The possibility of abuse of right by judges in the course of criminal proceedings is perceived ambiguously in the legal literature. Even among scientists who study the abuse of rights in criminal proceedings, there is no consensus on this issue. One of the debatable issues is the lack of a single conceptual and categorical apparatus to designate such a legal phenomenon as "rights abuse". Different terminological constructions can be found in different sources, such as, for example, abuse of procedural rights, abuse, abuse in the field of criminal process, procedural abuse, abuse of right. This happens due to the unequal understanding of the very concept of abuse of right. This leads to a different understanding of the very concept of abuse of rights. Some authors [3, p. 101] even expresses the opinion that the use of the term "abuse of procedural rights" is inherently discriminatory, because it creates a false impression that only its powerless subjects can abuse in criminal proceedings, because participants in criminal proceedings who act ex officio on behalf of the state, are given by law not rights and duties, but powers.

Of course, one cannot deny the fact that perpetrators in criminal proceedings take place on the part of any participant in criminal proceedings, in particular, as well as on the part of the participants of the process who have their own interest (suspect, defender, victim, plaintiff and defendant) and other participants (witness, expert, specialist), as well as from those who consider criminal proceedings (judge, prosecutor, investigator,head of the pre-trial investigation body). At the same time, judicial practice recognizes the existence of such a legal phenomenon, despite the fact that such a concept is absent in the criminal procedural law. In the resolution of February 16, 2022 in case No. 758/5719/16-k [4], the Supreme Court emphasizes the inadmissibility of abuse of procedural rights by pre-trial investigation bodies, using the concept of "abuse of procedural rights" and not powers.

Also, in paragraph 3 of part 3 of Art. 459 of the Criminal Procedure Code of Ukraine established that in provides for exceptional circumstances under which court decisions that have entered into force may be reviewed. Abuse of the investigating judge or the court during the criminal proceedings, as a result of which the decision was made, is defined as one of these grounds. In this way, the legislator assumes the admission of certain abuses by judges in the course of criminal proceedings, although it does not directly indicate what specifically a judge can abuse - rights or powers.

In our opinion, when defining certain acts committed by the specified subjects as abuses, we use the general concept of "abuse of right" in criminal proceedings based on the following. The general characteristics of subjective law show that it is a measure of legally possible behavior that allows

participants in criminal proceedings - suspect, victim, civil plaintiff and others to satisfy their own interests, the interests of the officials conducting the criminal proceedings - the court, prosecutor, investigator, such interests are the achievement of the assigned Art. 2 CPC of Ukraine tasks. At the same time, taking into consideration the public nature of criminal procedural law, the limits and methods of exercising the powers of officials, as well as the subjective rights of private individuals, are not completely arbitrary, but are clearly regulated by law. We draw attention to the fact that the officials conducting the criminal proccedings have certain powers, that is, they have the rights and fulfill the duties assigned to them. The right expresses certain opportunities given to the subject, realizing which, he manifests himself in full, but within the allowed limits. And the duties assigned to such a subject make it possible to apply what role it performs.

It should be noted that these legal categories - subjective right and powers have common features. So, firstly, the purpose of the use of subjective rights and powers is the satisfaction of the person's interests (personal, official and other); secondly, the possibility of implementing them contrary to their purpose; thirdly, by abusing them, the subject prevents the fulfillment of the tasks of criminal proceedings. In addition, they have a number of distinctive features, in particular, firstly, subjective right is a measure of the subject's possible behavior, and powers is not only a measure of possible, but also appropriate behavior; secondly, individuals use rights to satisfy their needs and interests, and officials exercise their powers in the interests of third parties, the state or society.

In this regard, the position of D. Kryvoruchko attracts attention, which notes that definitely "abuse of right" and "abuse of powers" are not identical concepts due to certain features characteristic of each of these concepts. At the same time, it can hardly be denied that subjective rights in a broad sense in criminal proceedings are exercised by both the defense and the prosecution, therefore, supports the position regarding the understanding of the abuse of right in the criminal process as including the narrower scope of the concept of "abuse of powers" [5, p. 64].

The powers of officials in criminal proceedings, depending on the mechanism of their implementation, can be classified into 1) imperative, when the law defines a specific action that must be taken or refrained from, or a decision that must be taken; 2) discretionary, when the rule of law contains an indication of the possibility of several options for behavior or a list of possible decisions. The latter powers include the powers of the court, the investigating judge, which are reflected in the Criminal Procedure Code of Ukraine in such an external form as "has the right" parts 2, 3 Art. 97, part 1 of Art. 114, part 4 of Art. 156, part 4 of Art. 172, part 3 of Art. 187, part 4 of Art. 193, parts 3, 4 Art. 194, part 5 of Art. 201, parts 5, 7 Art. 244, part 5 of Art. 290, part 3 of Art. 297-3, part 3 of Art. 314, Art. 325, part 2 Art. 326, parts 2, 3 of Art. 332, part 3 of Art. 337, parts 11, 15 Art. 352, parts 1, 4 of Art. 356, part 1 of Art. 360, part 3 of Art. 382, part 3 of Art. 434, part 4 of Art. 466, part 6 of Art. 474, part 2 of Art. 530, parts 2, 6 of Art 616 of the Criminal Procedure Code of Ukraine and others. The judge can choose one of several behavior options, while the choice of a specific option depends on the circumstances of the case and the judgment of the judge himself. Such constructions enable the judge to use the granted right contrary to its purpose, which is one of the signs of abuse of right in criminal proceedings.

Having weighed all pros and cons, it seems that officials in criminal proceedings, in particular judges, can abuse their rights, as such rights are granted by law. This position is also shared by Andrushko O.V., Azarov V.O., Baev O.Ya., Papkova O.A., Tomin E.E. and other.

At the same time, in April 2019, a scientific and practical seminar "Abuse of right in the legal process" was held in Kyiv, where the issue of abuse of right was actively discussed not only by parties and participants in the process, but also by judges in various types of proceedings. Representatives of the scientific community, lawyers, as well as the judges themselves, including the judjes of the Supreme Court, spoke about the existence of the problem of abuse of right by judges in the proceediongs.

The analysis of judicial practice and our practical experience of participating as a party in criminal proceedings during the trial of criminal proceedings gives reasons to consider the adoption of some decisions by judges as ways of abusing their righs.

Some of the ways of abuse of judges are the following:

– disputes on liability. Thus, in the course of consideration of a submission by the Zhytomyr Court of Appeals on the transfer of criminal proceedings from one court to another within the jurisdiction of different courts of appeals, the court motivated such a submission by the fact that one of the district courts was considering criminal proceedings against the person who submitted a request for the transfer of this criminal proceedings to another district court, as another criminal proceeding against her is already being considered in the latter, for their unification. Therefore, the appellate court raises the issue of sending criminal proceedings against a person from the first court to another. Considering the specified case No. 278/1503/18 [6]. The Criminal Court of Cassation as part of the Supreme Court concluded that the transfer of a motion to transfer a criminal proceeding from one court to another within the jurisdiction of different appellate courts is not the same as the consolidation of criminal proceedings, therefore the courts must strictly adhere to the statutory provisions and emphasizes that their abuse is unacceptable. The court noted that the Criminal Procedure Code of Ukraine clearly defines the procedure for the consolidation of criminal proceedings, which differs from the transfer of criminal proceedings to another court, which must be followed by the courts.

– statement of self-recusal. A clear example of the abuse of the right is the use of the judge's right to recuse himself in order to delay the case in order to hinder the performance of the tasks of criminal proceedings. As a variant of such abuse, we cite an example when, during the consideration of criminal proceedings against a person under part 1 of Art. 122 of the Criminal Code of Ukraine, the judge issued a decision that satisfied the unjustified self-recusal, although he considered this proceeding for 2 years and 5 months and conducted almost the entire trial. This made it impossible to re-allocate the case automatically. The proceedings were brought to the Court of Appeal three times for a decision on whether to refer it to another court for consideration on the same grounds. As a result, the case was sent to another court of the region, where it will be considered first. All this time the person who appealed to the court to protect his rights was in limbo due to the fault of the lawyer, who for some reason delayed the consideration of the case. Abuse of the right to self-recusal may indicate a bad faith use of a minor pretext by the judge to avoid consideration of the case. This not only violates the rights of the parties to a timely hearing, but also shifts all responsibility for the correctness of the decision to other judges, which is also a violation of judicial ethics. This approach does not meet the goal of ensuring impartiality of the court during the consideration of cases [7]. At the same time, judges solve the problem of their workload in this way.

– the decision on a closed or opened court session (Article 27, item 2 part 2 Article 315 of the Criminal Procedure Code of Ukraine). The court has the right to consider criminal proceedings in closed session with the non-disclosure of information that should not be available to a wide range of persons. A judge who made a decision to consider a case in closed court on trumped-up grounds pursues another goal, for example, the appearance of media representatives and other persons in the meeting hall. When adopting a decision on consideration of criminal proceedings in closed session, in most cases, the conditions specified in Part 2 of Art. 27 of the Criminal Procedure Code of Ukraine than on the specific circumstances of the proceedings. One of the situations when a judge has the opportunity to abuse the powers granted to him by law may be his decision to hold an open or, on the contrary, a closed court session in proceedings where circumstances of private life or secrets protected by law may be disclosed. This is especially evident in proceedings regarding the application of coercive measures of a medical nature. Analysis of the relevant law enforcement practice, unfortunately, gives reason to state that often judges do not justify and motivate such decisions at all [8]. On the one hand, conducting proceedings in closed mode may be due to the need to keep information about the state of health of such a participant in the process, the circumstances of his private and/or family life, etc. confidential, but on the other hand, the court may also be guided by completely different considerations - reluctance to have "extra", unwanted observers present at the meeting. Impartiality and fairness of justice in a democratic society should be an axiom. Because of this, justice needs to be controlled by the public. The prerequisite for such control is the openness of the judicial system. However, it is also impossible to unequivocally proclaim the value of the openness of justice. The court, being an arbitrator in a wide variety of disputes, is forced to balance the interests of society, which seeks to control the impartiality of judges and litigants, who are often not interested in excessively publicizing their problems, circumstances of a personal, confidential nature. In court proceedings, circumstances of

a private and public nature are sometimes so closely intertwined that it is practically impossible to separate them. When considering such proceedings, the question arises as to which session (open or closed) it should be conducted? An open trial is one of the criminal law guarantees. But the closed consideration of the case is also a guarantee of non-disclosure of secrets protected by law. When deciding which of these competing values, procedural guarantees to give preference to, and which to neglect, it seems that the position of the person who is the subject of such proceedings (and, if necessary, the position of his legal representative) should be decisive. representative and defender).

– when deciding the issue of approving the agreement on reconciliation. One of the key conditions, when solving this issue, is compensation for the damage caused by the criminal offense. Sometimes it happens that the accused, realizing his real property situation and the fact that he is unable to fulfill the relevant legal requirement at once, offers to postpone such fulfillment, and the victim agrees with the corresponding offer. The current Code of Criminal Procedure of Ukraine, in fact, does not limit the participants in a criminal conflict - the parties to such an agreement - to determine by agreement the period during which the offender is obliged to satisfy the demands of the victim, recorded in the agreement. At the same time, a situation in which the term for fulfilling the terms of the agreement will exceed the statute of limitations for criminal prosecution is quite permissible. In such a situation, the court can both approve the agreement and refuse its approval with the argument that the terms of the agreement contradict the interests of one party (item 3 part 7 of Article 474 of the Criminal Procedure Code of Ukraine). It seems that if the court approves such an agreement and at the same time fails to explain to the victim the possible risks that in such a situation his interests may remain unprotected and he will not have any leverage over the accused (after all, according to the provisions of Part 1 of Article 476 of the Criminal Procedure Code of Ukraine, a petition for annulment of the judgment that approved the agreement due to non-fulfillment of its terms can be submitted only within the statute of limitations for criminal prosecution [9, p. 406], may well be considered as an abuse of the rights by the judge.

– failure of the court to take measures to replace a defense attorney who provides improper legal assistance. It is probably no secret that the overall quality of the services provided to a participant in the process by an appointed defense attorney is much worse than the quality of similar assistance provided by a "contractual" defense attorney. Other researchers make such conclusions about the sometimes inadequate protection provided by lawyers involved through regional centers for the provision of free secondary legal assistance [10, p. 128-129]. This conclusion also follows from the report of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine for 2020, in which it is stated that court-appointed lawyers who act on the basis of the mandate of the regional center for the provision of free legal aid sometimes behave improperly and dishonestly in the performance of their duties. ignoring the order of the Ministry of Justice of Ukraine "On approval of quality standards for the provision of free secondary legal assistance in criminal proceedings" [11]. Such improper performance of duties by the defenders, according to the Ombudsman, is manifested, in particular, in the fact that they do not conduct a confidential meeting with the persons in respect of whom the question of applying coercive measures of a medical nature is being decided and/or with their legal representatives (and sometimes no meetings at all do not organize - neither confidential nor public), do not explain their rights and obligations to the represented, do not agree with them on the legal position. For example, in the report of the Commissioner of the Verkhovna Rada of Ukraine, compiled based on the results of the visit-inspection of the Kyiv City Psychoneurological Hospital No. 3 (carried out in December 2020), it is stated that 52 (!) patients are persons for whom the issue of continuation, cancellation was decided or the change of coercive measures of a medical nature, and the interests of which were "advocated" by the appointed defender - reported that they do not even know their defenders by face [12]. Of course, such information can be questioned in view of the fact that it was reported by persons with mental disorders (due to their tendency to fantasize, suggest, exaggerate, inadequately evaluate the facts, etc.). However, the same information was confirmed (partially or even completely) by their legal representatives, as well as by third parties, disinterested persons - employees of the psychiatric care facility. It seems that in such situations, the behavior of a judge who does not take measures to replace a passive, inactive defense attorney, who is present in the process only formally, can also be considered as an abuse of rights by the judge. The considerations that are sometimes expressed

by individual practitioners both regarding the behavior of a completely passive lawyer and the behavior of a judge who does not react to it in any way run counter to the approach reflected in a number of decisions of European Court of Human Rights, in which the Strasbourg Court consistently and unequivocally defends the statement of that protection should not be formal, but effective and efficient. Along with the above-mentioned ways of abusing the rights of the courts, others can also be distinguished, such as manipulation of the automated distribution of cases (artificial impossibility of auto-distribution; abuse of an ethical nature (impolite communication, obscene gestures); artificial consolidation of cases; deliberate non-notification of persons who have be involved in the process.

5. Conclusions.

Therefore, when examining the problem of a judge's abuse of rights in criminal proceedings, taking into account the examples of the judge's actions given by us, it is worth noting that:

- a judge may abuse of the rights (discretionary powers), which he exercises within criminal proceedings;

- in order to prevent the abuse of the rights, it is advisable to restrict the broad limits of discretionary powers by clearly defining in the norms of the Criminal Procedure Code of Ukraine their actions or inactions that must be committed (refrain from committing), or the decision that must be made in specific situations.

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