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ISSUES OF QUALIFICATION OF ABUSE OF RIGHTS

Annotation

Legal literature indicates that contemporary law has reached such a level of development that it is possible to speak of the establishment of the rule of law and the supremacy of law everywhere. Unfortunately, this is not the case for the issue under discussion, as the institution of abuse of subjective rights and their prohibition are not clearly defined, not only in positive law but also in doctrinal terms, where there are significant disagreements. In this sense, we believe it is premature to speak of uniform scientific approaches or normative certainty regarding the methodology of qualification issues. However, on the other hand, it is impossible not to agree with the approach in legal literature regarding the modern pace of legal development, as the recognition of the supremacy of law and the establishment of the rule of law should be the starting point for the activities of civilized states and their authorities (both law-making and law-applying). Within the framework of this work, an attempt has been made to assess the highly relevant and simultaneously doctrinally underexplored issues of the abuse of subjective rights, particularly in terms of qualification, with an emphasis also on methodological problems.

Keywords: abuse of rights, qualification of abuse of rights, violation, the object, the objective side, the subject, the subjective side.

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1. General Provisions

1.1. About the terms. In order to fully understand the essence of legal institutions, it is necessary to subject them to etymological analysis. The concept of “abuse of rights” is no exception, causing many controversial discussions in the legal sphere. There are different approaches to the problem. Some groups of scientists either deny the need for the institution of abuse of rights in the legal sphere[1], or consider the simultaneous use of the concepts of “rights” and “abuse” unacceptable.[2] Some authors also express their rejection of the use of the problem in popular terminology (abuse of rights).[3] Such observations are justified primarily by the fact that the use of the concepts of “evil” and “good”, which have moral and philosophical meaning, takes the study of the problem beyond the scope of law, as a result of which ideas are formed about the illegitimacy of the structure under discussion.[4]

[1] **Malinovsky A.A.** Abuse of law: theoretical aspects // Journal of Russian law, 1998. No. 7, p. 70. **Agarkov M.M.** The problem of abuse of law in Soviet civil law // Bulletin of the USSR Academy of Sciences. Department of Economics and Law, 1946. No. 6, p. 427.

[2] See about this: **Muradyan M.H.** The term “abuse of right” in the system of legal concepts. / Krasnodar Institute of the Ministry of Internal Affairs of Russia, “Law and State: Problems of Methodology, Theory and History”, materials of the scientific and practical conference, 2018, pp. 149-157.

[3] See about this: **Gataullin E.A.** Marginal jurisprudence. Statement of the problem on the example of manipulations with jurisdiction// Corporate disputes. № A. 2005, pp. 92-95.

[4] **Abolonin V.O.** Abuse of the right to sue in civil proceedings in Germany. Monograph. Published by Wolters Kluwer, 2009, pp. 56-57.

In order to understand the terminological confusion around the term "abuse of rights", it is necessary to clarify whether the term "abuse" can be used in parallel with the concept of "rights".

The terms "abuse of rights" and/or "prohibition of abuse of rights" are concepts taken from the sources of Western doctrine and positive law. The term in question is widely used in the legal systems of various Western countries.[1]

A simple linguistic (terminological) analysis allows us to establish that we are dealing with an institution when the holder[2] of rights exercises his right for evil purposes. V.O. Abolonin notes:

"In the case of the abuse of rights, we are dealing with such an institution, in which there is violence against the right, in the sense of distortion of its essence, and such an action, which, in fact, contradicts the will of the legislator."[3]

Explanations of the linguistic content of the term "abuse" can be found in numerous explanatory dictionaries. In legal literature, it is customary to consider the definition in V.I. Dahl's dictionary as a starting point, according to which the verb "to abuse" is characterized as turning a suitable means into a bad one, an act performed with evil intentions, to the detriment of the abuser or other persons.[4] We also encounter equivalent definitions in Armenian-language explanatory dictionaries.[5] If we try to generalize, then in dictionaries, the prohibition of abuse of rights is presented as the explanation of using behavior for evil, using something more than necessary,

[1] **Muradyan M.H.,** the specified work, pp. 149-150.

[2] **Sags Michael,** Fundamentals of the General Doctrine of Fundamental Rights in Germany: Subjective Public Rights in Administrative Law / Yerevan: Tigran Mets, 2012, p. 22. **Muradyan M.H.** Basic Issues in the Theory of Human Rights / Yerevan, 2016 (part 1), pp. 25-34, 149-157.

[3] **Abolonin V.O.** Abuse of the right to sue in civil proceedings in Germany. Monograph. Published by Wolters Kluwer, 2009, p. 54.

[4] **Dal V.I**. Explanatory Dictionary of the Living Great Russian Language: in 4 volumes. Moscow, 1989. Vol. 1, p. 709.

[5] **Malkhasiants S.** Armenian Explanatory Dictionary: Armenian SSR State Publishing House, Yerevan, Volume 4, 1945, p. 14. The term "abuse" is also presented as "to carry out developments contrary to the law" for the explanation, see **Gnel Archbishop Jerejian**, **Paramaz K. Tonikian,** and **Artashes Der Khachaturian**. See New Dictionary of the Armenian Language. K. Tonikian and Sons Publishing House, Beirut, 1992, pp. 613-614. Note that in the concluding part of the explanation, the phrase "your honesty has been exploited" is mentioned in Western Armenian. It is noteworthy that in the explanatory dictionary of the modern Armenian language, the word "mercenary" is mentioned as the secondary meaning of the term "to abuse", "abuse". See Hrachya Acharyan Language Institute. Explanatory Dictionary of the Modern Armenian Language. Publishing House of the Academy of Sciences of the Armenian SSR, Yerevan. Volume 4. 1980, p. 129.

displaying unscrupulous behavior, turning a suitable means into a bad one, pursuing profit, or advantage. From the point of view of legal linguistic thinking, it turns out that the one who has, in dictionary terminology, an "interest", that is, the holder of rights, uses that positive value (rights) contrary to the purpose and essence of the rights.

The word "abuse" in itself cannot be considered a legal term. It acquires its fundamental character only as a result of a combination with one or another legal term, such as, for example, "rights".

The justification for the fact that, as a result of examining the problem in the light of the concepts of "good" and "evil," it is removed from the field of law is insufficient. The identification of the mentioned philosophical concepts is only a means of understanding the essence of the legal term of interest to us. Moreover, today it is difficult to find a legal term with such complex content that would not require clarification from the point of view of philosophy. It is appropriate to mention the observation of O.E. Leist that neither practical jurisprudence nor general theory of law is sufficient to understand the essence of law; it must necessarily be assessed outside the boundaries of the law.[1]

1.2. Use of the term "abuse of rights". In legal literature, the term "abuse of rights" was first used by F. Laurent (as an example, the French term "abuse de droit" is given, which means abuse of rights).[2] According to one of the opinions, it cannot be claimed that F. Laurent was the first to use the term, since before that, the Latin term "abusus" was known in Roman law, which is in fact the term "ab-usus" and has nothing to do with the content of the abuse of rights circulating in the modern scientific-positive platform, or dishonest exercise of the right. The theorist notes that the term "ab-usus" is associated with the Latin concepts of "usus" and "fructus", which in their unity constituted the rights of use, management, and possession of the owner in the modern sense.[3]

The fact that the term "abusus" was used in the sense of designating the rights of the owner is clear, but analysis allows us to establish that the term "abusus" was

[1] **Leist O.E.** The Essence of Law. Problems of Theory and Philosophy of Law. Moscow: Zertsalo Publishing House, 2008, p. 4.

[2] **Albuquerque P.** Responsabilidade Processual por Litigancia de Ma Fe, Abuso de Direito e Responsabilidade Civil em Virtude de Actos Praticados no Processo. Coimbra, 2006, p. 82; Cordeiro M. Da boa fe no direito civil. Lisboa, 1980, p. 670.

[3] **Abolonin V.O.** The specified work, p. 55.

also used in Latin in the sense of "abuse" (from which arose the well-known Roman private law abusus non tollit usum (abuse does not exclude correct use)).[1] From this perspective, the author's point of view is controversial.

According to another view in the doctrine, the phrase "abuse of rights" should be renamed to the term "marginal jurisprudence".[2] The applicability of the term "marginal" when it comes to such legal behavior as abuse of rights is unclear, since marginality should not be associated with negative consequences for the subject (rights holder), which is possible in the case of abuse. Marginal (borderline, close to the border) behavior as an independent type of legal behavior is based on the feeling of fear of punishment. The threat of coercion can bring the actions of persons with a distorted behavioral position into line with the order of the law.[3] Here, a person's actions cannot in any way be inconsistent with the purposes of the law, since his behavior is therefore lawful. The use of the term "marginal" can in no way help to describe cases of abuse of rights. Such (marginal) division of common forms of behavior is determined not so much by legal as by psychological criteria. Moreover, the use of such a term can cause considerable confusion if one pays attention to the characteristics given to the concept of "marginal" in the literature.[4]

According to one opinion in legal literature, the concept of "abuse of rights" does not express the real state of affairs, since we are dealing with concepts that contradict each other, and the exercise of rights cannot be illegal, as well as abused.[5] The reason for such a negative approach is the conceptual differences in the existing approaches to the problem. At the same time, as we see, the authors use a broader term "abuse of rights", which, for example, in the case of abuse of public-law powers, can and should be associated with illegality. The problem lies in the terminological confusion, as well as in the need to distinguish between acts

[1] **Muradyan M.H.** The specified work, p. 150. **Graeber, David Debt**: The First 5000 Years of History. Moscow: Ad Marginem Press, 2015, p. 204.

[2] On this, see **Gataullin E.A.** The specified work, pp. 92-95.

[3] Theory of State and Law: Educational Manual / Authors; Scientific Editor: A. Ghambaryan, M. Muradyan. 4th revised edition. Yerevan: Lusabats Publishing House, 2023, pp. 412-413.

[4] In legal literature, the word "marginal" is even associated with crime.

On this, see **Golodnyak A.Yu.**. Criminological features of antisocial behavior of adolescents from a marginal environment and prevention of crimes by them: author's abstract. diss. ...candidate of legal sciences. M., 2003. **Atoyan A.** Marginality and law // Social and political journal, 1994. No. 7-8, pp. 158-161.

[5] **Agarkov M.M.** The specified work, p. 427. **Ryasentsev V.A.** Conditions and legal consequences of refusal to protect civil rights // Soviet Justice. 1962. No. 9, pp. 8-9. It is noteworthy that such approaches to the issue are mainly found in the works of authors from the Soviet era.

classified as a criminal offense (for example, **abuse of official powers or the influence caused by them...)** and the institution of abuse of rights.

The term "rights" can be used with the concept of "abuse", which is necessary for understanding the essence of the discussed structure, and there is no internal contradiction between these terms. New terms proposed in legal literature (for example, "marginal jurisprudence") not only do not identify the discussed institution, but can also cause confusion in legal terminology.

Thus, in the case of abuse of rights, we will be dealing with legal behavior when a person (physical and legal as holders of rights) uses the jurisdiction granted by objective right (in the philosophical sense, the "good thing" mentioned above) for an evil purpose, a bad deed (abuses it), with the expectation of favorable consequences for himself or with the intention of causing harm to other people. From the point of view of the legal language of thought, the latter should be understood as the implementation of rights that does not correspond to the purpose and function of the rights, as well as deviating from it.

2. General Provisions. Regardless of the fact that in some branches of law (in the relevant legislation) there are positive provisions on the prohibition of the abuse of rights, to state that we are dealing with the type of offense, is highly controversial in our opinion, which is touched upon in the present work.

In theoretical legal literature, one of the characteristic features of an offense is the illegality of the act. It means that only the act that is prohibited by law is an offense. If an act is not prohibited by law, it is not an offense, regardless of the degree of public harm of that act. In the criminal law, this provision is formulated in the well-known formula: "nullum crimen, sine lege", that is, there is no crime unless it is mentioned in the law.

The illegal feature of the offense also means that the norms fixing the composition of the offense should be formulated as clearly as possible, which would enable the subjects of the law to distinguish legal behavior from the offense when choosing their behavior[1], and we think, from the abuse of rights.

According to Article 79 of the RA Constitution, when limiting basic rights and freedoms, the laws should define the grounds and scope of these restrictions, be sufficiently specific so that the holders and recipients of those rights and freedoms are

[1] State and law theory. Study manual / Authors Group. Scientific group: A. Ghambaryan, M. Muradyan - 4th revised edition, Yerevan. "Lusabats Publishing House", 2023, p. 448.

able to demonstrate appropriate behavior. The European Court noted that the expression "provided by law" requires not only the existence of a domestic law, but also refers to the quality of the law. The law should be accessible and predictable, that is, formulated clearly enough to allow the individual to adjust their behavior as needed.[1]

Thus, looking at the issue at least from this point of view, it can be noted that the existing positive stipulations about the general prohibition at the level of the principle of abuse of rights in a specific field are not enough to evaluate cases of abuse of rights as a type of offense. Thus, in the case of an offense, we are dealing not with a general regulation at the level of an abstract prohibition, but with a specific type of offense that is prohibited by the threat of law.

In the case of abuse, the abuser is constrained by the ethical and social assessment of the society in the specific case.

Taking into account the fact that within the framework of this work, the abuse of rights is considered as a separate type of legal behavior, not identifying it with legal behavior or an offense, from a methodological point of view, it is more appropriate to consider the problem in the light of a combination with an offense. The basis for the approach is also the fact that many scholars identify the institution not with the implementation of law, but with the violation of law.[2]

In the theory of law, there are different methods for characterizing a person's behavior as an offense.[3] Based on the doctrine of criminal law, two elements of the offense can be distinguished: objective (material) and subjective (psychological).[4] The absence of any one of these elements means that the person

[1] *Sunday Times v. the United Kingdom* ECJ judgment of 26.04.1979, paragraph 49, *Sanoma Wittgevers BV v. Netherlands* ECJ judgment of 14.09.2010, paragraph 81.

[2] **Yatsenko T.S.** Chicane as a legal category in civil law: abstract of dissertation... cand. legal Sci. Rostov-on-Don, 2001. **Gribanov V.P.** Limits of implementation and protection of civil rights. M., 1972. Journal "Law and Politics" No. 6, 2000. **Zaitseva S.G.** On the question of ways to counter the manifestation of the phenomenon of "abuse of law" in real life // Lawyer. 2003. No. 9, Civil law. Part 1 / Edited by Yu.K. Tolstoy and A. P. Sergeeva. St. Petersburg, 1996; Civil law: Textbook. T. 1 / Edited by E. A. Sukhanov. M., 1998.

[3] **Porotikova O.A.** The problem of abuse of subjective civil law: monograph. – 3rd ed., additional M.: Yurayt Publishing House, 2023, pp. 122-124.

[4] The objective and subjective elements of an offense are referred to differently in various legal systems. For example, in the English and American legal systems, the objective (material) and subjective (psychological) elements are called actus reus (criminal act) and mens rea (guilty mind), respectively. In the doctrine of French criminal law, the elements of an offense are referred to as the material and moral (psychological) elements of the criminal act. In Italy, they are called material and subjective (psychological) elements. In Soviet and post-Soviet legal studies, the structure of the offense

has not committed an offense and is not subject to liability. This is based on the well-known legal maxim from ancient times: "actus non facit reum, nisi mens sit rea" (actus non facit reum, nisi mens sit rea) does not make a person guilty; in other words, there can be no responsibility without the unity of a guilty will and guilty action.

If we take a general look, in order to be held legally responsible, it should be justified that the person (subject) intentionally or negligently (mens rea) committed a specific act provided by the law, as a result of which a certain (prescribed by law) consequence arose, which is in a cause-and-effect relationship with the act (objective side), the public relations protected by the law (object) were damaged, at the time of committing the act, the person did not have any basis to justify his act, there was no circumstance excluding the responsibility provided by the law (illegality of the act), and the person realized that the act he committed was illegal (guilt).

In order to qualify the abuse of rights as an independent type of offense or to exclude it, we consider it necessary to evaluate it using the mentioned algorithm. Of course, one should also take into account the fact that the cases of abuse of rights (description of the act), as a rule, do not have a legal fixation, and the Court evaluates them only through general regulations regarding its prohibition.

2.1. Correlation of composition of violation and abuse of rights

2.1. 1. The object. In the case of object evaluation, emphasis should be placed on what the person's behavior is aimed at. In the case of an offiense, the problem is more than simple, taking into account the fact that the offenses and their specific types are certain, and it is not difficult to find out what values and social relations can be damaged by that act. The violator, by damaging certain public relations, simultaneously violates the norms regulating those public relations. Without delving into the concepts of "general", "type", and "immediate" objects of the

(criminal composition) is accepted as a four-component structure: the object of the offense, the objective side of the offense, the subject, and the subjective side. For more details, see: **Golovanova N. A.** Criminal Law of England: a textbook for universities. Moscow: Yurayt Publishing, 2021, p. 21; Kozochkin I. D. Criminal Law of the USA: a textbook for universities. Moscow: Yurayt Publishing, 2020, pp. 42-43; **Krylova N.E.** Criminal Law of France: a textbook for universities. Moscow: Yurayt Publishing, 2020, pp. 41-44; **Ignatova M. A.** Criminal Law of Italy: a textbook for bachelor's and master's programs. Moscow: Yurayt Publishing, 2019, p. 16.

violation (especially the crime), it can be noted that they are the public relations protected by law.[1]

The problem is different in the case of abuse of rights. Taking into account the fact that the specific manifestations of the abuse of rights are not determined by the legislation, it is correct to find out the issue of the object in this case, taking into account the function and essence of the specific right. It is also necessary to specify what kind of interests and public relations a person can harm when he exercises his subjective right contrary to its purpose and essence.[2]

According to A.A. Malinovsky, in case of abuse of rights (...) a person causes harm to other participants[3] of public relations, other subjects.[4] It is emphasized that damage (moral, psychological, or property) can be caused to a person, society, politics, or the state.[5] It is noted that the damage caused to society and the state through abuse can be political[6], moral, economic[7], organizational, or ideological[8]. Individual authors mention universally recognized and legally protected goals and prevailing morality[9] in society as an object.

According to some points of view in the legal literature, as a result of abuse, damage is directly caused, without specifying the scope of damaged public relations or the subjects bearing the damage.[10]

Individual authors, not being fundamentally opposed to causing damage as a result of the abuse of rights, with its actual existence, believe that the abuse of rights also takes place in cases when the holder of rights at least has the intention

[1] Theory of state and law: textbook. Edited by V.K. Babaeva. M.: Publishing house Yurist. 2003, p. 491.

[2] **Malinovsky A.A.** Harm as a legal category // Lawyer. 2006 No. 2, p.p. 4-7., Civil law of Russia. Part one. Textbook / Edited by Z.I. Tsybulenko. M., 1998, p. 433.

[3] **Gribanov V.P.** Limits of implementation and protection of civil rights. M.: Russian Law, 1992, pp. 14, 27.

[4] Abuse of law as a special type of legal behavior: theoretical and legal analysis: abstract of thesis ... Candidate of Legal Sciences. Nizhny Novgorod, 2006, p. 7.

[5] General theory of law and state / Edited by V.V. Lazarev. M., 1994, p. 324.

[6] Implementation of subjective right in such a way that harms the state administration system, the formation and activity of state bodies.

[7] In this case, as an example, it is possible to mention the unnecessary (conscious) disputes of legitimate administrative acts, actions, and inactions of administrative bodies by private sector persons, both administratively and judicially, when the state body is forced to use large resources in that direction. It can be stated that organizational matters are also damaged here. We believe that in such situations, damage is done not only to state bodies and public interest, but also to private individuals.

[8] **Yudin A.V.** Abuse of procedural rights in civil proceedings, St. Petersburg. 2005, pp. 67 -75.

[9] **Shram V.P.** An interesting book about abuse of law / State and Law. 1997. No. 4, p. 122.

[10] **Eugenzikh V.A.** Morality and law (Interaction. Regulation. Action). Dushambe: Irfon, 1987, p. 160.

to cause such damage. In practice, in cases of abuse of rights, harm is not always caused, and it is sufficient that the intention to cause such harm is confirmed[1] (we will talk about the issue below).

In case of abuse of rights, domestic and foreign judicial practice is also useful from the point of view of determining the object.

Thus, the Court of Cassation, referring to the content of Article 102 of the former RA Criminal Procedure Code, states that the participant in the trial should submit such a motion (petition), the possibility of satisfaction of which is provided by the legislation of the Republic of Armenia. In case of submitting an obviously illegal petition in violation of the above requirement, a person cannot reasonably expect a reasoned decision to reject or grant it from the body conducting the proceedings. The Court also emphasizes that, regardless of whether the procedural requirements for the submission of petitions and their content are observed, establishing the duty of the body implementing the proceedings to examine these petitions and make a reasoned decision in connection with them contains prerequisites for the abuse of the rights of a person to initiate a petition. Such an interpretation of the procedure for submitting motions and examining them by the competent body conducting the proceedings will disproportionately burden the body conducting the proceedings, which in turn may lead to the neglect of the legitimate public interest in ensuring the normal course of investigation of the criminal case.[2] It is obvious that the Court considers the public interest as an object of such abuse of rights.

The Constitutional Court of the Republic of Armenia, addressing the issues of marriage abuse within the framework of Decision DCC-1576 of 12.02.2021, among other features that characterize the abuse of rights as an independent institution, also notes that "(...) the seemingly legal actions of a person lead to the violation of the legal interests of the state, the public or other persons, and the person strives to achieve the desired result or goal (...)". The Constitutional Court of the Republic of Armenia emphasizes that the characteristic of the abuse of rights in that regard is when the subject of the right acts in accordance with the legal orders during his activity (...), but distorts the meaning of the right by acting

[1] **Chervonyuk V.I.** Abuse of law in the sphere of private and public law // Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia named after V. Ya. Kikot, 2017, No. 3, pp. 166-170.

[2] 28.08.2015 Decision No. ECD/0184/11/14 of the Court of Cassation of the Republic of Armenia.

contrary to the intended meaning of the given legal provision or, in this case, contrary to the purpose and spirit of the right to marriage, as a result of which harm is caused to another person, the state, or society.

Another example from the practice of the Supreme Court of the Russian Federation. In one of the cases, the person who owns 1/40th of the apartment applied to the Court to live in that apartment (and the person living in the apartment at that moment has the ownership right to 1/2 of the apartment). It is noteworthy that the claim was satisfied in the first and appellate instances, and only the Supreme Court recorded that there was an abuse of rights in the plaintiff's actions, emphasizing that such exercise of the right causes damage to the person who owns 1/2 of the apartment.[1] The Court does not mention it directly, but it is obvious that it recorded the fact of the abuse of rights, which harms the social relations arising around the property right.

Thus, in contrast to the offense, when the object is the social relations that the law protects from offenses, and at least from the point of view of finding out the general object, the problem is more certain. In the case of the abuse of rights, we have a double picture regarding the object.

First of all, the analysis of both the doctrine and judicial practice allows us to record that it is possible to find out the object of the abuse of rights by determining the scope of the victims. Secondly, we believe that in case of abuse of rights, as a result, not only the interests of the "victims" are harmed, but also rights (subjective) themselves, their function is crippled, and the values that are related to the essence of the specific right are "suffered". A person consciously and deliberately uses the subjective right granted to him for a purpose contrary to its functional meaning.

From this point of view, the position of S.D. Radchenko is relevant, that the abuse of civil rights is the abuse of his right by a competent person in opposition to the legal interest protected by that right.[2] It is obvious that the author considers the problem not by emphasizing the circumstance of causing harm to other persons, but rather emphasizes the interest that lies at the basis of the abused rights, by and large considering the abused right itself as an object. Focusing on the

[1] Rulings of the Supreme Court of the Russian Federation dated December 3, 2013, No. 4-KG13-32 // SPS "Consultant Plus".

[2] **Radchenko S.D.** Abuse of law in Russian civil law: dissertation of Candidate of Legal Sciences, M.: 2007, p. 202.

inadmissibility of internal conflict within subjective right, F.K. Savini notes that whoever deceives himself and allows abuses in places where general freedom is possible, he himself renounces noble demands.

Taking into account the fact that the abuse of the subjective right is mostly characterized as the implementation contrary to its purpose, there is a need to clarify the purpose of the right as well. It is noted that the purpose of the right is the result that can be achieved through the implementation of the right, and the meaning of the right is not only the useful purpose of the right, the result of its implementation, but also its content (realization) in legal relations.[1] The right is realized in accordance with its purpose when the person's behavior corresponds to the goals of the given legal norm. The complete picture of the objective of the right is not always apparent from the documentation of that right.[2] Such cases cause complications both for the exerciser of the right, from the point of view of determining the limit of the exercise of his right, and for the competent authorities, from the point of view of recording the fact of possible abuse. Often it can be found out from the general problems of the legal act fixing the specific right, the subject of regulation, etc.[3]

2.1. 2. The objective side. In this case, the unit of measurement of the offense is the act (action and inaction). In a formal sense, in the case of abuse of rights, we still have an act, but it is manifested not by doing what is prohibited by law (violation), but by exercising the subjective right or, in individual cases, not exercising it.[4] The right and its implementation (...) are the starting values of the institution of abuse of rights.[1]

[1] **Vasiliev Yu.S.** Interaction of law and morality // Soviet state and law, 1966, pp. 18–20.

[2] **Przybysz P.** Nadużycie prawa w prawie administracyjnym, [w:] H. Izdebski, A. Stępkowski, Nadużycie prawa, Warszawa, 2003, S. 197.

[3] For example, Article 49 of the RA Constitution guarantees the right of an RA citizen to enter the public service. It is not possible to fully determine the function and purpose of that right from the documentation of the basic right. This can be done through a systematic analysis of sectoral legislation. In particular, according to Article 1 of the RA Law "On Public Service", "This law defines the principles of public service in RA, the requirements for entering public service, the classification of public positions, the main rights and duties of a public servant, social guarantees, features of positions, the system of conduct, (...)".

[4] An example of the abuse of rights by legal inaction is the obviously unscrupulous, uneconomical behavior of the right holder towards the subjective right, due to which, in terms of content, the rights of the right holder may be limited in relation to his own subjective right, as a result of which, in fact, there is a loss of right. It is noted that the right holder's failure to exercise his right for a long time or not taking measures to ensure it creates trust worthy of protection among other persons, as a result of

The right and its implementation (...) are the starting values of the institution of abuse of rights. They are rights guaranteed by the legal system and legal models of behavior. Exercising the right means being free to choose the type and extent of one's behavior. Here, type indicates the relation of right to social good, and measure indicates the limits of legal behavior, outside of which we will be dealing either with an offense that is specifically established by the legislation, or with the abuse of rights, the "meter" of which is law enforcement, including the Court. In the case of a violation of law, the act cannot be based on law in the substantive sense, and in the case of abuse of rights, a person exercises his right, a specific model of behavior, which only in certain situations begins not to express the essence and purposeful meaning of that right, to go beyond the limits of free conduct.[2]

Another important question related to the so-called objective side of the composition of the abuse of rights is the emergence of the consequence.

According to the position of the Supreme Court of the Russian Federation, as a result of the abuse of rights, any negative consequence may arise, which is a direct or indirect result of the exercise of the right.[3] The Court, emphasizing the causal connection between the act (the exercise of the right) and the consequence, essentially outlines the objective side of the abuse of rights.

According to A.V. Volkov, material consequences cannot be considered a mandatory element of abuse.[4] In general, one should agree with the author's position. This is evidenced by the wording of Article 12 of the RA Civil Code, according to which the actions of citizens and legal entities performed only with the intention to harm other persons (...) are not allowed. In other words, at least the presence of such an intention is sufficient. However, it is also important that

which a person is confident that the right holder will not exercise his right again. As a consequence, the right holder is prohibited (by judicial order) from further exercising his right, because the delayed exercise of the right will violate the principle of good faith. Here, it is necessary to note that the right holder's failure to exercise his right for a long time and subsequent attempts to exercise it, in fact, violate the rights of those who have, for example, legitimate claims to a specific right (property). For details, see **G. Hovhannisyan,** General Jurisprudence and Legal Methodology. Yerevan 2020. pp. 78-88.

[1] **Porotikova O.A.** The problem of abuse of subjective civil law. M., 2007, p. 1.

[2] **Baru M.I.** Decree. Op, p. 118.

[3] Rulings of the Supreme Court of the Russian Federation dated 02/03/2015 No. 32-KG14-17 // SPS "Consultant Plus".

[4] **Volkov A.V.** Abuse of civil rights: problems of theory and practice: diss. ... Doctor of Legal Sciences M.: 2010, p. 423.

in the case of intentional material damage, we can deal with the institution of obligations arising as a result of causing damage (delict obligations) (the existence of a crime is still possible). However, here the actions of the person should be illegal, that is, the material damage caused is not the result of the exercise (abuse) of rights of the person.

2.1. 3. The subject. The subject of legal responsibility can be a capable natural person who has reached a certain age provided by law, as well as a legal entity. In the case of abuse of rights, we are still dealing with a specific subject, which is typical of physical and legal entities. Persons endowed with public powers cannot be subjects of abuse of rights. If, in the case of an offense, the subject is the one who performs the act prohibited by the tort law, then in the case of the abuse of rights, we are dealing with a person who exercises his right. In other words, the abuser should have the appropriate right. The consideration of the issue of the subject does not aim to identify the offender and the exerciser (abuser) of the right. It is just to highlight the perpetrator of the act, both in cases of violation of the law and abuse of rights.

2.1. 4. The subjective side. The essence of the abuse of rights is directly related to the person's awareness of the social harmfulness of his behavior, the implementation of which, based on the factual circumstances of the act, may harm other persons, the interests of society, and distort the goals, function, and legal order of the right.
In the case of abuse of rights, the subjective side of a person's act is the awareness of the social harmfulness of the act and acting with that intention.
V. Kowalski singles out the intentionality of such an act among the features of abuse of rights.[1] Some authors note that the intention is characteristic only of such a type of abuse as chicane, that is, the implementation of a right that has the sole intention of causing harm to another person.[2] Some say that acting with the intention of "causing harm" should be evaluated as an element of abuse of rights.[3] One has to agree with the point of view, because the non-targeted

[1] **Kovalsky V.** Why is the evil of law, "Legal Bulletin of Ukraine" 2003, pp. 3–10.
[2] **Mariâ Kuncevič,** Злоупотребление правом в административном праве // Studia z zakresu nauk prawnoustrojowych. Miscellanea 4, 2014, p. 80.
[3] **Malinovsky A.A.** Decree. Op, pp. 70–76.

implementation of rights does not harm even a specific person, but the public interest and the general legal order undoubtedly appear in the status of "victim".

It has been repeatedly noted that the abuse of rights, if we abstract from its social harmfulness and possible consequences, is first of all the exercise of that right, that is, the exercise of one's freedom by a person. Here, the question arises: how can the awareness of social harmfulness and acting with that awareness coexist, on the one hand, and on the other hand, the implementation of the right, which seems like it should not have a negative tone? This questioning is important from the point of view of evaluating the subjective side of the abuse of rights.

It is important to note that awareness of social harmfulness in itself cannot be qualified as abuse. It is roughly the same when we hold a person accountable for just thinking. Acting with the awareness of social harmfulness plays an important role here when implementing the right.

In the case of abuse of rights, even in the case of chicane, which is considered exceptional, only the intention of the abuser to cause harm is relevant for the qualification of the act (Article 12 of the RA Civil Code, Part 1, 1st half-sentence: "the actions of citizens and legal entities performed only with intention to harm other persons, (...) are not allowed). In other words, the legislator is "indifferent" to the occurrence of damage in the form of any consequence, recording that such intention is prohibited.

In one of the cases, the Supreme Court of the US state of Louisiana recorded:

Exercising the right (...) without a legitimate and serious interest, even when there is no presumed or proven intention to harm, is an abuse of the right, which should be unacceptable by the court.[1]

As we can see, the Court urges to qualify as abuse even those cases where there is no intention to harm, giving the main role to the fact of non-targeted (illegitimate) exercise of the right. We believe that causing harm is a possible but not mandatory characteristic: the awareness of the social harmfulness of the act

[1] *Brenton T.M., Jr., Plaintiff-Appellant-Relator, v. J. Ray mcdermott & CO., INC., et al.*, Defendants-Appellees-Respondents. No. 57984. Supreme Court of Louisiana. December 13, 1976. https://law.justia.com/cases/louisiana/supreme-court/1977/344-so-2d-1353-1.html (Last access: 27.12.2023). For details, see also: *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919); see *Onorato v. Maestri, supra*; Julio Cueto-Rua, Abuse of Rights, 35 La. L. Rev. 965 (1975).

and acting with that awareness (the exercise of the right without legitimate interest) is sufficient to qualify it as an abuse of rights.

However, all this does not mean that harm cannot be caused by the abuse of rights, and in such situations, the act cannot be qualified as abuse.

In order to qualify the infringement, among other circumstances, it is very important to justify that the act committed by a person corresponds to the characteristics of any offense provided by the law, and there are no circumstances excluding the illegality of that act, that is, the person cannot justify his behavior on any basis provided by the law.[1]

Taking into account the fact that the cases of abuse of rights "catch the eye" with a low degree of formal certainty and their evaluation is within the discretion of the law enforcer (Court), it can be noted that in this case, the gap between the violation of the law and the abuse of rights is enormous. There is a lack of a description of the specific act, to the characteristics of which the abuser's act should be matched. As for the "justification" of abuse, this issue cannot be discussed in the realm of abuse of rights. For example, for the evaluation of the illegality of a criminal offence, it is very important that the person has committed the act described in the law; then it is considered or not considered a crime based on the justifications provided by the law (circumstances excluding criminal liability). The law does not provide justifications for cases of abuse of rights; it is a matter of the discretion of the Court.[2]

Regarding the classification of violations (especially crimes), it is also important to find out the circumstances of guilt. Guilt in modern science is evaluated mainly on the basis of the value concept. If we try to present it as briefly as possible, then

[1] For details, see **Жалинский А.** Modern German criminal law. - M. Ed. Prospect, 2006. - C. 178. **Hovhannisyan G.** A problem for beginning students - criminal law "Smoking" can be deadly // Legality, 2022, № 131, pp. 3-12, **Markosyan M.** The criminal-legal characteristics of taking possession of property out of a person's possession // Modern Law problems. Collection of scientific articles / Educational Complex of the RA Ministry of Internal Affairs. Yerevan 2023, p. 151.

[2] For example, the person changed the lawyer several times during the proceedings, with the aim of delaying the proceedings, but this behavior was not appreciated. Once again, the person decides to change his lawyer not because of delaying the proceedings, but because of his personal reasons, because of the lawyer's hygienic features. A question arises: can the court assess such behavior (changing the lawyer for the last time) as abuse, or will it be sufficient to justify that in this case a person has an objective justification, or, in general, there is no need to discuss the issue of abuse and to look for excuses in order to dismiss the act as such? We think that there is no issue of abuse here, and the court should assess the specific act as the exercise of a right, not abuse, but not apply the possible consequences, considering that a person had a specific justification for exercising his right for another purpose.

it should be understood that it is the possibility of impeaching a person for a specific act. During the assessment of guilt, the question is often asked as follows: Did the person realize that his act was illegal or not? It is important here that, if the person realized the illegality of his act, therefore, he also realized that he could have chosen a different way of behavior, but he committed the criminal act, and therefore his behavior is reprehensible, there is guilt.

As we can see, in the assessment of guilt, the awareness of the illegality of the act is essential, as opposed to the intention, which refers to the awareness of the factual circumstances of the act. In other words, when qualifying the abuse of rights, the Court should limit itself to the assessment of intent and not address the question of guilt.

With regard to the institution of abuse of rights, it is objectively impossible to consider the question of its illegality. Consequently, it turns out that the question of guilt is not subject to evaluation, not only because it is characteristic of the offence, but because guilt is the awareness of illegality, which is absent in the case of abuse.

3. As a result of covering the nature of the violation and abuse of rights, the following can be stated:

1. In the case of both the violation and the abuse of rights, the presence of the subject is mandatory, but in the case of the violation, the subject performs the specific act prohibited by the law; in the case of the abuse of rights, we deal with entities (physical and legal) who exercise the right. The absence of a subjective right cannot prevent a person from committing an offense, and if a person does not have a right, he cannot abuse it either.

2. Both in the case of a criminal offense and the abuse of rights, there are public relations that are subject to protection. In contrast to the abuse of rights, in each case of offense, there is a sphere of specific public relations protected by the law, which is due to the high degree of formal certainty of the offence. In each specific case, the object of abuse is specified during its qualification. The general summary assessment is that the object of the abuse of rights are the public relations that develop around the individual, society, and the state. In other words, the entire legal system is subject to protection from abuse.

3. Both the offense and the abuse of rights are evaluated from the objective side. In both cases, the main measurement unit of the objective side is the action. In a formal sense, in the case of abuse of rights, we still have an act, but it is

manifested not by doing what is prohibited by law (violation), but by exercising the right or, in individual cases, not exercising it. In case of abuse of rights, a person exercises his right, a specific model of behavior, which does not express the essence and function of that right.

4. The essence of the abuse of rights is directly related to the person's awareness of the social harmfulness of his behavior, the implementation of which can harm other people, the interests of society, distort the goals, function of the right, and the legal order in general.

5. When qualifying an offence, it is also important to justify that the act committed by a person corresponds to the characteristics of a specific act prohibited by law, and there are no circumstances excluding the illegality of the act (for example, grounds excluding criminal responsibility). In other words, a person cannot justify his behavior on any basis provided by the law. In the case of abuse of rights, there is no specific prohibition to exercise this or that right, there is no description of a specific act, the features of which the act of the abuser should be matched with, and there are no grounds provided by the law justifying the abuse.

6. In case of offences, when assessing the guilt, the question is asked as follows: Did the person realize that his act was illegal or not? It is emphasized that it is important here that if the person realized the illegality of his act, and therefore he also realized that he could have chosen a different way of behavior, but he performed the specific prohibited act, and therefore his behavior is illegal, there is guilt. Taking into account that in the case of abuse of rights, the illegality of the act is objectively impossible, it follows that the question of guilt is not subject to assessment.

If we try to generalize the implementation of the right, the violation of the law, and the abuse of rights, then we can have the following picture.

If a person's exercise of his right corresponds to the requirements of the law, the spirit and the letter of the law, its meaning and purpose in social relations, the rules of social coexistence, then we are dealing with the exercise of a right. If that behavior contradicts the decrees of the law, and it is directly prohibited by the sectoral legislation, then we are dealing with a violation of the law. In cases where a person's exercise of his right does not directly violate the norms of the law, but is in conflict with the rules of moral and social coexistence, if the

function and purpose of the right are not preserved in such an act, then we are dealing with an independent type of legal behavior - abuse of rights.

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ՍՈՒԲՅԵԿՏԻՎ ԻՐԱՎՈՒՆՔԻ ՉԱՐԱՇԱՀՄԱՆ ՈՐԱԿՄԱՆ ԽՆԴԻՐՆԵՐԸ

Ամփոփագիր

Իրավաբանական գրականության մեջ նշվում է, որ ժամանակակից իրավունքը հասել է զարգացման այնպիսի մակարդակի, երբ ամենուր կարելի է խոսել իրավական պետության, իրավունքի գերակայության հաստատման մասին: Ցավոք, քննարկվող հիմնախնդրի պարագայում այդպես չէ, քանի որ սուբյեկտիվ իրավունքի չարաշահման, վերջինիս արգելքի ինստիտուտները հստակեցված չեն ոչ միայն պոզիտիվ իրավունքում, այլև լրջագույն տարակարծություններ կան նաև դոկտրինալ մակարդակներում: Այս իմաստով խոսել որակման հարցերի մեթոդաբանության վերաբերյալ միատեսակ գիտական մոտեցումների առկայության կամ նորմատիվ որոշակիության մասին, կարծում ենք, ժամանակավրեպ է: Սակայն մյուս կողմից էլ հնարավոր չէ չհամաձայնել իրավունքի զարգացման ժամանակակից տեմպերի մասին իրավաբանական գրականության մեջ առկա վերը նշված մոտեցման հետ, քանի որ իրավունքի գերակայության ճանաչման, իրավական պետության կայացման հարցերը պետք է լինեն ժամանակակից քաղաքակիրթ պետությունների և նրանց իշխանությունների գործունեության (և՛ իրավաստեղծ, և՛ իրավակիրառ) ելակետը: Սույն աշխատանքում փորձ է կատարվել գնահատել ժամանակակից իրավագիտությունում չափազանց արդիական և միաժամանակ դոկտրինալ տեսանկյունից քիչ հետազոտված սուբյեկտիվ իրավունքի չարաշահման հատկապես որակման հարցերը՝ շեշտադրում կատարելով նաև մեթոդաբանական խնդիրների վրա:

Հիմնաբառեր. սուբյեկտիվ իրավունքների չարաշահում, սուբյեկտիվ իրավունքների չարաշահման որակում, խախտում, օբյեկտ, օբյեկտիվ կողմ, սուբյեկտ, սուբյեկտիվ կողմ:

ПРОБЛЕМЫ КВАЛИФИКАЦИИ ЗЛОУПОТРЕБЛЕНИЯ СУБЪЕКТИВНЫМИ ПРАВАМИ

Аннотация

В юридической литературе отмечается, что современное право достигло такого уровня развития, что повсеместно можно говорить об утверждении правового государства и верховенства права. К сожалению, в контексте обсуждаемой проблемы это не так, поскольку институты злоупотребления субъективным правом и его запрета четко не определены не только в позитивном праве, но и вызывают серьезные разногласия на доктринальном уровне. В этом аспекте говорить о наличии единообразных научных подходов к методологии вопросов квалификации или о нормативной определенности, на наш взгляд, преждевременно. Однако, с другой стороны, нельзя не согласиться с упомянутым в юридической литературе подходом к современным темпам развития права, поскольку признание верховенства права и формирование правового государства должны быть отправной точкой деятельности современных цивилизованных государств и их властей (как в правотворческой, так и в правоприменительной сферах). В рамках данной работы предпринята попытка оценить вопросы квалификации злоупотребления субъективным правом, которые являются чрезвычайно актуальными в современной юридической науке и в то же время мало исследованными с доктринальной точки зрения, с акцентом на методологические проблемы.

Ключевые слова: злоупотребление субъективными правами, квалификация злоупотребления субъективными правами, нарушение, объект, объективная сторона, субъект, субъективная сторона.

Հոդվածը հանձնված է խմբագրություն 15.09.2025 թ., տրվել է գրախոսության 16.09.2025 թ., ընդունվել է տպագրության 19.09.2025 թ.: