



Adequacy of Enforcement Discretion in the Aspect of Manifestations of its Inadequacy and Measures of Optimisation

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This paper examines problems of the adequacy of law enforcement in the manifestation of its inadequate dynamic law enforcement practices. The study is based on the method of analysing paired categories - antipodes, which suggest that a comparative assessment of inadequate enforcement discretion as an antipode, its adequacy is based on the opposite properties of each of them. The main characteristics of conflicting cooperation are inadequate enforcement of discretion. According to the authors, the discretion of the subject of law enforcement is of crucial importance for overcoming legal uncertainty in law, due to the abstract-general and relatively uncertain nature of the rules of law. It must itself be distinguished by adequacy. In this regard, special attention is paid to identifying criteria for adequate enforcement of discretion. It is concluded that, in order to ensure the adequacy of enforcement, the fundamental principles of law must have clear legal interpretations that exclude the diversity of their interpretation.

Key words: *Law enforcement, principles of law, adequacy of enforcement.*

Introduction

Law enforcement practice, as is known, is mediated by complex objective and subjective factors determining one or another variant of behavior of the subject of law enforcement. Like any kind of legal practice, it “includes hidden positive and negative phenomena, attitudes, processes, trends (Pogodin, 2018). One of these hidden phenomena of legal practice, characterised by a positive and at the same time negative potential, is the discretion of the subject of law enforcement, which is the crucial factor in the realisation of the right. The discretion of the subject of law enforcement is a “subjective possibility of the law enforcer, on the basis of the case materials studied, to choose and substantiate the morally and legally impeccable version of the legal qualification of the social relation in question” (Voplenko, 1993). “The ability to act in its own discretion, because of its legal nature, in principle, is intended to ensure positive trends in the development of the legal sphere” (Valiev, 2018). However, the use of enforcement discretion is not always adequate to its purpose in the enforcement mechanism and often acts as the personification of arbitrariness of enforcement. The use of discretion that is not adequate to the objectives of law enforcement, the manipulation of discretion in contradiction to its legal nature deforms law enforcement and may turn out, without exaggeration, destructive for the mechanism of legal regulation in general. Inadequate discretion turns it into its opposite - an antipode that contradicts the purpose of discretion in the law enforcement mechanism. The foregoing actualises the appeal to the question of the adequacy of the enforcement discretion and the criteria of its legal identity, which seems relevant in the general context of the problem of streamlining law enforcement.

Methods

Adequacy and inadequacy are mutually exclusive antipodes in the characterisation of law enforcement discretion. For adequate enforcement, this antipode is its inadequacy. In this context, the development of the problem of the adequacy of enforcement discretion can be fruitful through the use of the method of analysis of paired categories. For the purposes of this study, this method suggests a comparative description of inadequate enforcement of discretion as the antipode of its adequacy based on the opposite properties of each of them. Identifying the main manifestations of inadequate enforcement of discretion, in our opinion, is a necessary condition for determining the constructive components of the model of adequate enforcement of discretion.

Results and discussion

The problem of discretion in law enforcement is deeply historical, since there is exactly as much as law enforcement exists. The expediency and justification of discretion, its scope and

permissible limits, the relationship with legality and justice - all these issues have always been the focus of attention of researchers, see, for example: (Bouveresse 2010; Davis 1969; Davis 1976; Ford 1995; Galligan 1990; Michoud 1913, Waline 1930). However, in the context of the designated topic of this study, the issue of enforcement discretion was not specifically addressed. Meanwhile, the objectivity, comprehensiveness, proper assessment or qualification of the circumstances of the case and, as a result, the validity, legality and fairness of the enforcement decision depend entirely on the adequacy of the enforcement discretion. The inadequacy of the discretion of the subjects of law enforcement finds expression in various manifestations of arbitrariness, personifying the atypical form of law enforcement discretion.

The inadequacy of the enforcement discretion contradicts its purpose in the enforcement mechanism expressed in the legal norm by legislative will. Inadequate enforcement may be expressed in a biased or dismissive attitude. Enforcement discretion can be a veiled way of violating the law.

The inadequacy of law enforcement discretion may be due to the dominance of individual principles of law enforcement over regulatory, subjectivism or personal preferences of the subject of law enforcement over an objective approach in assessing the circumstances of the case. This is equally true in the case of unbiased and deliberate or deliberately unfair enforcement.

At the same time, the inadequacy of law enforcement discretion can manifest itself in both active and passive conformist forms.

In the system of law, many rules of law are expressed with the help of such means of legal technology, which determine their general or relatively specific character. Formulating general regulatory requirements, the legislator is guided by the desirability of granting the subject of law enforcement the authority to take discretion based on the law-enforcement situation. As notes K.I. Komissarov, the legislator “provides for the main direction of regulation, and instructs the court to precisely determine the scope and content of rights” (Komissarov 1971).

The problem is that the legal institutionalisation of discretionary powers, determined by legal uncertainty at the level of norms of law, makes unrestricted discretion of the subject of law enforcement. Possessing the right to unlimited discretion, the subject of law enforcement can act differentially, expressing a completely opposite attitude to the same factual circumstances of the case in the process of law enforcement. In our differentiated and selective approach to resolving cases that is contrary to the legal nature of law enforcement, it is possible, in our

opinion, to perceive arbitrariness of law enforcement activity, which embodies the inadequacy of law enforcement discretion (Shirvani et al, 2015).

The objectively determined uncertainty of the content of most legal norms and principles serves as the basis for the potential possibility of their arbitrary interpretation and inadequate application. Consequently, the uncertainty of the norms of law has the value of the negative potential of inadequate enforcement of discretion. On the contrary, legal certainty, clarity and unambiguity of normative legal prescriptions and principles of law determine their predictability for the addressees of the law and acts as a guarantee of an adequate interpretation of the law and discretion (Martins et al, 2018).

The foregoing allows us to conclude that in order to overcome the inadequacy of the enforcement discretion, it is necessary to solve the problem of ensuring legal certainty in the order of their maximum concrete definition at the general regulatory level of legal regulation. However, legal certainty at the general regulatory level cannot be absolute. Therefore, legal certainty of abstract general or relatively defined rules of law is achieved in the course of their implementation on the basis of concretisation, which is mediated by the discretion of the subject of law enforcement.

Consequently, the solution of the tasks of determining the criteria for adequate law enforcement discretion depends on the general legislative regulation and assumes that the legal nature of enforcement is guided by this. In this context, it is logical to determine the adequacy of law enforcement actions.

The social value of law enforcement is expressed in ensuring the effective implementation of the applicable law. It is such socially significant in nature and purposeful in content activity that can, in our conviction, be considered as a rational basis for the adequate discretion of the subject of law enforcement. At the same time, it seems to us that the basic criterion for the adequacy of the enforcement discretion should be compliance or proportionality of the enforcement discretion to the underlying principles of enforcement. If the subject of rule-making projects norms with the requirements of the principles of law, then, therefore, these principles should be taken into account by the subject of law enforcement.

Indeed, in the conditions of uncertainty of legal norms, the main content of the concept of the adequacy of discretion, in our opinion, should be a focus on the requirements of the most important principles of law that serve as the main criteria for the viability and effectiveness of law enforcement. Among the most important among them are such principles as justice and legality, objectivity and good faith, expediency and rationality. These principles are designed to ensure the implementation of law in accordance with its social purpose. The consistent

implementation of these principles on the basis of their optimal combination, in our opinion, allows us to ensure not only the adequacy of law enforcement discretion, but also the effectiveness of law enforcement in general.

The study of the role of law enforcement discretion cannot be limited only formally by legal principles of law enforcement. Law enforcement practice has inherent subjective principles that have a significant impact on it. Their underestimation limits the theoretical understanding of the problems of law enforcement. When considering the discretion of the subjects of law enforcement in the context of the law enforcement process, it becomes possible to fully reflect the whole complex of law enforcement factors that in one way or another affect its final results.

Being embedded with the institutional links of the law enforcement mechanism, they significantly affect law enforcement behaviour, often determining the irrational costs of law enforcement.

Enforcement discretion can be regarded as a legal means of the enforcement mechanism only if it is within the legal framework, in line with the socially important objectives of the law and the logic of enforcement. The problem of willfulness in dealing with law in the process of its application, in our opinion, can and must be solved, first of all, through acceptable legal restrictions. In this context, it is possible to talk about such improvement in the regulatory principles of law enforcement, which boils down primarily to a more specific statement of the law by the legislator, clarifying the content and uniform interpretation of the principles of law that underlie law enforcement.

The problem of ensuring the adequacy of the enforcement discretion, in this aspect, can be more specifically reducible to the definition of its criteria, since enforcement application is possible in many respects precisely because the discretion of the subject of enforcement is not limited by law. The unrestricted enforcement of discretion represents the potential basis for abuses in law enforcement. Providing such powers without appropriate regulation of the measures for its use is an institutional prerequisite for the inadequacy of law enforcement discretion and law enforcement arbitrariness. The very subjective nature of this element of the enforcement mechanism predetermines the need to determine the permissible (from the point of view of social purpose of enforcement) measure of law enforcement. This, in our opinion, is one of the ways to achieve the adequacy of law enforcement discretion in the general context of the problem of streamlining law enforcement.

In the conditions of legal uncertainty of norms of law, arbitrariness arising from inadequate discretion will be a potentially inevitable consequence of unlimited enforcement of discretion when, for example, interpretation of such norms of law is carried out. However, the problem

is that some of these principles are proclaimed by the legislator, but not disclosed. For example, in Russian civil law, when it is impossible to use the analogy of the law, the rights and obligations of the parties are determined on the basis of general principles and meaning of civil law (analogy of law) and the requirements of good faith, rationality and justice. This means that the interpretation of these principles is left to the legislator at the discretion of the law enforcer. In this regard, it is logical to say that the possibility of a free interpretation of the principles of law also contains the potential danger of law enforcement arbitrariness and abuse of law enforcement.

Meanwhile, the result of enforcement depends on the interpretation of the content of these principles. In this context, the question arises: can the enforcement position be objective if the completeness of the research, assessment or qualification of the circumstances of the case and, as a consequence, the validity, fairness and legality of the act entirely depend on the enforcement opinion. After all, the objectivity of the enforcement act is as subjective as the discretion itself is subjective. One cannot but agree with V.N. Kudryavtsev, who notes that the discretion of the law enforcer is objective by nature, as it depends on the actual circumstances of the case, and is subjective by the nature of the reflection of real facts in the minds of officials (Kudryavtsev 1963). Therefore the challenge is to help ensure the optimisation of the measure enforcement discretion, the boundaries of which were found to depend on the legal certainty of the rules and principles of law. Therefore their specific and uniform interpretation is necessary.

Findings

The problem of inadequate enforcement of discretion is directly dependent on its unlimitedness. The dynamics of this relationship depends on the ratio of the margin of appreciation. In other words, the freer the subject of law enforcement is to use discretion, the more law enforcement is subject to discretionary tendencies whose manifestations entail derogation of the rights, freedoms and legal interests of citizens, since there is no unlimited discretion that is a potential basis for abuses in the law enforcement process.

Legal uncertainty at the level of general legal regulation reproduces the conditions for contradictions in the process of law enforcement. One of the contradictions of law enforcement is reflected in inadequate enforcement of discretion, determined by legal uncertainty.

The inadequacy of the enforcement opinion is an indicator of its conflicting potential, contrary to the legal nature of enforcement. Manifestations of inadequate enforcement of discretion personify the dialectical opposite - the opposite of adequate enforcement of discretion. In this context, the question concerns a measure of enforcement discretion that



impedes its inadequate forms. In order to ensure the adequacy of the enforcement discretion, the optimisation of the enforcement discretion is relevant.

Optimisation of enforcement measures seems reasonable in order to update the criteria for its adequacy. The value of adequacy criteria can serve as a criterion for identifying and assessing inadequacy. One of such criteria is compliance of the law enforcement discretion with the principles of law. For this purpose, the fundamental principles of law should have clear legal interpretations that exclude the diversity and diversity of their interpretation.

Conclusion

The study serves as the theoretical basis for the actualisation of the model of adequate law enforcement discretion in the law enforcement mechanism. The study allows us to state the axiological essence of the principles of law enforcement as criteria for the adequacy of law enforcement discretion and optimisation of law enforcement. Compliance with the principles of law is one of the most important indicators of the adequacy of enforcement discretion.

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