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On the question of correlation between the concepts "abuse of rights" and "violation of law"

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Abstract

The limits settings scopes of concrete equitable rights which can have both objective and subjective character are considered in the article. Correlations of concepts "abuse of rights" and "delict" are examined. Insolvency of equation of these concepts is grounded, because it conduces to the loss of independence of abuse of rights institute.

Keywords

Equitable right, limits of rights, abuse of rights, delict.

Introduction

The question on framework of subjective rights is one of the most complicated one in legal science. Its difficulty is due to the freedom of man being restricted by the framework of law, directly or indirectly.

Studies show that there is no single approach in science to solve the problem of determining the framework of subjective rights and, accordingly, to define the concept for abuse of rights, although it's not the only problem. Lack of an unified definition for abuse of rights leads to a various interpretations of cor-

relation between the concepts "abuse of right" and "violation of law." However, a wide range of opinions on this issue can not be considered as a negative phenomenon, as it indicates the dynamic development of science.

Questions on the framework of subjective rights, abuse of right and violation of rights have been studied in domestic and foreign legal science by M.M. Agarkov[1], A.A. Malinovskii[2], O.N. Sadikov[3] and other scientists.

This article is aimed to study the frameworks of specific subjective rights that may have both objective and subjective nature, as well as to find out the correlation between the concepts "abuse of right" and "violation of law".

German jurists offer quite a solid approach to solve the problem of determining the framework of subjective rights. In particular, it refers to the application of the formula "a proper balance of interests"[4] when establishing the framework of subjective rights. In summary, this formula reduces itself to the following provisions. The basis of any subjective right is interest. The interests between subjects of law being satisfied the conflicts of interest are taking place, which inevitably leads to competition of subjective rights. In order to prevent this competition the frameworks of subjective rights need to be determined in a way to establish a proper (proportionate, reasonable, proportional) balance of interests. This will allow each subject to satisfy its interest by using legal protection[5].

Interpretation of the correlation between the concepts

Having analyzed the issue in more detail we may identify some key aspects. The subjective right is well known to be a measure of a possible (permissible)

1 Agarkov, M.M. (1946), "The problem of abuse of rights in a modern civil law" ["Problema zloupotrebleniya pravom v sovremennom grazhdanskom prave"], *Izvestiya Akademii nauk SSSR. Otdelenie ekonomiki i prava*, No. 6, pp. 22-39.

2 Malinovskii, A.A. (2006), *Abuse of right* [*Zloupotreblenie pravom*], Prior, Moscow, 340 p.

3 Sadikov, O.N. (2002), "Abuse of right in the Civil code of Russia" ["Zloupotreblenie pravom v Grazhdanskom kodekse Rossii"], *Khozyaistvo i pravo*, No. 2, pp. 16-18

4 Sorokin, V.D. (2006), *Legal regulation: object, method, process (macrolevel)* [*Pravovoe regulirovanie: predmet, metod, protsess (makrouroven')*], Yurid. tsentr Press, St. Petersburg, p. 88.

5 Lerche, P. (2004), "The limits of basic rights", *Constitutional law of Germany. Vol. 2* ["Predely osnovnykh prav", *Gosudarstvennoe pravo Germanii. T. 2*], Drofa, Moscow, pp. 234-240.

behavior. In other words, the subjective right is the subject's freedom within a specific framework. Boundless freedom is an arbitrary will and has nothing to do with the law. Legal behavior of authorized entity beyond the prescribed limits may be qualified as a violation of right (excess of law) or abuse of right depending on the circumstances.

Limits, establishing the framework of specific subjective rights may have both objective and subjective nature. Objective limits are outlined by the current legislation (objective right); subjective are determined by a legal subject. Thus, talking about the concept for "framework of subjective right", it is necessary to bear in mind that in this case we are talking about legal regulations that establish the boundaries of authorized entity's behavior. The concept for "limits of subjective right implementation" mainly characterizes subjective aspects of right implementation. It is the holder of subjective right who determines them and exercises this right at its own judgment to achieve its interest.

In domestic science this approach was initially established by Professor V.P. Gribanov and was further developed in the works of his contemporaries[6]. According to V.P. Gribanov every subjective right is a measure of the possible authorized entity's behavior. And the exercise of a subjective right is the fulfillment of these opportunities. Contents of the subjective right are always predetermined by law that either directly prescribes a certain behavior to the authorized entity or authorizes it. In contrast, the process of implementation of right has a strong-willed character and depends on the will of the authorized person. Thus the correlation between the behavior establishing the content of subjective right, and behavior establishing the content of its implementation process can be represented as the correlation of the objective and subjective[7].

6 Mal'ko, A.V., Subochev, V.Z. (2004), *Legitimate interests as a legal category* [*Zakonnye interesy kak pravovaya kategoriya*], Yurid. tsentr Press, St. Petersburg, p. 61; Smirnova, M.G. (2008), *Social claims and equitable law: dissertation* [*Sotsial'nye prityazaniya i sub"ektivnoe pravo: dis. ... k. yurid. n.*], St. Petersburg, p. 90; Lipinskii, D.A. (2003), *Issues of legal responsibility* [*Problemy yuridicheskoi otvetstvennosti*], Yurid. tsentr Press, St. Petersburg, p. 54; Vasil'ev, A.M. (1976), *Legal categories. Methodological aspects of the development of the system of categories of law theory* [*Pravovye kategorii. Metodologicheskie aspekty razrabotki sistemy kategorii teorii prava*], Yurid. litra, Moscow, p. 34.

7 Gribanov, V.P. (2001), *Realization and defense of civil rights* [*Osushchestvlenie i zashchita grazhdanskikh prav*], Statut, Moscow, p. 44.

Let us analyze the abovementioned concepts. Objective frameworks of subjective right are determined by the legislator on the basis of the specific historical conditions. Moreover, the social and economic development of the society, its religious, cultural features, national traditions, international standards of human rights and many other factors are taken into account. It is the state that decides what rights shall be granted to its citizens and to which extent. The framework of a particular subjective right may differ dramatically depending on the legal system of a particular country. For instance, let us analyze the right of men for marriage. Thus, the family law of secular legal systems allows a man to be married with only one woman. In the religious legal systems a man has a right to marry two or even four women. In this case, the subjective right has a purely quantitative limit. However, in some countries (for example, in the Netherlands) the legislation expands the framework of man's right to marriage by filling it with a whole new content and allowing to marry another man. Thus, by giving the subject a particular right the legislator defines its framework, establishing it in legal acts.

Theoretically, a subject may use any of its subjective rights, if it's officially promulgated. However, the law shall clearly indicate the framework of subjective rights, i.e. the conditions under which a subject shall be authorized with a corresponding right, and the framework where it would implement this right at it's own judgment. These may be: certain age (marriage, retirement), term of inheritance, necessary education (legal, medical) for a certain occupation, professional experience, as well as many other requirements (infants, disability, religion impeding military service). In general, the content of the specific subjective right provided to an individual is established by permissive rules, and its framework – by prohibitory rules[8].

If the framework of the subjective right is not delineated by the legislator, it is impossible to exercise this right in most cases. In such cases, one usually appeals to declarativity of rule and lack of the mechanism for its implementation. A good example is the right to alternative civilian service, which after having been proclaimed by the Art. 59 of the Constitution of the Russian Federation ("citi-

8 Vavilin, E.V. (2010), "The concept and mechanism of realization of civil laws and execution of duties" ["Ponyatie i mekhanizm osushchestvleniya grazhdanskikh prav i ispolneniya obyazannostei"], *Zhurnal rossiiskogo prava*, No. 5, pp. 35-43.

zen of the Russian Federation shall have the right to substitute military service with alternative civilian service in case his or her convictions or religious belief contradict to it, as well as in other cases stipulated by federal law") has been remaining on paper for a long time due to a lack of the corresponding law, although it was strongly required. The following situation has shaped in this case: subjective right did not have its objective framework, and thus neither citizens nor public authorities could clearly define the measure of freedom of an authorized entity. It is not surprising that commissars simply ignored this right being afraid that there could be abuses of this right by conscripts who would declare themselves followers of a particular religion.

There is no consensus on the concept of abuse of rights in science. Lack of a unified definition for abuse of rights leads to a various interpretations of correlation between the concepts "abuse of right" and "violation of law". However, a wide range of opinions on this issue can not be considered as a negative phenomenon, as it indicates the dynamic development of science.

Under the abuse of rights one should understand the act of the authorized person either in the form of action or inaction to implement its subjective rights, committed within opportunities provided by the law and the results of which are beyond the specified limits of the law implementation due the intention of the authorized entity to harm the rights and legitimate interests of other persons, as well as due the objective harm to them.

Most scientists involved in research on abuse of right believe it is a violation of rights, or certain types of abuse of rights are a violation of right[9]. This position is justified in many ways, but almost all of its supporters do not forget to make a reservation that the abuse of right is a specific type of offense, or that certain types of right abuses are a violation of right, etc. This position doesn't seem to be quite correct, since it leads to the loss of independence and inherent worth of the institute for abuse of right, although

9 Pashin, V.M., Shilokhvost, O.Yu. (2003), "Institute of abuse of equitable laws de lege ferenda", *Current issues of civil law* ["Institut zloupotrebleniya sub"ektivnymi pravami de lege ferenda", *Aktual'nye problemy grazhdanskogo prava*], Apriori, Moscow, p. 56; Radchenko, S.D. (2002), "The concept and essence of abuse of equitable civil right" ["Ponyatie i sushchnost' zloupotrebleniya sub"ektivnym grazhdanskim pravom"], *Zhurnal rossiiskogo prava*, No. 11, pp. 23-30; Yatsenko, T.S. (2001), *Shikana as a legal category in civil law: Author's thesis* [*Shikana kak pravovaya kategoriya v grazhdanskom prave: avtoref. dis. … k. yurid. n.*], Rostov-on-Don, p. 20.

it is inappropriate to ignore the opinion of the specified position's supporters. One can hold the position of identifying two completely different legal phenomena only by not delving into their essence. Thus, if we will use the term "violation of right" in the broad sense, according to which the phenomenon is an antisocial act causing harm to society and being punishable by law, it is not difficult to prove that the specified features are typical of abuse of right as well.

According to V.P. Gribanov, abuse of right may and must be used in the science of civil law. Thus, under abuse of rights one should understand a particular type of civil offense committed by the authorized person when exercising its right associated with the use of specific prohibited forms of general behavior permitted to it by the law[10].

A.A. Malinovskii, author of numerous works devoted to the problem of abuse of right, expressed even more original opinion on abuse of right: "Abuse of right is not a special kind of legal behavior. It is a form of a subjective right implementation in contradiction with its purpose, when the subject using permissive rules prejudices the interests of others by committing crimes or immoral acts"[11].

This position completely erases the boundaries between the abuse of right and the violation of right on the one hand, and the abuse of right and lawful behavior – on the other hand.

Although without identifying the concepts of "abuse of right" and "violation of right" T.S. Yatsenko believes that chicane (abuse of right intended to harm) is a violation of right. The main argument justifying this position is that chicane is of unlawful nature as a person violates its obligation to not take any actions to implement its right with causing harm to another person, that follows from the meaning of the Art. 10 of the Civil Code[12].

M.M. Agarkov believes that cases of right abuses which represent behavior of a person exceeding the frameworks of its right, are an offense[13].

10 Gribanov, V.P. (1992), *Limits of realization and defense of civil rights* [*Predely osushchestvleniya i zashchity grazhdanskikh prav*], Rossiiskoe pravo, Moscow, p. 90.

11 Malinovskii, A.A. (2009), "Setting of equitable right" ["Naznachenie sub"ektivnogo prava"], *Pravovedenie*, No. 4, pp. 117-122.

12 Yatsenko, T.S. (2001), *Shikana as a legal category in civil law: Author's thesis* [*Shikana kak pravovaya kategoriya v grazhdanskom prave: avtoref. dis. ... k. yurid. n.*], Rostov-on-Don, p. 22.

13 Agarkov, M.M. (1946), "The problem of abuse of rights in a modern civil law" ["Problema zloupotrebleniya pravom v

According to S.G. Zaitseva, who considers individual abuse of right to be a specific type of offense, the difficulties associated with identifying abuses of right and classifying them as such, are due to the activities of the offender in the "legal framework"[14]. In other words, when committing the act, which can be later qualified as abuse of right, the subject exercises its right, fulfills opportunities granted by law, but the consequences of the act are beyond the law implementation procedure.

The most popular textbooks in civil law state that abuse of rights, as defined in Art. 10 of the Civil Code of the Russian Federation, is a civil offense[15], which may be of a tort nature (non-contractual breach), as well as a breach of earlier contract or unilateral commitments. Such offenses are specific due to their relation to the entity's implementation of its subjective civil law, with its framework being exceeded.

This makes the behavior of the person an offense and to ensure the rule of law and the proper property turnover the person should face adverse legal consequences, the use of which is intended to stimulate the proper exercise of subjective rights. However, they are extremely various both in terms of origin and content, thus defining their framework is not easy.

The current legislation, reflecting the requirements of a market economy, declares considerable freedom for legal subjects in determining the content and implementation of their civil rights. According to Art. 1 of the Civil Code, individuals and legal entities are free to establish their rights, and arbitrary interference in private affairs is unacceptable. Article 14 of the Civil Code allows for self-defense of civil rights. Appealing to it obviously exclude abuse of the right.

Due to these circumstances and overly brief and general wording of Art. 10 of the Civil Code the courts receive considerable independence while applying the rules of civil law on the abuse of right. The current legal cases on this issue confirm this statement. Whereby confusion of the right abuse institute and other related law enforcement institutes

sovremennom grazhdanskom prave"], *Izvestiya Akademii nauk SSSR. Otdelenie ekonomiki i prava*, No. 6, pp. 22-39.

14 Zaitseva, S.G. (2003), "On the question on the methods of counteraction the phenomenon of "abuse of right" in real life" ["K voprosu o sposobakh protivodeistviya proyavleniyu fenomena "zloupotreblenie pravom" v real'noi zhizni"], *Yurist*, No. 9, pp. 55-56.

15 Sukhanov, E.A. (2010), *Civil law: Textbook: in 2 vols. 2nd ed. Vol. 1* [*Grazhdanskoe pravo: Uchebnik: v 2 t. 2-e izd. T. 1*], Yurist", Moscow, p. 345.

is accepted, although the conditions of their implementation significantly differ.

According to O. Sadikov[16], in terms of its objectives and appearances the abuse of right, arising beyond the contractual relationship, reminds a tort liability (Section 59 of the Civil Code), and the abuse of right under the contract – liability for breach of obligations (Section 2 of the Civil Code). However, the conditions of applying mentioned institutions have significant differences, depend on the subject of the offense, and their convergence, much more confusion, should not be accepted, for it leads to wrong and unjust legal conclusions.

However, the Civil Code of the RF has specific legal rules that must be referred to other forms of right abuses within Art. 10, although the term "abuse of right" is not used there. Among these rules are the rules of Art. 240 on mismanaged cultural values and Art. 241 on mistreatment of animals. These are quite obvious and, unfortunately, quite common cases of right abuses.

These articles refer to the implementation (in the form of action or inaction) of owner's right, which leads to the right and sense of justice being unacceptable and requiring legal action. Specific legal consequences of such owner's behavior (redemption of property by court) fit well into the general formula of Cl. 2 Art. 10 of the Civil Code of the Russian Federation, according to which it is not protected in case of the right abuse.

Obviously cases of right abuses are more difficult to identify than cases of illegal acts (violations of rights). However, according to M.I. Barou, the abuse of right eventually leads to the violation of right. Moreover, if an unlawful act is not even formally based on law and exercised in its pure form, the abuse of right is always superficially based on subjective right and to a certain point (the beginning moment of infringement in relation to other entities) does not formally contradict the objective law. If a person has no subjective rights, it can't abuse the right. Although it can commit the offense even without any subjective rights[17]. This is the main difference between the abuse of right and the violation of right, thereby identifying the studied phenomena even under exceptional circumstances with some reservations, seems to be unreasonable and impractical.

16 Sadikov, O.N. (2002), "Abuse of right in the Civil code of Russia" ["Zloupotreblenie pravom v Grazhdanskom kodekse Rossii"], *Khozyaistvo i pravo*, No. 2, pp. 16-18.

17 Baru, M.I. (1958), "On the Art. 1 of the Civil code" ["O st. 1 Grazhdanskogo kodeksa"], *Sovetskoe gosudarstvo i pravo*, No. 12, pp. 117-120.

M.I. Baru gives the following example of abuse of the right of ownership: "A homeowner, having failed to remove a undesirable tenant from a house by the legal means destroyed a part of the house (owned by the homeowner in terms of the property right) in the absence of the tenant and left him under the open sky"[18]. This example illustrates how the authorized entity violates the rights of another person by its actions. But there is a conflict between a statutory prohibition of the abuse of right and the right of the owner to dispose of his home on his own. Using the right to dispose of property – or rather the abuse of this right has led to the violation of the tenant's right to housing.

I.A. Pokrovskii believes that "chicane is nothing more than most ordinary tort. Causing harm by exercising rights can in no way be an excuse, as rights are provided by law to meet personal legitimate interests, and not to cause harm to others"[19]. However, this is not always the case, since offenses (torts) are committed by violating legal prohibitions, and not by exercising subjective rights.

Disputing this point of view professor N.S. Malein wrote that "in this case two variants are possible: if the entity acts within the framework of its right – and then it does not abuse the right, or it goes beyond the limits set by law, and thus when breaking the law it does not abuse the right and commits a simple offense, which supposes responsibility… "[20].

At first glance, the thesis of professor Malein is impeccable. Indeed, many abuses are illegal, and therefore, they should be regarded as an offense. Other do not violate applicable law, and therefore should be considered a lawful behavior. However, such a dogmatic approach hardly promotes scientific law, since it excludes the abuse of rights as a legally significant phenomenon. That does not lead to the development of law, but rather to its simplification.

Professor Ya. Yanev suggest to distinguish between the abuse of right, lawful behavior and violation of right, considering the position of those authors who believe the abuse of right is a violation of right to be wrong. Explaining his position, he writes that "if the actions on implementation of subjective rights and performance of assigned legal obligations are in full compliance with the

18 Ibid.

19 Pokrovskii, I.A. (2007), *Basic problems of civil law* [*Osnovnye problemy grazhdanskogo prava*], Litera, Moscow, p. 77.

20 Malein, N.S. (1992), *Legal responsibility and justice* [*Yuridicheskaya otvetstvennost' i spravedlivost'*], Yurid. lit., Moscow, p. 70.

legal rules and the law in general, with the authorization of subjective rights and legal responsibilities, with the general spirit and principles of the law, it purpose in society and, as a rule, with moral principles and the principles of socialist community, they are legitimate.

If the actions or inactions contradict those legal rules, if the exercise of subjective rights and performance of assigned obligations go beyond the framework of results aimed by the legal norms and objectives, are in conflict with the authorization, such actions or inactions are illegal – they are a violation of right.

If action or inaction, directly or indirectly, do not violate legal rules and principles of law, but are in conflict with the principles of morality and rules of socialist community, violate the rules which should be respected and adhered to according to the rule of law, it will be actually the abuse of right"[21].

Ya. Yanev identifies the following elements of right abuse:

1) subjective rights;

2) using these rights in contradiction with the social purpose;

3) exercising subjective rights in a way, that still does not violate a specific, special legal rule, with a specific composition being beyond the general legal rule that does not protect actions exceeding the framework of these rights' implementation – rules prohibiting to abuse these rights;

4) violating the prohibition to exercise or use the granted rights or using them in a way that neglects their protection, as described in the corresponding general fundamental legal norm, but without these actions being declared offenses, despite the fact that they have some legal value;

5) implementing subjective rights in contradiction with their public purpose independently of the will and consciousness of the authorized person and whether these actions or inactions are intentional or reckless or are objectively unlawful in relation to granted rights and conferred responsibilities, their social purpose, whether they are aimed at causing harm to the interests of another person, or do not pursue any particular interest;

6) implementing these rights in contradiction with the requirements of socialist society rules[22].

According to Ya. Yanev, abuse of rights is a legitimate, but immoral exer-

21 Yanev, Ya. (1980), *Rules of socialistic dormitory (their functions in application of legal rules)* [*Pravila sotsialisticheskogo obshchezhitiya (ikh funktsii pri primenenii pravovykh norm)*], Progress, Moscow, p. 88.

22 Ibid. P. 89.

cise of subjective rights in contradiction with its purpose.

This scientist's position on the legality of right abuse requires clarification. Thus, by virtue of an explicit prohibition for abuse of right, contained in Part 3 Art. 17 of the Constitution of the Russian Federation, Art. 10 of the Civil Code, Art. 41 of the Arbitration Procedure Code of the Russian Federation and other legal acts, one can hardly assume that abuse of right is legitimate, but one can't also call it illegal as far as its pure form is concerned. When implementing the contents of subjective rights and actions of the subject in the legal framework the act is of a legitimate nature, but if the rights and interests of others entities are prejudiced, the act becomes illegal (transforms), i.e. the right and its implementation are legitimate and an intention to harm the rights of others or objective unintentional causing of such harm are illegal.

Another Bulgarian jurist L. Vasil'ev, while investigating the problem of abuse of right, comes to the conclusion that the abuse of right is characterized by a number of conditions:

1) actions on implementation of right shall not directly violate the legal rule, and may be admissible and possible;

2) in this particular case such actions are taken to achieve the objectives being not consistent with the objectives and functions provided for by the legal rule in relation to subjective rights;

3) these acts are committed with the intent to cause harm to others or impair their property or social status;

4) such actions are committed by holders of subjective rights, who do not have a legitimate interest[23].

Obviously both of these approaches deserve attention, but have their drawbacks. Thus, the elements of right abuse according to Ya. Yanev exclude the possibility of qualifying chicane as an abuse of right and apply to "other" cases of abuse without the exclusive purpose of causing harm. L. Vasil'ev 's opinion on the problem of abuse of right is not perfect as well, as the fourth sign significantly limits the ability for qualifying particular actions as an abuse of law. Abuses of right turn out to include only "malicious" acts of subjective right holder, which exercises its right without a certain interest. In this case, it is unclear how, according to L. Vasil'ev, one should qualify the legitimate exercise of subjective law contrary to the objectives of law, which has caused harm to others, but at the same time a holder of subjec-

23 Ibid. P. 99.

tive right was interested in this exercise of its rights.

Abuse of right and violation of right differ dramatically. Their identification is illogical and impractical because it can lead to the right abuse institute being absorbed by the tort institute, and thereafter to the return to the archaic situation described by jurist Gai as followed: "Nobody is considered to act maliciously if he exercises his right"[24].

The law must be studied not only in terms of traditional criteria of "legality-illegality", but also from the point of view of the purpose of law, the possibility of its use that causes harm to public relations, its exercise in contradiction with its purpose.

All this indicates the complexity of the legal institute for right abuse. It aims to strengthen the rule of law, and is considered to be necessary and useful in the modern legal doctrine, both in Russia and in the West. However, its use should not lead to a restriction of civil rights entities' independence and rights provided to them lawfully, and the courts should clearly distinguish between abuse of rights and related civil and legal institutes, conditions and the consequences of which are different.

24 Malinovskii, A.A. (2006), *Abuse of right* [*Zloupotreblenie pravom*], Prior, Moscow, p. 128.

Conclusion

So, considering the issue on abuse of right we may come to the conclusion that there is no single opinion on understanding this category among the scientists. Also one should take into account the problem of correlation between the concepts of "abuse of rights" and "violation of right".

Various authors' opinions on these issues were studied, and conclusions were made about what should be understood as an abuse of rights; that abuse of right and violation of right should not be identified

for it leads to loss of independence specific to the institute of right abuse. Also various elements specific to abuse of right were discussed and their content was analyzed.

The author concluded that the institute of right abuse is legally complicated, and it is necessary to carefully examine every particular act, before taking it to the category of the violation of right or the abuse of right.

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К вопросу соотношения понятий «злоупотребление правом» и «правонарушение»

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Аннотация

В статье исследуются пределы, устанавливающие рамки конкретных субъективных прав, которые могут иметь как объективный, так и субъективный характер. Рассматривается соотношение понятий «злоупотребление правом» и «правонарушение». Обосновывается несостоятельность отождествления понятий злоупотребления правом и правонарушения, так как это ведет к потере самостоятельности института злоупотребления правом.

Ключевые слова

Субъективное право, пределы прав, злоупотребление правом, правонарушение.

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