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PUBLIC AND DISPOSITION SEGMENTS OF ABUSE OF THE SUBJECTIVE RIGHT: INTERDISCIPLINARY LOOK

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The subject. The article is devoted to the analysis of a phenomenon "abuse of the right" from a position of the public and dispositive beginnings of his manifestation.

The purpose of this article is to consider public and dispositive principles of abuse of the right in the scope of legal theory to qualify this phenomenon in criminal proceedings properly.

Methodology. The author use methods of theoretical analysis and interdisciplinary approach as well as legal methods, including formal legal method and comparative law.

Results, scope of it's application. The authors note that the use of the advantages offered by abuse of the right is initially inherent only for the defending party in criminal proceedings.

Abuse of the right in the procedural segment of disposition appears in the implementation of the right to protection in the criminal procedure as well as in the implementation of almost any rights in the civil proceedings.

The main resource of publicity is realized exclusively by the courts in the civil procedure as well as by all government entities and officials in the criminal process. That's why abuse of the right is interdicted by the activity of the court in civil procedure.

The imperative method of legal regulation of public relations, that is the basis of publicity, is in fact one of the ways of prevention and suppression of abuse of rights,. The disposition method, that is the basis of competition in legal relations, is a catalyst for the creation of situations of possible abuse of rights.

Abuse of rights is manifested first and foremost in terms of the disposition, moreover – the higher the level of disposition in the particular branch of law provokes the greater likelihood of abuse of the right. Publicity limits disposition and, therefore, the possibility of abuse of the right.

Conclusions. Legal institute of abuse of right requires early normative entrenchment in the criminal process. It should contain specific grounds for restricting specific rights, which is abused by party of procedure.

The authors allow only one kind of liability for abuse of rights: a temporary restriction of the subjective rights of participants in criminal procedure on a very short term. It can be used only for systematic abuse of this right. Only court should have an authority for such restriction, taking into account prior notification of the supervising Procurator.

Keywords: abuse of the right, criminal trial, civil process, publicity, disposition, imperative method.

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1. Introduction to the subject of research

When studying the phenomenon introduced in the title of this article, its interbranch character attracts attention. We are also interested in the specifics associated with the form of the criminal process, in which the wide scope of the rights of persons participating in the investigation and consideration of the criminal case (first of all, suspects and accused persons) should provide them with guarantees against unreasonable and unlawful criminal prosecution in the framework of public legal relations. The legal category of "abuse of law" in criminal proceedings is quite unique. The revealed features underline the nature and conditions of origin of the phenomenon under discussion, and first of all the dispositive characteristic which is typical for civil law and

civil procedure. The purpose of this article is to study the abuse of law for proper qualification of this phenomenon in criminal proceedings.

2. Subjects of abuse of the law in criminal proceedings

The use of "opportunities" for abuse of rights is inherently important for the defense side, especially in cases related to economic crimes. We have already touched upon this issue in our publications, noting that the term "abuse of the law" in criminal proceedings can be used only with respect to private persons; in the case of representatives of state bodies, it should be understood that either a crime (or an official offense) in the form of abuse of official authority, or arbitrary discretion of the law enforcer (artificial and unreasonable expansion of discretionary powers)[1, 2] takes place, so we will not dwell on it in detail.
The consistent strengthening of the right to defense in the criminal procedure, the increase in the number and quality of the subjective rights of the suspect, accused, defender, sometimes leads to the temptation to abuse these rights [3, p. 285]. The Supreme Court of the Russian Federation also emphasizes the essence of this concept in the activity of the defense side. In particular, in paragraph 18 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of June 30, 2015 No. 29 "On the practice of courts applying legislation that provides the right to protection in criminal proceedings," it is stated that the court may not recognize the defendant's right to protection violated in those cases when a refusal to satisfy an application or other restriction in the exercise of the individual powers of the accused or his counsel is due to the manifestly unfair use of these powers at the expense of the interests of other participants in the process, Article 17 (3) of the Constitution of the Russian Federation, the exercise of human rights and freedoms should not violate the rights and freedoms of others.

3. The relationship of abuse of law with the dispositive start of the process

It can be concluded that the interpreted construction is realized in the activities of individuals while defending their personal interests, which indicates the manifestation of disposability "in its pure form" when implementing such powers. Indirect confirmation of this is also the circumstance under which the analyzed category initially attracted the attention of specialists of the theory of civil law.

According to L.V. Golovko, when comparing concepts and legal institutions, it is necessary to understand the difference between their conceptual and functional comparison and to apply it for strictly defined purposes [4, p. 10-11]. The conceptual comparison allows us to state the existence of the institution of abuse of law in civil law, its normative certainty and the absence of an analog in criminal proceedings. From the point of view of functional comparison, it is noted: on the one hand, the variety of the application of this category in the civil (arbitration) process and, on the other hand, the possibility of using only within the framework of one branch of law, in one or several legal situations, according to the grounds defined in the criminal procedure law.

The existing differences, in our opinion, are due to the branch features of the implementation of the legal construction of abuse of law: the predominance of disposability in the first case, and the primacy of public principles - in the second. For the further productive analysis of the category it is extremely important to answer the question: what is dispositiveness in criminal and in civil procedure?

4. The notion of optionality in civil and criminal procedure

The Decree of the Constitutional Court of the Russian Federation No. 4-P of 14.02.2002 specifies that it is an opportunity for participants in the civil process to dispose, with the help of the court, of their procedural rights and disputable substantive law, which leads to the appearance, change and termination of procedural relations in civil proceedings. S.N. Abramov,

under the principle of disposability of the civil process, understands the freedom of the parties to dispose of the object of the process (the substantive law itself) and those procedural means that are directly aimed at protecting it [5, p. 12]. At the same time, the criminal nature of the process is understood as the principle by virtue of which its participants and other persons defending (representing) a personal interest in the criminal case are able to dispose of the subject of the criminal process (accusation) or disputable substantive law in the process of civil Criminal case, as well as dispose of procedural rights in order to protect the interests that are asserted, the implementation of which has a significant impact on the criminal proceedings [6, p. 37-38]. Proceeding from the foregoing, the material (the ability to dispose of the subject of the criminal process) and the procedural (not related to the order of the subject of the criminal process) dispositions are distinguished. Some scientists under the second element of the concept under consideration also understand the freedom of the participants in the process to dispose of their rights and duties within the limits stipulated by law [7, p. 12].

5. Abuse of law due to material disposability in the civil and criminal process

Disposition of the subject of criminal proceedings (private prosecution cases), are consistent with the right to file a statement of claim in civil proceedings. These institutions, from the position of probable abuse of law, are very similar. In both cases, an unreasonable appeal to the court enables the other party to receive compensation related to the proceedings. For example, according to Art. 98 and 100 of the Code of Civil Procedure (CCP), the basis for reimbursement of court costs is the very fact of taking a judgment in favor of one of the parties, which means, in particular, that the defendant's right to such compensation does not depend on the fault of the other party in presenting an unreasonable claim, unlike the law, on compensation for the loss of time (Article 99 of the RF Code of Civil Procedure). The foregoing rules is justifiyng to be applied to the cases of private prosecution. In accordance with the legal positions set out in the Decree of the Constitutional Court of the Russian Federation of July 2, 2013 N 1057-O, it is obvious that the interpretation of the provisions of Art. 1064 of the Civil Code of the Russian Federation in the system of current legal regulation presupposes the possibility of full or partial compensation by the private prosecutor of the harm, depending on the actual circumstances of the case, indicating a conscientious error or, on the contrary, about the maliciousness that took place in his actions, taking into account the requirements of reasonable sufficiency and justice [8]. In other words, similar abuses are possible in the same branches of law. It should be noted that within the framework of the civil (arbitration) procedure, it is possible to adopt final procedural decisions on the sole basis that one of the parties abused the law. For example, item 7 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015 No. 25 "On the application by courts of certain provisions of Part I of Part One of the Civil Code of the Russian Federation" clarifies that in cases where the transaction violates the prohibition established by clause 1 of Article 10 of the Civil Code, depending on the circumstances of the case such a transaction may be declared invalid by the court (clauses 1 or 2 of Article 168 of the Civil Code of the Russian Federation).

The situation of abuse of law in criminal proceedings is practically reduced to zero, but in civil cases it is used quite often.

6. Abuse of law caused by a procedural dispositive in civil and criminal procedure

The second element of disposability is the ability to manage procedural rights from the standpoint of upholding personal interests, and at first glance, it identically manifests itself. Nevertheless, there are key differences that, in our opinion, are as follows: the scope of the given rights and corresponding responsibilities is manifold (in the civil (arbitration) process it is wider), the role of the court also differs (for the criminal process it is still rarely used, especially

in the pre-trial stages). This can be explained by a different balance and publicity and optionality of interest in the areas of law. For a correct understanding of the correlation of the investigated principles the concept of publicity should be studied.

7. Publicity in criminal and civil proceedings

Publicity is defined as one of the fundamental criminal procedural principles, according to which the actors conducting criminal proceedings are required to perform procedural actions and take procedural decisions because of the powers vested in them, regardless of the discretion of individuals and organizations, independently ensuring the criminal case, its development and substantive resolution, acting on behalf of the state and society in the public interest to achieve legal and technical aims and social purpose of criminal proceedings [9, p. 13]. It is also defined as the quintessential essence of social relations [10, p. 9, 29], or as a principle having a form-creating influence on the procedural regime of proceedings in the case [11, p. 19]. According to Barabash's correct observation, publicity was due to the historical formation of Russian statehood [10, p. 27]. The essence of publicity is the protection of state interests within the framework of which the personal interest of each member of the society is already laid. The public side of the principle of publicity is: 1) the requirement for procedural activity in the activities of the subjects leading the criminal process; 2) the requirement of guidance in the preparation of procedural acts of entities conducting the criminal proceedings; 3) mandatory acts of law enforcement; 4) the normative establishment of the obligation of the state to bear legal responsibility for the violations of the rights and legitimate interests of the persons participating in the criminal case and the delinquency of officials as subjects of criminal procedural relations committed by its bodies and officials of these bodies [11, p. 37]. It is very interesting to assess the role of publicity in the civil process. G.A. Zhilin believes that legal proceedings in civil cases organically combine public and private principles. This is due to the very essence of the civil process, its objectives, the legal status of the subjects of civil procedural legal relations, their procedural functions [12, p. 40]. It can be concluded that the main potential of publicity in civil procedure is exercised exclusively by the court, while in criminal case is exercised by all the officials.

8. Competitiveness of the parties in the civil and criminal process

Spheres of publicity and dispositions "characterize the legal relationship between the state and the victim, search and competitiveness characterize the legal relationship between the state and the accused. Thus, from this point of view, public principles do not exclude adversarial activity, as well as dispositive ones do not contradict the search" [14, p. 122]. In this regard, we agree with M.T. Ashirbekova, who stated that "without dispositive elements there is no competition" [15, p. 57]. The above is also applicable to the civil process. At the same time, the level of competition in the criminal process is much lower, which can be explained by the different possibilities of the parties in the procedure for finding and consolidating evidence. But at the same time, the court's power to identify and demand evidence in civil proceedings is much broader, which is due, inter alia, to the civilian design of the prerogatives of the parties in the search for and presentation of evidence in the case. The cognitive role and the powers of the court in civil procedure are actively analyzed. The authors note that "the new philosophy of private legal regulation, connected with the more complete implementation of the principles of disposability, determines the need to build a system of judicial process on the basis of discretion and competitiveness, the abandonment of active participation of the court in the process of proof, the transformation of the principle of procedural activity of the court into the principle of judicial leadership" 16, p. 10-11].

9. Dependence of the abuse of the right from the development of dispositive principles in

sectoral legal regulation

Based on the foregoing, it can be argued that the basis of publicity is the imperative method of legal regulation of the relevant legal relations, which is one of the ways to prevent and suppress abuse of law, while competition is based on discretionary. Thus, the conclusion is that the the right is manifested primarily in the conditions of the action of dispositive, moreover, the higher the level of disposability in a specific branch of law, the greater the likelihood of abuse of law. Publicity limits disposability and the possibility of abuse of law. Accordingly, in order to prevent abuse of the right, a clear "dosage" and differentiation in the norms of the law is necessary. In the theory of the civil process, the following optimal correlation of the phenomena being investigated is proposed, if it is necessary to increase the share of disposability: "The implementation of dispositive norms at the discretion of a private person in his private interests is carried out in the form of using lawful actions at the discretion of the person himself. The control by the court ensures the legality of the use of private law "[17, p. 29-48]. Its essence in relation to private individuals is to conduct a check for compliance with the law decisions made in the exercise of management activities [18, p. 9]. In the opinion of O.I. Andreeva limits of freedom of behavior (dispositional) depend on: 1) the existence of a framework for their fixation in the federal law; 2) the need to protect state security and public order; 3) the need to protect the rights and interests of the population; 4) compatibility with other rights recognized by law [7, p. 25].

10. Conclusions

The institution of abuse of law in criminal procedure requires normative fixation. It must necessarily specify certain grounds for restricting the specific subjective law can be abused. However, additional guarantees for participants of criminal proceedings should be created. This could be the opportunity prescribed in the Code of Criminal Procedure, according to which, in certain cases, the power actors of the criminal process would be authorized to formulate and officially announce to the relevant participant in the proceedings in the case a preliminary notification on the inadmissibility of abuse of the right [20, p. 68]. But at the same time, considering that the risks of limiting the rights of individuals in public criminal proceedings are much higher than in civil process, we allow only a temporary restriction of the subjective rights of a participant of criminal procedure for a very short time in case of systematic abuse of this right. Powers for such a restriction should be given only to the court, with the obligatory preliminary conclusion on this fact of the supervising prosecutor.

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