ABSTRACT

Based on studying and analyzing the norms inherent in the institution of the abuse of right and legal opinions by scholars of civil jurisprudence and legal precedents, the authors explore the essence of the legal category “the abuse of right”. The authors define the meaning of the novels in Article 10 of the Civil Code of the Russian Federation and identify the drawbacks, gaps, and contradictions in the institution of the abuse of right. The authors analyze the theoretical, practical, and social issues affecting the rights and interests of participants in social relations when the right is abused. The relevance and the need for further development and improvement of the institution of the abuse of rights are justified.

Keywords: Subjective civil rights. Exercise of subjective civil rights. Limits to exercising subjective civil rights. Forms of abuse of right. Consequences of abuse of right.

ABUSO DE DERECHO: SOBRE CUESTIONES DE REGULACIÓN LEGAL

RESUMEN

A partir del estudio y análisis de las normas inherentes a la institución del abuso de derecho y de las opiniones legales por parte de estudiosos de la jurisprudencia civil y los precedentes, los autores exploran la esencia de la categoría jurídica “el abuso de derecho”. Los autores definen el significado de las novelas en el artículo 10 del Código Civil de la Federación de Rusia e identifican las desventajas, lagunas y contradicciones en la institución del abuso de derecho. Los autores analizan las cuestiones teóricas, prácticas y sociales que afectan los derechos e intereses de los participantes en las relaciones sociales cuando el derecho es violado. La relevancia y la necesidad de un mayor desarrollo y mejora de la institución del abuso de derechos están justificadas.


Introduction

The formation of a legal mechanism for regulating subjective civil rights presupposes, on the one hand, the provision of maximum freedom and autonomy to the authorized subjects and, on the other hand, the determination of the limits of their implementation through a system of permissible, restrictive, or prohibitive norms. This legislative technique contributes to the fact that the problem of the proper implementation of subjective civil rights becomes an integral part and an essential characteristic of civil law. By amending Art. 10 of the Civil Code of the Russian Federation (CC of the RF), the legislator aimed to make the legal structure of "abuse of the right" clearer and more perfect. However, such changes and additions gave rise to an equally significant range of new questions, problems, and contradictions. These changes cause new disputes and discussions regarding numerous issues of abuse of rights. The reaction to the fact that the legislator gives judges an even greater degree of their own discretion is ambiguous, which may entail even greater unpredictability in civil commerce (POROTIKOVA, 2013).

The problems of the limits to exercising subjective civil rights have long been the subject of discussion. Nevertheless, the pluralism of opinions continues to persist both in research and in law enforcement practice regarding the phenomenon of abuse of rights. In civil jurisprudence, some completely deny that an authorized person has the opportunity to abuse their right, while others argue that abuse of rights is a "common offense", "a type of offense", "a special kind of legal behavior", or "immoral exercise of rights". This diversity of views makes solving the problems of abuse of rights significantly more complicated, thus maintaining their extreme relevance. Similar problems exist in foreign law, although the approaches to their solution differ from Russian (DAVID & J AUFFRET-SPINOSI, 1999). We proceed from the fact that in the study and comparative analysis of foreign legislation "it is important not only to study the law itself but also to keep track of the most problematic areas in its practical application" (NAVASARDOVA et al., 2015).

Methods

During the work on this article, we used various methods of research historical, dialectical, logical, and comparative legal. The historical method was used primarily in the study of the prerequisites for the development of the institution of abuse of rights. The dialectical method contributed to the possibility of studying the legal mechanism for regulating relations in the presence of abuse of rights in connection and interaction with other institutions of civil law. The logical method was used in the study and analysis of general and special norms that determine the legal consequences of abuse of rights. We used the comparative-legal method to analyze and compare Russian and foreign legislation in the field of regulation of relevant relations.

Results

Abuse of rights: issues of interpretation

The issues of the subject seem to be relevant due to the lack of general ideas about the legal essence of the phenomenon of abuse of rights, a unified approach to the definition of this legal category, as well as the insufficient study of the forms of abuse of law and the limits to the exercise of civil rights through the criteria of good faith and reasonableness. Some scholars of civil jurisprudence see the norms of Art. 10 of the CC of the RF as completely useless. According to V. I. Emelyanov (2013), due to the primacy of dispositive principles in civil law, targeted prescriptions that restrict the exercise of certain rights should be established in the contract, for example, by introducing a penalty clause in the contract, which is a civil law means of preventing abuse of civil rights. That is why the scholar does not recognize the need to stipulate special norms on the abuse of civil rights. We believe that Art. 10 of the CC of the RF is perceived by the scholar as establishing legal responsibility for the abuse of rights, which is not true. Such norms are, first, a means of special systemic protection against bad-faith behavior of subjects of law, which directly follows from the construction of Art. 10 of the CC of the RF. When forming the norms of this article, the legislator does not use a dispositive method of civil law regulation, but a prohibitive method aimed at suppressing abuse in the exercise of subjective rights.

We agree with the view that Art. 10 of the CC of the RF embodies a special limitation of the discretion of civil commerce subjects in the process of exercising the rights (VOLKOV, 2009). However, we believe that the model of behavior for holders of subjective civil rights consolidated in Art. 10 of the CC is very abstract by nature. Therefore, scholars and law enforcement officials note its content-related limitations and not without cause. The specific nature of the scope of regulation for Art. 10 of the CC lies in the fact the article contains the limitations of behavior for the exercise of subjective rights which forms a rather complex construction of "a right to the right".

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Consideration should be given to the absolute universality and applicability of Art. 10 of the CC of the RF to all subjective rights and obligations in the event of a situation of legal uncertainty associated with the illegal use of certain legal means. We believe that Art. 10 of the CC of the RF, like any other rules, regulates the limitations of permissible and unlawful behavior but at a higher, systemic level, based on general principles of civil law. On this basis, it can be concluded that the norms in Art. 10 of the CC of the RF are characterized as guarantee norms with inherent advantages and disadvantages, since the more abstract the rule of law, the narrower its content.

A feature of the norms in Art. 10 of the CC of the RF is that these norms enshrine such a model of behavior which states that all subjective civil rights correspond to the legal obligation to exercise their civil rights in good faith. Given this, one must emphasize the dualistic nature of Art. 10 of the CC, since the norms are imperative and prohibiting. However, by the position in the civil law system, these norms represent guarantee norms that are responsible for the quality use of institutions that are part of the civil law system. Such an assessment of the institution of abuse of rights is associated with the features of the content of its constituent norms (SHEVCHUKEt al., 2018).

Circumvention of law
The legislator emphasizes the stipulation of "circumvention of the law" in Art. 10 of the CC of the RF. In the legal literature, the notion causes controversy as in practice it is extremely difficult to draw a line between such concepts as "circumvention of the law" and "legal behavior". The legal literature contains an example from judicial practice, when an entrepreneur, having studied foreign legislation, concluded that the norms of Russian law did not protect his interests. Therefore, the entrepreneur had the right to take measures to minimize business risk and conclude a transaction by choosing the applicable law which is not illegal. The entrepreneur's actions were qualified as a desire to deliberately circumvent Russian law. Does the entrepreneur circumvent the law? Yes. However, there is no violation of the law (RADCHENKO, 2013).

The essence of the novels in Art. 10 of the CC of the RF, according to A.I. Muranov, "is to provide the courts with the opportunity to invalidate transactions and actions that are lawful in form and which, in the court's opinion, lead to results that do not comply with the law due to violating a certain purpose of the law. However, the answer to the question about the purpose of the law largely casuistic, mainly due to the interests of a particular law enforcement officer, which may cause undermining the stability of civil commerce" (MURANOV, 2012). This position seems to be controversial. If we turn to the rules of the analogy of law and analogy of the right, the common thing in these situations is that the judge does not find a clear answer in the law on a specific controversial situation, and the norms are used by the court as a guideline and source of legislative directions. In judicial practice, the concepts of "circumvention of the law" and "fraudulent deal" are often equated. The distinction should be made according to the direction of the will of persons, which, when circumventing the law, is aimed precisely at achieving the legal result that was assumed at the conclusion of the transaction.

The indication of the inadmissibility of circumvention of the law in the norm contributes to greater certainty of legal regulation, protection of the rights of bona fide participants in the commerce and corresponds to the development trends of the modern legal order, and the new edition of Art. 10 of the CC of the RF is only a technical and legal expression of what has existed before.

The correspondence of the norms in Art. 10 of the CC of the RF and special norms
Considering the position of Art. 10 of the CC of the RF in the system of norms of the CC of the RF, this article is placed in the general part of the CC among the general provisions that form the basis of modern civil law. Placed in the section of the general norms of the Civil Code dedicated to the emergence, exercise, and protection of civil rights, Art. 10 contributes to the formation of the most general limits to exercising subjective civil rights using the criteria of reasonableness and good faith, preventing harm. Considering that this prohibition is a general legal principle of the inadmissibility of abuse of the right, the commission of any actions that violate this prohibition must be qualified as unlawful behavior.

For example, if during the conclusion of a sale and purchase agreement, there were rights of third parties in relation to the subject of the agreement, and the acquirer was not warned about them, then there was a seller acting in bad faith who knew about the legal defect of the property but exercised their right "for evil"towards the other party. Can we qualify the dishonest seller's actions through Art. 10 of the CC of the RF? In the presence of special rules governing the case of a conflict of interests between the buyer and the seller in the abuse of rights, there is no point. The special legal regulation removes the resolution of the dispute between the seller and the buyer from the jurisdiction of the general rules of Art. 10 of the CC of the RF. If a disputable situation arises that cannot be settled by special rules, general provisions come into effect, contributing to the resolution of the
dispute not by special, but by general regulation.

One should also refer to the new wording of Item 1 Art. 10 of the CC of the RF, which clarifies the abstract formula "abuse of rights in other forms". The legislator refers to the abuse of the right as "other exercise of civil rights knowingly in bad faith". This rule is due to the experience of the established judicial practice, in which the abuse of rights in other forms takes place only on the condition that the person's actions were deliberately in bad faith. This norm, despite its apparent clarity and simplicity, evokes criticism in the literature when deciding whether it is possible to act in bad faith, but not knowingly.

The issue of applying the methods of protection of rights in the abuse of rights remains unresolved. On the one hand, Item 1 Art. 10 of the CC of the RF prohibits the abuse of rights which entails the possibility of demanding the prohibition of actions that constitute an abuse of rights, and on the other hand, Item 2 Art. 10 of the CC of the RF expressly provides for possible measures that the court has the right to apply in this situation: refuse to protect the person who abuses rights or apply other measures directly provided by law (which are not specifically established by law).

**DISCUSSION**

The lack of a single scientific and theoretical approach to determining the subjective limits of the exercise of civil rights and the performance of duties undermines the application of the law. Both Russian and foreign legislation often stipulates unfavorable legal consequences for a person whose behavior is interpreted as abusing the right. However, with an extremely diverse and sometimes distorted understanding of the essence of abuse of rights, an increased risk of erroneous application of a sanction remains if a certain way of exercising a subjective right is taken as an offense. This unjustifiably restricts the subject's legal freedom. The opposite undesirable situation may also arise when there is an unreasonable refusal of any measures of legal responsibility in relation to a person exercising their subjective right for evil.

Due to the wide variety of situations with the characteristics of bad faith and maliciousness in the exercise of subjective rights in practice, it becomes difficult to understand the nature of the phenomenon under study, since the phenomenon "often 'accumulates' both a wide range of significant and insignificant features" (GADZHEV, 2002). Authors often equate abuse of rights and offense, which leads to a complete match of their essential features. If authors understand abuse of rights as a special type of offense, then this leads to the identification of additional qualifying features, including malicious intent and violating the limits of the exercising rights. If authors reduce the abuse of rights to a legitimate phenomenon, then they highlight bad faith, the antisocial orientation of the subject's actions, and others. Therefore, we consider it feasible to enshrine the essential features of the concept of "abuse of rights" in the legal norm considering the analysis of authors' positions.

According to some authors, the constructive feature of the phenomenon under study is "doing evil" as a result of exercising subjective civil rights. Despite the simplicity and obviousness of this criterion, the latter is far from indisputable. The complexity of this feature is due to the lack of an unambiguous approach to the category of "evil" from the standpoint of law. From the perspective of a general philosophical approach, evil is a certain negative aspect of human activity, the opposite of good. From the point of view of the law, "evil" within the framework of this topic is any negative consequences of exercising the right. More often, such negative consequences are designated by the term "harm".

**CONCLUSION**

We have attempted to study and analyze the norms inherent in the institution of abuse of rights, legal positions of scholars regarding the phenomenon of "abuse of rights", as well as identify problems in the application of the law. The novels that have been expressed in the current edition of Art. 10 of the CC of the RF, although imperfect, are of great theoretical and applied value. Previously, courts had extremely rarely used the norms of this article since these norms were perceived as something exotic for a long time. They were applied, as a rule, in those cases when the case materials unambiguously indicated that a party abused its right or the desire not to exercise its right, but, for example, unreasonably enrich themselves at the expense of the contracting party.

We proceed from the fact that in terms of functionality Art. 10 of the CC of the RF is a so-called "reserve norm", which comes into effect only in a situation of legal uncertainty, when either there is no corresponding special rule of law regulating the disputed relationship, or a special rule cannot competently and fully solve the task of regulating social relations due to its shortcomings (for example, formal the content of a special norm, the presence of gaps in the law). We also believe that Item 4 Art. 10 of the CC of the RF that secures the possibility of
claiming damages when the right is violated deserves a critical assessment, since this method of protection is directly provided for by law in Item 1Art. 15 and Art. 12 of the CC of the RF. Thus, there is no need for additional duplication. It is proved that the legal integration in this area of public relations could have a significant impact on the development of legal regulation of relations in case of abuse of rights (KLYUKOVSKAYA et al., 2017). At the stage of reforming civil legislation, including in the field of exercising subjective civil rights, it becomes very useful to turn to the analysis of foreign legislation, which has a wealth of experience in legal regulation in relevant areas.

REFERENCES


