ПОРІВНЯЛЬНЕ ПРАВОЗНАВСТВО

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THE COMPARATIVE LEGAL ANALYSIS OF THE TRANSFORMATION OF THE GENERAL RULES ON THE ABUSE OF RIGHT AT THE LAW OF POST-SOVIET AND POST-SOCIALIST COUNTRIES

The genesis of the general rules on abuse of right at the legal frameworks of the USSR and other socialist states as well as their further transformation at the legislation of the post-socialist countries are investigated in the article. First of all rules of the Draft of the Civil Code of the Russian Empire of 1913 provided on the abuse of right as well as ante-revolutionary legal studies of Russian lawyers and their impact on the Soviet law are described. Further the genesis of the rules of the Soviet law of different periods provided for the exercise of legal rights and the discussion of the Soviet lawyers for this topic are covered. The impact of the Soviet law on the legal frameworks of a number of socialist countries of the Eastern Europe is reviewed. The comparative analyses of the changes of legal rules on the abuse of right of the post-Soviet and post-socialist countries have been fulfilled as well as a modern discussion of the lawyers of the post-soviet countries for this topic has been outlined.

Key words: abuse of right, proper exercise of right, limits of exercise of right.

Problem statement. A major challenge arising in the course of the law-governed state building is a deplorable fact that many people regard their rights provided by law as unlimited ability to make any arbitral legal impact on their own discretion. Such egoistic exercise of right may take inadmissible form known as an abuse of right. Wide extension of this form of exercise of right is observed by many legal scholars and may be indirectly evidenced also by the interest displayed by the legal community for this topic in recent 10–15 years.

Analysis of researches and publications. One should mention Volkov A. V., Gorbas D. V., Durnovo N. A., Yemelyanov V. I., Zaytseva S. G., Izbrekht P. A., Malinovskiy A. A., Naumov A. E., Porotikova O. A., Radchenko S. D., Filippov P. M. and Belonozhkin A. Y. among authors, who paid attention to the issues of abuse of right at the post-Soviet area.

It is our opinion that the problems of the wide extension of abuse of right practices are determined also by the fact that legislators of a number of post-Soviet countries have chosen insufficient model of the legislative regulation of this matter after they denied from the soviet paradigm of the proper exercise of right.

Paper purpose. It is the purpose of this article to investigate the transformation of the general rules on the abuse of right in the law of post-Soviet and post-socialist countries.

Paper main body. Whereas the soviet model of the regulation of the proper exercise of rights has been elaborated at the dawn of the Soviet epoch one has to start with the brief review of the legal regulation of the abuse of right matters in ante-revolutionary Russia.

So, at the turn of XX century the legal frameworks of the most of leading European countries of civil law or Romano-Germanic legal tradition has elaborated certain approaches for the issue of abuse of right, furthermore the newest for that moment codifications resolved that problem in different ways.

A draft of the Civil Code of Russian Empire *(«Российское гражданское уложение»* in Russian) has been elaborated at that time as well. Therefore a problem of a legislative prohibition of abuse of legal right was discussed among others.

First two draft versions of the Civil Code of 1899 and 1905 provided that a person which acts within limits of a legal right provided by law is not liable for damage done and did not stipulate general rule prohibiting the abuse of right (article 1066 of the Draft of 1899 and article 2602 of the Draft of 1905) [1, p. 434].

The prohibition of abuse of right was implemented only to the last draft version of 1913 in the following wording: 'a one who shall act within limits of the legal right provided by the law is not liable for damage done unless the right has been exercised with the only purpose to injure other person' (article 1174 of the Draft of 1913) [1, p. 434].

As one may see the draft of Russian Civil Code of 1913 has reproduced the approach of the article 226 of German Civil Code (*Bürgerliches Gesetzbuch* in German) [2]. However the draft of Russian Civil Code has never been adopted because of First World War, Revolution and Civil War in Russia.

Also, it should be noted that there was a case law for abuse of rights at Russian Empire commented by the contemporary legal scholars notwithstanding the absence of the legislative rules.

V. Domanjo is one of Russian legal scholars of that epoch who paid attention to the issue of abuse of right and we are informed of the ante-revolutionary case law for abuse of right due to his studies. He regarded that abuse of right lies in exercise which is not in line with purpose of law in general as well as purpose of this concrete right in particular [1, p. 435].

It is important to note that V. Domanjo emphasized connection between legal right and certain social function, upon that inconsistency between them amounts to the abuse of right.

I. Pokrovskiy was another one ante-revolutionary legal scholar commented abuse of right issues. In his judgment abuse of right constitutes a tort and «a fact that exercise of right is a mean of harm-doing does not in any way excuse in this situation, because legal rights are granted in order to fill legal interest of the entitled person but not to injure others» [3, p. 118].

The socialist revolution in Russia called into existence new legal order which was principally different from the one of the Russian Empire.

The Soviet law provided general rule that legal right is to be exercised according to its purpose. V. Gribanov, who was a leading soviet author in the field of the abuse of right specified this rule as a manifestation of the fundamental principle of the Soviet civil law that is a principle of accordance of the exercise of legal right with its purpose at the socialist society that is legal expression of the requirement to harmonize public and private interests at the society which builds the communism [4, p. 20–21].

That was clear at the times of the first Soviet codification of law. Thus, article 1 of the Civil Code of the Ukrainian Soviet Socialist Republic of 1922 [5] provided that civil rights are under the protection of Law unless they are exercised contrary to their socially-economical purpose. The article 1 of the Civil Code of Russian Soviet Federated Socialist Republic provided the same rule [6]. Whereas the legislator did not use the term «abuse of right» («злоупотребление правом» in Russian and «зловживання правом» in Ukrainian) many soviet lawyers regarded that the rule obliged to exercise right in accordance with its purpose is suited to prevent the abuse of right.

The contemporary soviet lawyers offered the controversial opinions for the aforesaid rule. Thus, Y. Kantorovich qualified it as a fundamental change of the traditional assumptions and essential dogma of the civil law [7, p. 9], whereas B. Rubinstein regarded that idea as an adopted from the «bundle of knowledge of the capitalist jurisprudence» [8, p. 83].

One must acknowledge that the soviet understanding of abuse of right in actual fact is closely associated to the theoretical construct of one ante-revolutionary legal scholar V. Domanjo.

Some time later, upon the end of the World War II there was an opinion that the rule of Art.1 of the Civil Code 1924 fade in importance because it has been implemented into the legislation solely and exclusively in order to prevent specific abuses peculiar to the transitional period of the New Economic Policy provided by the Soviet government at 1921–1928 [9, p.435; 10, p.267]. At the same time M. Agarkov regarded that exercising of right cannot be illegal and actions usually called as abuse of right are operated outside of its limits [9, p. 427].

M. Baru opposed that opinion and argued that term 'abuse of right' expresses really existing relations where entitled person exercises its right in improper way and it nevertheless carries a face of a legal act [11, p. 118], i.e. in fact grounded actuality of the rule of abuse of right in the context of the soviet society of that epoch.

One must emphasize that the abuse of right phenomena have been limited under the Soviet regime by few situations in the residential lease on the whole

which were often eccentric enough. As an example we may regard a situation where the landlord destroyed a part of the house where tenant lived in his absence after the claim for dispossession of the tenant has been rejected by the court [11, p. 118].

The codification of the Soviet law which took place at sixties of XX century held up the principle of exercising of legal rights according to their purpose. Thus, Article 5 of the Fundamental Principles of the Civil Legislation of the Soviet Union and Union Republics of 1961 [12] as well as Article 5 of the Civil Code of Ukrainian Soviet Socialist Republic [13] and Article 5 of the Civil Code of the Russian Soviet Federated Socialist Republic [14] provided the following identical provisions: «Civil rights are under the protection of law unless they are exercised contrary to their purpose in the socialist society at the stage of building of the communism. Citizens and organizations have to obey the law and respect rules of the socialist community life as well as moral principles of the society which builds the communism when they exercise rights and fulfill obligations».

As one may see ideologically neutral category of «socially-economical purpose of legal right» has been replaced by the ideologically tinged category of «purpose of legal right in the socialist society at the stage of building of the communism». Also proper exercise of right was tied with duty «to obey the law and respect rules of the socialist community life as well as moral principles of the society which builds the communism».

A vast discussion appeared among the soviet lawyers on the abuse of right matters namely resulting from the second Soviet codification of early sixties.

M. Samoylova highlighted that holder of right acts legally in all the situations where he exercises his right, so illegal exercise of right is impossible following the line of reasoning of M. Agarkov [15, p. 11]. As one may see aforementioned authors principally denied the very notion of possible illegality of acts of the person exercising its legal right.

On the contrary such authors as V. Riasentsev and S. Bratus regarded that exercise of right may be declared as illegal but assumed that the «exercise of right according to its purpose» category provided by the contemporary law is sufficient enough and opposed use of «abuse of right» term as a needless one.

V. Riasentsev regarded that «abuse of right» term emphasizes subjective aspect of entitled person's behavior much more than «exercise of right according to its purpose» category and does not clarify properly the essence of the social phenomenon in question [16, p. 8–9]. In the opinion of S. Bratus the use of «abuse of right» category might result in disregard for the rule of law as well as unwarranted expansion of the judicial discretion [17, p. 82].

V. Gribanov was the one who upheld the idea of «abuse of right» and wrote the first monograph with the investigation of this problem at 1973 [4].

In the opinion of V. Gribanov one may and one should use «abuse of right» category in order to describe certain kind of violation of law meaning injurious act committed by entitled person in the course of exercise of its right concerned with impermissible particular form within limits of the general pattern of behavior permitted by the law [4, p. 55].

V. Gribanov separated the categories of «limits of the legal right» and «limits of the exercise of the legal right». In his opinion the person which is going beyond the limits of right in other words exercising act which is outside of the content of the legal right in question commits delict and there is no abuse of right in this case.

So, the abuse of law takes place if a person acts within the limits of the legal right but beyond the limits of the exercise of the legal right, i.e. exercises acts included at the content of the legal right by improper way.

The category of the «limits of the exercise of the legal right» is a key notion of the V. Gribanov's concept. He discovers the aforesaid limits not only as a purpose of right according to the cotemporary legislation bur also as legal requirements for the entitled person, terms and order of exercise of right as well as nature and limits of means of enforcement and remedies of the right of entitled person. V. Gribanov regarded that breach of any of these criteria means breach of the limits of the exercise of the legal right and is an evidence of the abuse of right.

The V. Gribanov's theory asserted great influence over the genesis of the concept of the abuse of right. It may be regarded today as a parental for a number of modern theories of the abuse of right. Nevertheless it has some lacks and is subjected to the serious critics as a result.

Nevertheless the Fundamental Principles of the Civil Legislation of the Soviet Union and Union Republics of 1991 [18] developed the concept of the exercise of the right in accordance with its purpose but not the concept of the limits of the exercise of the right.

Article 5 of the Fundamental Principles provided that citizens and legal entities may dispose by the civil rights they have including right to protect them by their discretion to the extent that exercise of civil rights shall not injure rights and interests of other persons protected by the law. Citizens and legal entities have to respect moral principles of the society and rules of business ethics while they are exercising their legal rights. Civil rights are protected by the law unless they are exercised contrary their purpose.

One may see that rules mentioned above are ridden of an ideological bias. Fundamental Principles provides among criteria of proper exercise of right not only purpose of legal right but also respect of moral principles of the society and rules of business ethics as well as the very important criterion of non-infringement of rights and interests of other persons protected by the law.

So we may put in a nutshell the following essential features of the Soviet epoch legal rules in this field: there was no direct legislative prohibition of abuse of the legal right; there was direct legislative prohibition to exercise legal right contrary to its purpose that was thought of as a prohibition to abuse the right by some legal scholars.

The most important features of genesis of the doctrine of abuse of right of the Soviet epoch are the following: there was a discussion on the very possibility of the illegal exercise of rights as well as permissibility of the malicious exercise; there was a discussion on the necessity of the category of the abuse

of legal right; the concept of the «limits of the exercise of rights» has been developed.

The legislators of the socialist countries in general copied the soviet model of the legislative rules in this field.

Article 5 of the Civil Code of Polish People's Republic of 1964 [19] prohibited exercise of right contrary to its socially-economical purpose (*spoleczno-gospodarczym przeznaczeniem* in Polish) or to the basic rules of the community life (*współzycia spolecznego* in Polish). Acts like that are not regarded as the exercise of rights and are not under the protection of law. Aforesaid Article 5 has been entitled as «abuse of subjective right» (*nadużycie prawa podmiotowego* in Polish). One may see it resonates with the aforementioned idea of the soviet legal scholars that exercise of the legal right contrary to its purpose means abuse of right. The legislation of Yugoslavia concerned abuse of right as an exercise contrary to its purpose. Article 13 «Abuse of right» (*злоупотреба права* in Serbian) of the Law of Socialist Federal Republic of Yugoslavia «On obligation relations» prohibited exercise of rights contrary to its purpose provided or acknowledged by the law [20]. Article 4 of the Law of Socialist Federal Republic of Yugoslavia «On the Fundamental Principles of the Property Relations» provided the same prohibition for the same kind of improper realization of the ownership right and regarded that ownership right is to be exercised in line with the nature and kind of property [21].

Article 7 of the Preamble of the Civil Code of Czechoslovak Socialist Republic of 1964 prohibited abuse of right contrary to the interests of the society and other citizens as well as self-enrichment to the injury of citizens and society [22].

Article 5 of the Civil Code of Hungarian People's Republic of 1959 prohibited the abuse of rights an provided that exercising of any right directed toward an objective that is incompatible with the social function of that right shall be regarded as an abuse of rights, particularly if it would lead to damaging the national economy, harassing persons, impairing their rights and legal interests, or acquiring undue advantages [23].

One may see that the law of the socialist countries mentioned above stipulated principle of the purpose of legal right taken from the soviet law but unlike the legislation of USSR the term of abuse of right has been implemented at the *lex lata*. The crisis of the socialist system in the late eighties as well as the crash of the socialist camp and USSR followed after that drew forth a number of the reforms at post-socialist and post-soviet countries. The criteria of qualification of the abuse of right have been revised in the course of legal reforms.

The Preamble of Czech Civil Code qualified abuse of rights as an unsocial exercise has been disestablished whereas Part 1 of Article 3 was redrafted as the following: «exercise of rights and obligations has not to injure rights and legal interests of other persons as well as to be against good morals» [24].

The same rule is still in force in Slovakia [25], whereas the new Civil Code of Czech Republic has been adopted at 2012 and came into force at 2014 [26].

Part 1 of Article 6 of Czech Civil Code of 2012 obliges one to act honestly (*poctivě* in Czech), states at article 7 person that acts in the way provided by

the law is regarded as acting honestly and in good faith (*poctivě a v dobré víře* in Czech) and arranges at the article 8 that obvious abuse of right (*zjevné zneužití práva* in Czech) is not protected by law.

So the Czech legislator discovers abuse of right at its exercise performed not in the way provided by the law.

The new Civil Code of Hungary of 2013 prohibits abuse of right at Article 1.5 as well as the Code of 1959 but does not mention category of «purpose of right». According to Article 1.3 of the Code in exercising rights and in fulfilling obligations the requirements of good faith and fair dealing shall be observed. The requirements of good faith and fair dealing shall be considered breached where a party's exercise of rights is contradictory to his previous actions which the other party had reason to rely on [27].

Article 15 «Abuse of Right» (*Abuzul de drept* in Romanian) of the Civil Code of Romania of 2009 entered into force at 2011 [28] is a verbatim translation of the Article 7 of the well known Civil Code of Quebec [29] providing that no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

Also there is Article 1353 at the Civil Code of Romania providing that person is not obliged to indemnify for the damage caused by the exercise of right unless the abuse of right took place.

It is seen that Romanian legislator regards abuse of right as chicane and exercise of right in excessive and unreasonable manner, and therefore contrary to the requirements of good faith, following the authors of the Civil Code of Quebec.

At 1993 Article 6 of the Law of Bulgaria «On Obligations and Contracts» of 1950 has been revised and its new version provides that persons exercise their rights in order to satisfy interests and should not do that contrary to the interests of the society [30]. Article 289 «Abuse of Right» (*злоупотреба с право* in Bulgarian) of the Trade Code of Bulgaria of 1991 provides that exercise of right arose from the commercial deal is inadmissible if it has been done in order to cause damages of the other person [31].

Thus the abuse of right is understood in Bulgaria in the sense of the category of lawful interest and is regarded as chicane.

In general the legal frameworks of the post-socialist countries mentioned above have refused from the Soviet concept of the purpose of right. The same is not true at Poland and former republics of Yugoslavia. Article 5 of the Civil Code of Polish People's Republic of 1964 [19] prohibited exercise of right contrary to its socially-economical purpose or to the basic rules of the community life is still actual at contemporary Poland.

The old Laws of Yugoslavia «On Obligation Relations» and «On the Fundamental Principles of the Property Relations» prohibiting exercise of rights contrary to its purpose provided or acknowledged by the law as well as obliging ownership right to be exercised in line with the nature and kind of property still have effect at Serbian Republic [20; 21]. The identical laws have been entered into force by the Assembly of Republic of Macedonia [32; 33], by the

Parliament of Montenegro [34, 35], by the People's Assembly of Republika Srpska (the Serbian part of Bosnia and Herzegovina) [36, 37], by the Parliament Assembly of the Federation of Bosnia and Herzegovina (the Croatian and Muslim part of Bosnia and Herzegovina) [38, 39].

The Parliament of Croatia (Sabor) has adopted law [40] identical to the Law «On Obligation Relations» with the same rules on the abuse of rights (*zlouporabe prava* in Croatian). Nevertheless the Law «On the Ownership and Other Proprietary Rights» [41] on the contrast deeply varies from the old legislation of Yugoslavia and constitutes conceptually different act.

As for the abuse of right Article 31 of the aforesaid law directly prohibits chicanery (the owner is not empowered to use its rights with the only purpose to injure or to cause inconvenience) and does not use term «abuse of right».

The Parliament of Slovenia adopted 2 totally new codes provided the rules on the abuse of right (*zlorabe pravic* in Slovenian) namely the Code of Obligations (*Obligacijski Zakonik* in Slovenian) and the Code of Proprietary Rights (*Stvarnopravni Zakonik* in Slovenian). The aforesaid codes provide the following concept of abuse of right: rights are to be exercised in line with the fundamental principles of each code and according to their purpose, the fictitious exercise of right (*navidezno izvrševanje pravice*), i.e. exercise of right with the only or obvious purpose to injure (namely — chicane) is prohibited (Article 7 of the Code of Obligations, Article 12 of the Code of Proprietary Rights) [42; 43].

Also Part 2 of Article 7 of the Code of Obligations obliges the participants of the obligation legal relations to refrain the conduct which is complicating the performance of obligations by other persons while they are performing their own obligations. Part 1 of Article 12 of the Code of Proprietary Rights provides restriction of the rights of owners as well as other proprietary rights with the similar rights of other persons. As one may see the principle of the purpose of legal right dated back to the legislation of Yugoslavia and USSR is still topic in the legal frameworks of the countries of former Yugoslavia. It ought to be specially focused on the complex approach implemented by the Slovenian legislator to the issue of abuse of right.

Unlike the former Yugoslavian republics and Poland the post-Soviet countries refused outright the soviet approach in the field of the abuse of right. Consequently we may divide post-Soviet countries in some groups depending on the approach provided by the legislation in the field of the abuse of right.

Thus, Article 115 «Inadmissibility of the Abuse of Right» of the Civil Code of Georgia of 1997 [44] provides that civil right shall be exercised lawfully. Exercise of a right exclusively with the intention to inflict damage on another shall not be allowed. In this case we may see the prohibition of the classical canonical form of the chicane as well as use of the criterion of «lawful exercise of rights» which may be defined as a not too purposeful one for qualification of abuse of right.

The legislation of some post-Soviet countries provides the general rule for good faith but not for the prohibition of the abuse of right.

The legislation of Latvia is a briefest one in this field. Article 1 of the Civil Code of Latvia [45] of 1937[1] provides only that rights are to be executed and obligations are to be performed in good faith.

The legal regulation like this appears as a lapidary and clearly insufficient. Part 1 of Article 9 of the Civil Code of Moldova of 2002 obliges natural persons and legal entities participating in civil legal relationships to exercise their rights and perform their obligations in good faith, pursuant to law, contract, public order and good morals and provides that good faith is presumed unless proven otherwise [46].

The term «abuse of right» is used in the Civil Code of Moldova only at few special provisions on the prohibition of the abuse of rights by the tutor and usufructuary. Nevertheless the content of the notion of abuse of right is not revealed.

An advantage of the legislation of Moldova as compared to the legislation of Latvia is a clear presumption of the bona fide exercise of right as well as much more extended description of the attributes of the proper exercise of right. § 138 of the General Part of the Civil Code Act of Estonia[2] of 2002 [47] goes further and not only prescribes rights to be exercised and obligations to be performed in good faith but also provides a prohibition for the exercise right with the objective to cause damage to another person (i.e. chicane) as well as exercise right «in an unlawful manner».

Article 9 of the Civil Code of Turkmenistan of 1998 [48] in a like manner: obliges parties of the legal relations to exercise rights and obligations in good faith to do not injure other persons by act or omission (without mention of the purpose of act or omission); provides that court may dismiss a suit filed in order to protect rights if there is a breach of the requirements mentioned above; presumes that rights are executed reasonably and in good faith.

As we may see legislations of Estonia and Turkmenistan put requirement of a good faith together with a general prohibition of the abuse of right.

The most detailed regulation of the issue of abuse of right is provided by the legislation of Lithuania.

The Civil Code of Lithuania of 2000 [49] specifies the prohibition of the abuse of right among other principles of legal regulation of civil relations listed at Article 1.2 and contains extended Article 1.137 «Enjoyment and Exercise of Civil Rights and Performance of Civil Duties». The aforementioned article obliges persons to obey laws, respect rules of public welfare and principles of good morals, good faith, reasonableness and justice, while exercising their rights and performing their duties. Also there is an expanded description of the abuse of right as an exercise of right: in a manner or by means intended to violate other persons' rights and interests protected by laws; or to restrict other persons in their rights and interests protected by laws; or with the intent of doing damage to other persons; or where this would be contrary to the purpose of the subjective right.

[1] The old Civil Code of 1937 has been reissued at Latvia at 1992.

[2] Riigikogu (the Parliament of Estonia) has adopted the Civil Code of Estonia with several laws.

According to Part 3 of Article 1.137 of the Civil Code of Lithuania injury to other persons called by the abuse of right shall be the grounds for the implementation of civil liability. At the same time a court may refuse to protect the subjective right of which the person abuses. Part 5 of Article 1.137 amplifies aforesaid rule providing that civil rights shall be protected by the laws, except in cases when the exercise of these rights is inconsistent with their purpose, public order, good usages or the principles of public morals while Part 6 of Article 1.137 stipulates that a renouncement of exercise of a subjective civil right shall not abolish the civil subjective right, except in cases established by laws.

As one may see the Lithuanian legislator defines abuse of right through the alternative criteria of qualification likewise the way proposed by Article 3:13 of the Civil Code of Netherlands [50]. Put it in a nutshell it's an adequate and sound solution.

Also Part 4 of Article 1.137 provides prohibition of the exercise of civil rights in bad faith and with the intent of unlawfully limiting competition or in abuse of the dominating position in the market.

The legal frameworks of the rest of post-soviet countries (Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Ukraine and Uzbekistan) have the similar essential features of the legal rules provided for the abuse of right whereas divergences among them are insignificant: the prohibition of abuse of right is drafted as a prohibition «to exercise right with the purpose of inflicting damage to another person, as well as the abuse of the civil rights in other forms» (part.1 of the article 10 of the Civil Code of Russian Federation of 1994 [51], part 3 of the article 13 of the Civil Code of Ukraine of 2004 [52], paragraph 1 of the part 1 of the article 9 of the Civil Code of Belarus of 1999 [53], paragraph 1 of the part 1 of the article 12 of the Civil Code of Republic of Armenia of 1998 [54], part 1 of the article 16 of the Civil Code of Republic of Azerbaijan of 1999 [55], part 5 of the article 8 of the Civil Code of Republic of Kazakhstan of 1994 [56], part 5 of the article 9 of the Civil Code of Republic of Uzbekistan of 1996 [57], part 1 of the article 9 of the Civil Code of Kyrgyz Republic of 1996 [58], part 1 of the article 10 of the Civil Code of Republic of Tajikistan of 1999 [59]). However the law of Russia, Belarus, Armenia, Azerbaijan and Kyrgyzstan stipulates the exclusive intention of inflicting damage to another person whereas law of Ukraine, Tajikistan, Uzbekistan and Kazakhstan do not provide such regulations. Also Kazakhstani and Uzbekistani legislators as distinct of legislators of other post-Soviet countries specify exercise of right contrary its purpose among «the abuse of the civil rights in other forms»; the article of the Civil Code of the appropriate country devoted to the issues of abuse of right is nominated as a rule as «The Limits of Exercise of the Civil Rights» except for Uzbekistan and Kazakhstan; at most of post-soviet countries mentioned above the law provides regulations on the right of court to reject the claim of the person claim for the protection of the abused right, except for Azerbaijan and Ukraine as well as a clause on the presumption of the good faith of entitled persons exercising its right, except for Armenia and Azerbaijan.

The similarity of regulations of abuse of right in the legal frameworks of aforementioned countries is stipulated by the fact that legislators have taken rules of the Civil Code of Russian Federation as a model. Also it's obviously that Russian legislators followed V. Gribanov's concept.

The general rule for the abuse of right in the legal framework of Ukraine is Article 13 «The Limits of Exercise of the Civil Rights» if the Civil Code of Ukraine.

The aforementioned article: provides prohibition of exercise of right with the purpose of inflicting damage to another person, as well as the abuse of the civil rights in other forms (Part 3 of Article 13); obliges to refrain from acts injuring rights of other persons as well as prejudicing environment or cultural heritage (Part 2 of Article 13); obliges to abide the moral principles of the society in the course of exercise of right (Part 4 of Article 13); provides prohibition of exercise of right for the purpose of restricting the competition, as well as the abuse of the dominating position on the market and unfair competition (Part 5 of Article 13).

There are following specific features of the legislation of Ukraine in the field of prohibition of abuse of right as compared to the legal frameworks of other post-Soviet countries: the regulations of Part 1 of Article 13 of the Civil Code of Ukraine provides that person shall exercise civil rights within limits established by the contract or acts of civil legislation. As it was mentioned above articles of the Civil Codes of a number of post-Soviet countries are titled as «Limits of Exercise of the Civil Rights». Beyond a shadow of doubt that is a clear reference to the theory of the limits of exercise of rights of the Soviet scholar V. Gribanov, but legislators of the post-Soviet countries do not use term «limits of the exercise of civil rights» in the body of legislative rules. The Ukrainian legislator takes it a step further and provides direct legislative implementation of the theory of V. Gribanov. Nevertheless the Civil Code of Ukraine does not clear up how we should understand the limits of exercise of the civil rights; the regulations of Part 6 of Article 13 of the Civil Code of Ukraine providing that the court may oblige the person to terminate proved abuse of right. Such approach provides that injured person shall file the suit claiming person abusing its right to terminate unlawful conduct. It means that injured person sues as a plaintiff and wins an action in case if the abuse shall be proved. This way is totally different from the approach provided by the legislation of Russian Federation as well as a number of other post-Soviet countries stipulating that court may dismiss the claim sued in order to protect abused right. It means the reversed situation where abuser shall sue and lose if defendant proves the fact of abuse of right.

Thus the development of the legislative regulation of the problem of abuse of right at the post-Soviet countries has been subjected to the substantial changes of the following features: legislators have retreated from the purpose of the legal right as a leading criterion. It has been survived to the present day only at the legislation of Kazakhstan, Lithuania and Uzbekistan as one of alternative criteria; the category of abuse of right is directly provided by the legislation of most of the post-Soviet countries as well as a direct prohibition

of chicane. The only exceptions are the legal frameworks of Moldova and Latvia providing only obligation to act in good faith while exercising legal right; legislators of most of post-Soviet countries do not expand the content of the notion of abuse of right; civil codes of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Uzbekistan and Ukraine provides references to the category of «limits of exercise of right» proposed by the soviet legal scholar V. Gribanov but unfortunately do not expand the content of this category. The most striking instance of this trend we may see at the Civil Code of Ukraine.

One must admit the approach of legislators of the aforementioned countries as insufficient and contradictory because of reference to the self-contradictory theory of V. Gribanov without disclosure of the content of the notion of «limits of exercise of right».

A number of legal studies of the abuse of right issues have occurred in the recent years as a result of insufficient legal regulations in this field.

Some of legal scholars try to improve the theory of the «limits of exercise of right» [60; 61; 62; 63; 64], whereas other criticize it motivating that there is no reason to tease out artificial 'limits of exercise of right' different from the 'limits of right' [65; 66; 67]. So, it will be observed that there are attempts to promote alternative theories of the purpose of right [65], of legal interest [67], of semblance of legality [68]. Also one should note that some of authors in Russia try to validate a concept of a 'legal abuse of right' i.e. abuse of right interpreted as an admissible and lawful act [60; 67; 69; 70]. As one can see this discussion is far from the end.

Conclusions. So, one may summarize that the most advantageous approach related to the prohibition of the abuse of right among the post-Soviet countries has been realized at the legislation of Lithuania.

The reasons for this statement are the following: the prohibition of abuse of right is regarded as a fundamental legal principle; the content of the category of abuse of right is expanded through the alternative criteria of qualification; there is a rule providing that damage caused by the abuse of right is a ground for the legal responsibility; the court is empowered to refuse to protect the subjective right of which the person abuses if the exercise of these rights is inconsistent with their purpose, public order, good usages or the principles of public morals.

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ПОРІВНЯЛЬНО-ПРАВОВИЙ АНАЛІЗ ТРАНСФОРМАЦІЇ ЗАГАЛЬНИХ НОРМ ПРО ЗЛОВЖИВАННЯ ПРАВОМ У ПРАВІ ПОСТРАДЯНСЬКИХ ТА ПОСТСОЦІАЛІСТИЧНИХ КРАЇН

Резюме

У цій статті розглядається розвиток загальних норм про зловживання правом у правових системах СРСР і соціалістичних держав і подальша їх трансформація в законодавствах постсоціалістичних країн. Узагальнюються суттєві риси як регулювання проблеми здійснення прав, так і доктрини зловживання правами в радянський період. За результатами порівняльного аналізу норм радянського права і соціалістичних держав робиться висновок про серйозний вплив радянського права на правові системи соціалістичних держав з цього питання. За результатами порівняльного аналізу норм права постсоціалістичних держав робиться висновок про відсутність наступництва в підходах до правового регулювання проблеми зловживання правами в соціалістичний і постсоціалістичний періоди в більшості держав (крім Польщі та колишніх республік Югославії). Виявлено як оригінальні рішення законодавців, так і запозичення з правових систем інших держав. Відзначається важлива роль теорії меж здійснення прав радянського правознавця В. Грибанова у формуванні норм Загальної частини ЦК Російської Федерації про зловживання правом, а також — запозичення цієї конструкції законодавцями більшості пострадянських держав, включаючи Україну. Теорія меж здійснення прав характеризується як внутрішньо суперечлива, а підхід законодавців, заснований на відсиланні до категорії меж здійснення прав без розкриття її змісту, визнається незадовільним. Кращим варіантом правового регулювання цього питання визнається рішення, передбачене в правовій системі Литви.

Ключові слова: зловживання правом, належне здійснення прав, межі здійснення прав.

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СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ ТРАНСФОРМАЦИИ ОБЩИХ НОРМ О ЗЛОУПОТРЕБЛЕНИИ ПРАВОМ В ПРАВЕ ПОСТСОВЕТСКИХ И ПОСТСОЦИАЛИСТИЧЕСКИХ СТРАН

Резюме

В данной статье рассматривается развитие общих норм о злоупотреблении правом в правовых системах СССР и социалистических государств и последующая их трансформация в законодательствах постсоциалистических стран. Обобщаются значимые черты как регулирования проблемы осуществления прав, так и доктрины злоупотребления правами в советский период. По результатам сравнительного анализа норм советского права и социалистических государств делается вывод о серьезном влиянии советского права на правовые системы социалистических государств по данному вопросу. По результатам сравнительного анализа норм права постсоциалистических государств делается вывод об отсутствии преемственности в подходах к правовому регулированию проблемы злоупотребления правами в социалистический и постсоциалистический периоды в большинстве государств (кроме Польши и бывших республик Югославии). Выявлены как оригинальные решения законодателей, так и заимствования из правовых систем других государств. Отмечается важная роль теории пределов осуществления прав советского правоведа В. Грибанова в формировании норм Общей части ГК Российской Федерации о злоупотреблении правом, а также — заимствование данной конструкции законодателями большинства постсоветских государств, включая Украину. Теория пределов осуществления прав характеризуется как внутренне противоречивая, а подход законодателей, основанный на отсылке к категории пределов осуществления прав без раскрытия ее содержания, признается неудовлетворительным. Лучшим вариантом правового регулирования данного вопроса признается решение, предусмотренное в правовой системе Литвы.

Ключевые слова: злоупотребление правом, надлежащее осуществление прав, пределы осуществления прав.