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FREEDOM OF CONTRACT: THE EVOLUTION OF A LEGAL PRINCIPLE IN THE ERA OF INFORMATION

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The subject of the article is new patterns observed in approaches to the principle of freedom of contract from legal science and law enforcement practice.

The purpose of the article is to show the directions of evolution of the principle of freedom of contract in connection with the influence of information technology on civil circulation and changes in the significance of this principle for law enforcement.

Main results, scope of application. In science, there is a transformation of ideas about the principle of freedom of civil contract. To the provisions of the codified civil law, reflecting the basic postulates of the principle of freedom of contract, modern researchers add freedom to choose the form, as well as the method (order) of its conclusion. This principle turns out to be actually limited by a technological innovation – a smart contract, for which the possibility of changing and terminating the contract, as a rule, is absent. The expansion of freedom of contract is observed in the circulation of new objects of civil rights – cryptocurrencies. Research in the field of neurophysiology (neuromarketing) calls into question human free will, and with it the freedom of contract. The collected statistical data characterizing the content of judicial acts allows us to state a pattern in recent years – a lesser orientation of courts considering economic disputes towards the principle of freedom of contract. The increasing role of centralized legal regulation of civil relations leads to a decrease in the role of autonomous regulation, and therefore a decrease in the importance of the principle of freedom of contract. The observed trend of growth in the number of norms in legislative acts can hardly be called positive – its continuation can lead to a deterioration in the skills of participants in civil transactions to develop flexible economic decisions, a decrease in responsibility and the level of legal culture. The results obtained will be useful for improving lawmaking.

The research methodology is represented by statistical, formal logical, formal dogmatic and comparative research methods.

Conclusions. Cycles of growth and decline in the importance of the principle of freedom of contract for law enforcement practice are in organic connection with the number of legal norms regulating civil relations, institutional transformations and changes in the approach to the official interpretation of the law. Lawmakers should ensure greater stability of legislation regulating this area of civil relations.

1. The principle of freedom of contract in law and scientific research

Civil law principles have an adequate impact on public relations only when they function harmoniously and in a system with other legal regulation fundamentals included in the norms of related branches of law. The freedom of a civil contract as a social phenomenon is related to the freedom of work [1, p. 502] and the support of the unemployed citizens [2]: the absence of such contracts negates the opportunities provided by civil legislation since forced labor and indigence compelling the person to seek for means of living nullify the effectualness of the discussions about the principle of freedom of contract.

Civil law is characterized by the broadest freedom of those participating in regulated public relations to establish, change and terminate their rights and obligations at their discretion [3, p. 193]. The freedom of contract is a part of a larger-content principle – the principle of dispositivity of civil law regulation [4, p. 156]. However, separating the freedom of contract out as an independent principle of civil law is facilitated by the fact that "unlike most other principles, it has a definite, clear, integral content in civil law, including owing to Article 421 of the Russian Federation Civil Code" [4, p. 159].

The freedom of contract is also characterized by such a feature recognized in Russian civil science as the possibility to choose between the forms of agreement [4, p. 174]. This feature is legitimized in the text of the codified law (Article 434 of the RF Civil Code) as a legal formula, but the lawmaker does not directly define it as a part of a legal principle.

It cannot be said that the understanding of freedom of contract is identical in different national legal traditions, we mean both formed (conservative) traditions and those developing. "According to civil law tradition," writes Indonesian researcher D.K. Harjono, "the freedom to make or not to make an agreement; b) the freedom to choose which party to enter into agreement with; c) the freedom to determine the content of the agreement; and d) the freedom to determine the form of the agreement; e) freedom to determine the way of formulating the agreement" [5, p. 652].

Although it is generally not typical for the Russian scientific tradition [6, p. 510; 7, p. 840] to refer to the method (procedure) of concluding a contract as a separate feature of the freedom of contract, experts who deal with the legal support of the digital economy usually mention it as well: "In accordance with the principle of freedom of contract, the parties are free to choose the terms of the contract, the procedure for its conclusion, and the form of agreement between the parties, including the right to stipulate the application of technologies to their contractual relations that ensure the automatic fulfillment of obligations" [8, p. 63].

Digitalization and informatization are gradually changing the perception of the principle of freedom of contract. As V.A. Protsevsky writes, "In the context of the latest technological achievements, the science of law is faced with new problems of interpreting the principle of free will and implementing it in legal practice" [9, p. 57].

The practice of concluding smart contracts based on blockchain technology [10] and using other digital tools for establishing and fulfilling obligations, while becoming widespread, causes re-interpretation of the traditional civil approach. With regard to smart contracts which involve automatic fulfillment of obligations upon the occurrence of certain conditions, the will of the parties becomes insignificant at a certain stage: the freedom of contract which presupposes the possibility of changing or terminating the contract by mutual agreement turns out to be technologically limited [11, p. 140]. Even if we assume that freedom of contract applies only at the stage when the contract is being concluded (or before it is concluded), and that "after the contract enters into force, it is not the principle of freedom of contract that applies but the principle of the mandatory fulfilment of the civil law obligations" [12, p. 60], one cannot deny the technological restrictions in the subsequent expression of the will of the counterparties aimed at correcting the

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contractual obligations that have arisen. A. Volos is right to note that “the contents of the good faith principle, the principle of legal equality of the economic turnover parties, the principle of the civil rights judicial protection and other principles are not fully suitable for the new realities formed by modern technologies” [13, p. 4]. While highlighting that the civil relations participants are free to conclude a contract using various technologies, the author concludes that a smart contract is “a tool that provides for the implementation of the principle of freedom of contract in practice” [13, p. 85]. At the same time, he also reports on the restrictions in the smart contract abilities to change or terminate the agreement, as well as on the shift towards the standardization of its terms [13, p. 91]

The perception of the freedom-of-contract principle in the gig economy conditions where the possibilities for recruiting freelancers and the digital platforms information capabilities are inextricably linked, is changing. This model of relations “leads to abuse by economically stronger actors, since formal legal equality does not mean actual equality of negotiating opportunities” [14, p. 319]. And thus, in some cases, the legislator’s approach shift towards the imperative regulation of contractual relations can also be viewed as a consequence of the digitalization of the society.

A change in one parameter can usually be characterized using the categories of “more” or “less”. In our case, the concept of “transformation” that involves the change of many parameters with some of them increasing and others decreasing – gives a more accurate view of the situation. Scientists and legislators have transformed their approach to freedom of contract as a legal phenomenon. Thus, the strengthening of the role of the principle of freedom of contractual regulation “in recognizing the force of unnamed contractual structures used by the parties to settle non-standard civil law relations” is reasonably acknowledged [12, p. 55]. But in other contexts, the principle of freedom of contract may look completely different: the uncertainty of the boundaries between the constructive legal innovation and the circumvention of the law through the development of new unnamed contracts is simply dangerous [15, p. 79].

The freedom of a civil contract has expanded in one more parameter - the objects of civil rights that can be traded on the free market. As E. Suvorov puts it, “freedom of contract is also required to resolve the issue of recognizing the force of contracts as applied to the objects which are not defined by the current legislation but also not directly prohibited therein” [16, p. 118]. There were legitimate grounds for introducing the cryptocurrencies into the civil circulation, since the principle of freedom of civil contract was in effect and there was no ban on the circulation of these civil rights objects. But when the cryptocurrency turnover was fine-tuned, the existing legals means turned to be insufficient for restricting it. The history of the cryptocurrency turnover fully fits into Collingridge dilemma: it is difficult to determine the effect of the technology at an early stage of its development, and later it is difficult to get the technology controlled by the norms established by the society and the state [17; 18].

We see how the doctrine of freedom of contract is undergoing a transformation under the pressure of arguments obtained in the course of modern scientific research in the field of neuromarketing. The use of knowledge about the human psyche qualities for encouraging the purchase of goods and playing on people’s emotions in order to persuade to make a deal have become the daily routine of the digital and the real world. As P.L. Likhter was right to note, “intensive pressure on the buyer’s mind within the conditions of asymmetry of the information on the transaction have the risks of the basic civil law principles distortion” [19, p. 670]. Speaking about marketing activities, the author concludes that “in certain cases, the practice of pre-contractual pressure contains signs of distortion of the principles of freedom of contract and good faith” [19, p. 661]. Unfortunately, the “anthropological inflection point” that led in jurisprudence “to the situation when the modern understanding of law has lost its objective scale and started to be perceived as nothing more than a part of a person’s consciousness” [20, p. 72], turned out to

be in dissonance with the economic practices of manipulating a person based on the knowledge of his nature and weaknesses that allow to effectively handle the masses. Focusing the positive law on the needs of an individual, in an environment where economic practices are focused on the needs of the masses, leads to a drastic reduction in the effectiveness of previously adopted and new legal norms.

"In the current conditions, when the main categories of civil law are undergoing changes in general, including the subjects (identification of personality), objects (tokenization), deals (ways of expressing will in the digital economy) and obligations fulfilment (smart contracts), the main thing that will remain unchanged in law is its principles," E. Suvorov notes [16, p. 114]. One can agree with the author, but with one very important reservation: the understanding of the principles of law may change over time, and evidence of this is a change in the approach to understanding the freedom-of-contract principle. Indeed, speaking about the tokenization process, he himself reports that "free consent (a manifestation of the principle of freedom of contract) to combine a right with a digital asset is the basis for the subsequent restriction of freedom of contract in terms of the right alienation" [16, p. 118]. Here we see that the tokenization process affects the content of law, in which the possibility of contractual disposal of a civil rights object is limited: one cannot dispose of his/her right except through a digital platform. Making a classic written transaction regarding the relevant object no longer gives the desired consequences.

The restriction of freedom of contract which inevitably goes with the increase in the centralization of legal regulation of relations can affect the interests of broad groups of persons and influence not only the interests of private investors, but also tax collection, especially when it concerns corporate relations regulation [21, p. 523]. The identification and explanation of correlations between different types of human freedom and small social groups in a large society is certainly essential for understanding this freedom nature and describing the main groups of factors that determine it.

Viewing the freedom of civil contract as a phenomenon of positive law outside the doctrinal, social and technological contexts can create a false impression of the very essence of this phenomenon. The above makes it possible to move on to the part of our study that is based on statistical data and on the trends identified from the data analysis. It is very important to keep track of what is happening in the practical application of the existing legal norms and how positive law is changing in accordance with the changes in the living conditions. This is the subject of the further part of this work, which we consider necessary to provide with an important warning. As known, "the government simply cannot conduct business in the way an individual can do" [22, p. 514]. Searching the criteria for choosing procedures that can facilitate the conclusion of profitable contracts in the interests of public law entities is an extremely difficult job [23]. Care should be taken in applying the conclusions proposed by the authors as following from the findings of the study to the sphere of binding relations involving the state and municipalities.

2. Freedom of contract in judicial acts of economic disputes

Assessing the importance of legal phenomena using the method of analysing the content of the legislation and of the judicial acts prepared on the basis of this legislation is a research area which significance that has not yet been fully appraised. It is known that judges are willing to use scientifically proven data [24], on the one hand, and tend to choose words that defend their reasoning [25, p. 4], on the other hand. The work aimed at establishing the reasons why the frequency of mentioning terms by courts changes significantly together with the content of acts of official interpretation of law, institutional transformations and changes in legal policy, makes it possible to see that decision-making is seriously influenced not only by legal norms and facts established during the trial, but also by other circumstances.

The search engines of official Internet portals and electronic libraries used by modern researchers have made it easier to collect

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information that describes references to various terms and phrases, but the task of interpreting the obtained information has become more complicated due to the low-quality documents in databases, the volume of which has become a side effect of digitalization.

Legal reference systems fit for limited use in determining how much a legal category is popular within judicial practice. This is due to the peculiarities of the judicial acts sampling for placement in the relevant databases [26, p. 233]. Unfortunately, there is currently no unified database of courts of general jurisdiction and arbitration courts that would contribute to the uniform practice development [27, p. 109]. The content analysis of judicial acts proves to be effective when using the capabilities of state information resource "*Bank of Decisions of Arbitration Courts*"[1] (hereinafter also referred to as the BDAC) which includes judicial acts loaded with no special "filters".

At first, we counted the total number of terms "autonomy of will" and "freedom of contract" used in judicial acts issued from 2010 through 2014 by the Supreme Commercial Court of the Russian Federation (hereinafter also referred to as the RF SCC), and in the period from 2014 through 2023 by the Supreme Court of the Russian Federation (hereinafter also referred to as the RF SC), which were loaded into the BDAC, that is, those delivered in administering economic justice in accordance with the commercial procedural legislation[2]. We see importance in the data on the proportion of judicial acts containing these terms rather than the in absolute values data.

Information on the number of cases is provided on the basis of an automated search engine report, without reviewing the judicial acts contents, and relative figures are accurate two decimal places (rounded downward). During the period of 2010-2014, there is a growth in the share of the RF SCC judicial acts that mention freedom of contract, and in particular: 22.92% in 2010, 24.36% in 2011, 22.26% in 2012, 23.24% in 2013, 29.08% in 2014.

After the RF SCC was delegated the powers to verify the judicial acts of commercial courts, that is, in the period of 2014-2023, there was a gradual and quite distinct reduction in the share of acts mentioning freedom of contract: 11.51% in 2014, 15.80% in 2015, 12.49% in 2016, 12.81% in 2017, 11.87% in 2018, 10.86% in 2019, 10.05% in 2020, 9.12% in 2021, 8.68% in 2022, 7.05% in 2023.

In 2014, there were two higher instances that administered economic justice: the Supreme Commercial Court of the Russian Federation (until August 6, 2014) and the Supreme Court of the Russian Federation[3] (after August 6, 2014). It is important to note that in the same period, the official understanding of freedom of contract was legitimized in the act of the official law interpretation – in Resolution No. 16 of the RF SCC Plenum dated March 14, 2014 called "*Concerning Freedom of Contract and its Limits*"[4] which became the final milestone in the court functioning and heralded the beginning of a new period of the "renaissance phase" [28, p. 535] of contractual freedom in the country. This Resolution contained an important message for the legal community: it is possible to determine the imperative or dispositive nature of the norm proceeding from "the goals that the legislator pursued when establishing the rule" (that is, on the basis of a teleological interpretation). The degree of contractual freedom began to decrease after the issuance of this act of interpretation and the liquidation of the RF SCC, as evidenced by the statistics provided.

It is significant that in "transitional" 2014, the acts of the RF SCC contained phrase "freedom of contract" almost three times more often than the

[1] URL: https://ras.arbitr.ru/ (dates of access: May 14, 2023, February 13, 2024).

[2] Commercial Procedure Code of the Russian Federation dd July 24, 2002, No.95-FZ. Collection of Laws of the Russian Federation. 2002. No. 30, Art. 3012.

[3] Article 2 of Russian Federation Law No. 2-FKZ on the Amendment to the Constitution of the Russian Federation "Concerning the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation" (Collection of Laws of the Russian Federation. 2014. No. 6, Art. 548). The last three Resolutions of the RF SCC (on the supervisory complaint rejection without consideration) are dated August 1, 2014.

[4] Bulletin of the Supreme Commercial Court of the Russian Federation. 2014. No. 5.

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acts of the RF SC (29.08% versus 11.51%). In our opinion, this circumstance suggests that the judges of the liquidated jurisdictional body were more inclined to rely on the parties' agreements in regulating the public relations. Conversely, the RF SC is more focused on regulating public relations by regulatory legal acts rather than agreements.

In view that the RF SC consists of a small number of judges (170 in total)[5], and at the same time, only part of them are the members of the Judicial Board for Economic Disputes, we assumed that the changes in approach could not be systemic in nature but could be conditioned by the legal positions of specific persons who considered cases. To verify this assumption, the practice of using phrase "freedom of contract" in judicial acts posted in the BDAC was studied without specifying the issuing authority. The assumption was refuted.

There is an increase in the share of documents mentioning freedom of contract in 2010-2015: 1.48% in 2010, 1.51% in 2011, 1.56% in 2012, 1.78% in 2013, 2.00% in 2014, 2.15% in 2015.

In 2016-2023, the share of judicial acts that mentioned freedom of contract decreased and amounted to 1.95% in 2016, 1.76% in 2017, 1.75% in 2018, 1.79% in 2019, 1.74% in 2020, 1.65% in 2021, 1.59% in 2022 and 1.56% in 2023. The data obtained allowed for a conclusion about a common pattern of the recent years – a less orientation of courts dealing with economic disputes towards the principle of freedom of contract. The decrease in the share of acts turned out to be noticeable a year after the powers were transferred from the RF SCC to the RF SC, with the law enforcement practice inertia persisting during that year.

The proportion of judicial acts containing phrase "freedom of contract" among the acts issued by the supreme courts (the RF SCC and the RF SC) is many times higher than the proportion of acts containing phrase "freedom of contract" issued by all commercial courts while administering economic justice, since most judicial acts of the first and appellate instances are interlocutory for the relevant stage. They resolve procedural issues (on accepting complaints, choosing the court, applying the interim measures, commissioning the expert examination, the disclosure of evidence, on the court costs, procedural succession and etc.). The questions pertaining to the application of substantive law, including questions about the applicability of the freedom-of-contract rule, are assessed only in the final procedural act which is called a decision in case with the court of the first instance. The judicial acts issued by higher courts on purely procedural issues are much less frequent. The freedom-of-contract rule is a general nature rule and its direct application by the courts of the first instance in public relations will always be cautious and depending on the practice of higher authorities or acts of official interpretation of law.

3. Freedom of contract and centralized regulation of civil relations

The Russian science attempts to link the legal doctrines on freedom of contract and scientific data related to neurophysiology [29], made bluntly and with no development of a thorough approach to the public relations regulation, in our opinion, will not have as significant effect as can be expected from a systematic approach – a view resting on the integrated ideas about statutory and non-statutory regulators of human behavior

In the scientific literature of recent years, some of the material has been devoted to the problems of individual and decentralized (autonomous) regulation of public relations. Substantiating a unified concept describing a

[5] Article 3 of Federal Constitutional Law No. 3-FKZ of 05.02.2014 "Concerning the Supreme Court of the Russian Federation" (Collection of Laws of the Russian Federation. 2014. No. 6, Art. 550).

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system of regulators affecting human behavior, in which the hierarchy (the priority) of the rules of behavior would be sufficiently clear, is a task of extreme complexity, and the willingness to start researching it can be regarded as scientific courage [30].

Agreements, unilateral transactions, decisions of meetings, constituent documents, local regulations and representations of circumstances are undoubtedly conscious behavioral acts that affect people. Of course, a contract is the most common tool determining the behavior of people who enter property relations. Consequently, it is the contract that is described with a category aimed at characterizing the state of choice – the range of opportunities that opens up to a potential participant in a civil legal relationship.

The type of the contract, the counterparties and the contract terms are the parameters in which a potential public relations participant is often bound by imperative norms of the law, and in case the contractual relations are commenced (in the absence of another fixed will of the parties) he/she is also bound by dispositive norms. Mentioning the freedom of contract in a judicial act, as a rule, turns out to be a way of addressing the possibility or impossibility of departing from the rule of conduct set out in a regulatory legal act and to establish such a rule independently.

Approaching the problems of decentralized regulation of public relations turned out to be possible due to the previous achievements of technical sciences, feedback aspects [31, p. 27] and complex self-regulating systems functioning [32].

Natural and technical sciences (the achievements of which are actively used by cognitive science) have created a solid foundation for the formation of new legal views. This digression, being an attempt to place a bridge between private law issues and technical and natural sciences, is not accidental. It will allow us to come up with a solution to the problem, to offer an explanation of why freedom of contract being a phenomenon and a state of conscious choice, tended to decrease and why this trend cannot be considered permanent, but is one of the patterns of our world – the cyclical nature of most of the processes taking place in it.

Finding correlations between the volume of civil legislation and the number of references to freedom of contract in judicial acts is the task for a separate study. Nevertheless, understanding the general patterns and links between centralized and decentralized regulation, in our opinion, is of great importance.

A fairly reliable, although not indisputable, way to assess the growth in the number of legal norms is to count the number of characters (symbols and spaces) in the wordings of law loaded from the online version of the *KonsultantPlus* legal reference system. The disadvantage of this method of assessment is that the versions of laws taken for analysis also provide references to legislative acts that introduce changes and thus somehow increase the size of the text. In addition, the number of norms and the size of the text are by no means the same thing.

A comparison of the size of the laws on the date of their adoption and on the date of this study completion shows 2.07 times increase in Part 1 of the RF Civil Code, 1.17 times increase in Part 2 of the RF Civil Code, 1.39 times increase in Part 3 of the RF Civil Code, 1.30 times increase in Part 4 of the RF Civil Code. The increase in the volume of the previously adopted normative legal acts is a systemic phenomenon, and the dynamics is much lower for codified civil laws than for the uncodified ones [33].

The increasing role of the centralized legal regulation of civil relations results in weakening the role of autonomous regulation, and hence in decreasing the significance of the freedom-of-contract principle. The observed tendency of increasing the number of norms in legislative acts can hardly be called positive – the continuation of this tendency may lead to the degradation in the skills to make flexible economic decisions of the civil turnover participants, to the responsibility decrease and legal culture level lowering.

4. Conclusion

The higher the influence is of the acts of the centralized regulation of public relations (regulatory legal acts), the smaller the role is of the decentralized regulation acts including contracts. Freedom of contract decreases when the number of mandatory rules increases. However, with this approach, the share of the commercial court acts mentioning freedom of contract should have fallen during the entire period analysed (2010-2023), but this can be observed only during a part of this period (2015-2023). Consequently, there were other factors that influenced the content of judicial acts of the courts.

Seemingly, the most important new signal for the commercial courts was the very liquidation of the RF Supreme Commercial Court and the transfer of its functions to the RF Supreme Court. That ended the period when commercial courts and courts of general jurisdiction interpreted law differently. The interpretative dualism of this previous period resulted in a greater freedom of legal thinking and therefore contributed to the maintenance of the freedom-of-contract principle which is the basis for regulating civil relations. The organizational changes that have taken place, along with the adoption of an act of official interpretation of law, have had a significant impact on the judicial system functioning.

The growth/decrease cycles typical for freedom of contract are organically associated not only with the number of legal norms governing civil relations, but also with other factors: the type of economy, legal policy, legal education, the state the legal order, the level of digitalization of society, institutional transformations and changes in the approach to the official interpretation of the law. Focusing on one factor in scientific research and trying to set such parameters thereof in the implementation of legal policy measures that will have a decisive impact on the state of society will not only fail to improve the public relations regulation quality, but will also destabilize the existing situation more. The increase in the number of acts issued by arbitration courts as demonstrated in this study, is an evidence that the growth in the legal norms number does not imply the reduction of the number of disputes between business entities. We see the solution to the problem in switching the legislator’s attention to the quality of legislative decisions, fine-tuning and building a hierarchy of all types of acts of decentralized regulation of property relations.

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