

SOME REFLECTIONS UPON THE SUBJECTIVE RIGHT AND THE ABUSE OF RIGHT DOCTRINE

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Abstract. The purpose of the article is an analysis of the theoretical aspects of the subjective right doctrine. Starting from the idea that the subjective right is something different from the positivist norm, the legal thinking was permanently concerned about giving a definition to it, about determining its features and legal nature, elements that differentiate it from the positive right, as well as establishing the principles of its exercise. In the following article we tried to highlight the fact that the exercise of a right by its holder contrary to the principles of exercise, as well as the fulfillment of the obligations assumed by him gives rise to a phenomenon called abuse of right.

Key words: *abuse of right, objective right, subjective right, positive right, external limit, lawful purpose, good faith, public order.*

Rezumat. Scopul articolului este realizarea unei analize a aspectelor teoretice ale instituției dreptului subiectiv. Pornind de la ideea că dreptul subiectiv este ceva diferit de norma pozitivă, gândirea juridică s-a preocupat permanent de a-i da o definiție, de a determina trăsăturile și natura juridică a acestuia, elementele care îl diferențiază de dreptul pozitiv, precum și de a stabili principiile exercitării acestuia. În articolul ce urmează s-a încercat a se evidenția faptul că exercitarea unui drept de către titularul acestuia, precum și îndeplinirea obligațiilor corelate asumate de acesta contrar principiilor de exercitare dă naștere unui fenomen numit abuz de drept.

Cuvinte cheie: *abuz de drept, drept obiectiv, drept subiectiv, drept pozitiv, limită externă, scop rezonabil, bună-credință, ordine publică.*

Introduction. Under the subjective right, the person is conferred certain competencies, powers and prerogatives, which are not absolute and must be exercised taking into account the limits of exercise, in the sense that the holder of the subjective right must exercise this right and perform his collateral duties in good faith, in accordance with the law, the contract, public order and good moral values. These limits of the exercise of the rights and of the fulfillment of the obligations are enshrined in art. 10 Civil Code of the Republic of Moldova and art. 55 of the fundamental law of the country - the Constitution of the Republic of Moldova, which establishes the principles of exercising subjective rights.

It is obvious that subjective rights are organically related to the objective right, because the subjective rights do not exist without being stipulated in legal norms. The objective right existence would remain meaningless too, if the requirements of its norms would not be achieved through subjective rights in interhuman relationships. Therefore, the objective and subjective rights, as fundamental notions of law, are not only contradictory ones, but they are interdependent: the objective rights correspond, in legal plan to the subjective rights [1].

The scientist Mircea Djuvara asserts the same: the subjective right could not exist without the objective one and vice versa, and the problem of prioritizing one of them is an artificial one, but the perspective from which it is treated is decisive on the conclusion which we are going to formulate. If substantiating the analysis in terms of generalization, there are no doubt that the objective law would be generator of subjective rights, the legal documents, are in this sense, the source of human rights. But if we refer to the individual's point of view, the situation changes, for its right is manifested and exercised real life - in some cases - even independently of legal norm.

The romanian scientist Gheorghe Mihai considers that the objective right appears like a part of positive law consisted of legal norms [2], at the same time, it does not limit the objective law only when referring to legislation and circumscribing to the last the customary law and jurisprudence in those legal systems where they are considered otherwise.

Alluding to the significance explanation of the objective right the distinguished Romanian jurist Ion Deleanu said: "Adjectivizing the term of "right" by equating it to the word "objective", entangles its meaning, opposed to simplifying it. The term "objective" additionally has different implications, getting from the methods of relating the subject to the object (ontological, gnoseological, psychological, etc.). Right isn't an objectivity in itself. It will address the generalized pith of a composite interest inhering in a marginalized social group or a commonality.

Substantially, right, which likewise infers the requirement for conduct guideline, albeit objective, is the result of individuals' action and acts just through them. *Voluntas facit legem.*". Furthermore, the aforesaid jurist asserts: "The right in its ontological importance, has not a objective complexion, but rather a qualities framework nature, which once made because of individuals' volition and communicating their inclinations, reflect subjective measure of these inclinations, earning a general autonomy towards them" [1].

Methodological part. This article is based on an analysis of the scientific literature and national and foreign jurisprudence in the field. Likewise, a series of normative acts, both national and foreign, were subjected to research. Regarding the research methods used, we mention that the study used the analytical method, the logical method, the hermeneutic method and the systemic method, as well as the comprehensive method in order to consolidate the act of understanding the materials subject to research.

Results and discussions. Clearly, the objective right takes part along with the subjective right in shaping and changing the law, just as its substance, yet the positive law can be dissected both, as far as its objective aspect and as far as its subjective aspect, or: as Ion Deleanu says "ab origin, the freedoms and obligations are unbiased. They are subjectivized through their circulation to certain fixed people. Then again, since there are emotional or subjective privileges and obligations emerging straightforwardly from legitimate standards, without a settled connection, it appears to be that it isn't of

embodiment of abstract freedoms and obligations that they emerge from a substantial lawful connection." [1] namely, the law principles are dictated by those two components, in such a way presenting a particularity to the positive right.

The well known romanian scientist Ion Deleanu in his endeavor to give a meaning of subjective rights, begins from the meaning of the legitimate circumstance just like the entirety of freedoms and commitments which each citizen has, as per the law[1], accepts it would be best not to characterize the term of legal objective right, yet that of lawful objective circumstance, an idea which signifies every one of the lawful standards which make up the law, standards which manage the freedoms and obligations. In this unique setting, subjective rights would become abstract lawful circumstances that would mean the emerged privileges and obligations on the record of a few law people. We yield in such a manner, the creator affirms, an incorporating outline of crafted by creation and utilization of the law" [1].

The legislation of Republic of Moldova does not define the subjective right, it just invokes this notion in art. 13, art. 311, art. 359, art. 409, art. 2671 and others of the Civil Code, which defines the meaning of the abuse of law, the act of preservation (an act which aims to prevent the loss of a civil subjective right), legal acts concluded under condition and the statute of limitations of subjective civil rights. Consequently, the doctrine has formulated several definitions of subjective right. We will present some of these definitions below.

Mircea Djuvara's definition sets up that the subjective right assigns a lawful individual workforce of a person towards someone else, a privilege that has as premise the lawful standard that gets from it and has a place settled in the subject of law.

Subjective right – as a privilege - may have a place or not to a particular person of law, to the extent this one has the legitimate ability to have that trait. Along these lines, the genuine right makes the lawful system, by explicit business standards for a person to secure abstract freedoms related to the partner nature of an organization (business society). Be that as it may, these abstract privileges can be acquired exclusively by people with full legitimate limit who have not been sentenced for fake administration, maltreatment of trust, fraud, utilization of imitation, trickery, feebleness, prevarication, giving or accepting incentives.

A subject of law can be both individual and lawful individual. There are no broad limits for specific classifications of individual or legitimate people to have subjective rights. Specifically, stateless people, for instance, have no democratic rights, and judges are not be partner to organizations. Additionally, on account of legitimate substances, these have an exceptionally wide field of subjective rights, every person of law has various privileges, position of sanctified rule of the utilization capacity claim to fame of the lawful individual.

So, the subjective right shows up as a benefit on the recuperation or the guard of one's own buries, as a benefit made or perceived by the lawful standards in power, which is reasoned and promoted by the subject of law [3].

In this manner, the emotional right includes an interest. This axiom is set up officially in various parts of law. Along these lines, the Civil Procedure sets up the rule that specifies that there is no activity without interest. The main condition for somebody to sue an activity is to have an interest, yet its nonappearance has thus the activity excuse. The common law cherishes, in its turn, the rule that specifies that there is no substantial show with practically no interest [1]. However, few out of every odd interest is law, just the one that is ensured by law, whose question of law has the legitimate means to pursue the court to underwrite and perform law.

Assuming the law is the one that gives authenticity and lawfulness to the interest, the inquiry is whether the legislature – obliged to make laws fitting to a coordinated society – comprehends that it is his commitment to do the errand, having some place, at the opposite finish of legitimate connection, the reporter of a law to have the best freedoms to imagine. Assuming we think about the authoritative power as an undertaking, a mission, as an obligation of the assembly, it implies that its assignment turns into an obligation [4].

In a word, the two notions, the one of subjective right and that of adroitness are subsumed under the so-called "power of law." Both subjective right, a prerogative about the provision of a value, as well as the adroitness, a prerogative about the execution of a certain function or power, are powers of law [5].

The subjective right is a fundamental concept of law. If the objective right, investigated as far as its all universality, perceives and cherishes major human subjective rights, then, at that point, the subjective right is "the power that every individual needs to imagine as their resources, their abilities and their powers that are not limited by law, would be regarded, however upheld by the general public, when they were deciphered in innovative volition acts through its legitimate bodies to brought to realization impacts of made relations" [6]. The universality issue of the objective right is connected with fleetingness, yet the objective right in power characterizes between the past and future a recommended and approved present.

The rights are presented distinctly to satisfy an ideal of the right holder, being totally in opposition to the explanation that those freedoms are given to fulfill individual pitiful interests contradicting to an ethical system and embodiment of law.

"In all cases a right ought to be practiced in such a style that the consequence of the activity stays inside a degree judged sensible in the light of the common social ethics. At the point when a direct by one who implies to do as such neglects to show social sensibility and when the noteworthy harms to others surpass the cutoff which is for the most part expected to be borne in the public activity, we should say that the activity of the right is no longer inside its passable extension. Along these lines, the individual who practices their right in such a style will be held obligated on the grounds that his lead establishes an abuse of right." [7]

When the holder of the subjective right exercises his right within its external limits, we are in the presence of an act of exercising the right, but if the use exceeds the external limits of the subjective right, we are in the presence of an act committed outside the law, i.e. a circumstance characterized by the non-existence of subjective right.

In the light of the above, the following principles of exercising subjective rights can be deduced:

a) The exercise of the subjective right by its holder must be carried out according to a lawful purpose, regardless of the nature of the right.

Article 1 of the Civil Code of the Republic of Moldova regulates the principle of free exercise of civil rights, establishing that civil law is based on the recognition of equality of participants in relations regulated by it, protection of privacy, private and family life, recognition of inviolability of property, contractual liberty, protection of good faith, consumer protection, recognition of the inadmissibility of interference in private affairs, the need for the free exercise of civil rights, the guarantee of the restoration of the person's rights in which he has been harmed and their defense by the competent courts. This principle guarantees

natural and legal persons the opportunity to exercise their civil rights in the manner and under the conditions best suited to their interests. At the same time, it must be borne in mind that there is no absolute freedom to exercise civil rights.

b) Exercising in good faith the subjective rights.

The norm contained in art. 55 of the Constitution of the Republic of Moldova obliges the citizens of the country to exercise their fundamental rights and freedoms in good faith, without violating the rights and freedoms of others. Article 10 Civil code of the Republic of Moldova establishes that the natural and legal persons participating in the civil legal reports must exercise their obligations in good faith, which is presumed until proven otherwise. Good faith is a *sine qua non* condition both for the exercise of a right by its holder and for the fulfillment of an obligation, whether we are referring to a natural or a legal person. If the person in the exercise of his rights or in the performance of his obligations has acted in good faith, the legal acts concluded by such a person may not be declared null and void. On the contrary, if he acts in bad faith, consciously of the abusive nature of his conduct, the holder of this right may be sanctioned. For example, if the employer orders the dismissal of an employee in bad faith, this may result in material, misdemeanor or criminal liability, as the case may be. Thus, we conclude that it is inadmissible to exercise in bad faith the rights and obligations of a part of the legal relationship. A sensitive issue for the theory and practice of law is to determine to what extent a person, exercising a right, can be considered in good faith has been reported by doctrinaires over time. A possible solution is revealed by the romanian researcher Dimitrie Gherasim, who states that in the situation where a person acts with malicious intent - commits an act of gross negligence assimilated to deceit - he is in bad faith. In this case, good faith is defined by the antithesis: whenever the subject uses malicious maneuvers as well as in the case of an intentional omission assimilated to malice, we are in the presence of bad faith and in the absence of good faith.

c) The exercise of the subjective right by its holder takes place in compliance with the law, public order and morality.

A protected right is one that is not contrary to public order and morality, one that is not part of a legal relationship contrary to the law. Explaining this principle encounters certain difficulties due to the fact that it involves a multitude of theories and arguments. What is the connection between the legal order, the social order and the moral order? The answer is simple: the legal and moral order is the cornerstone of the social order. Moral norms are mechanisms that trace a certain behavior typical of a certain society in a certain period, and the legal norms codify this behavior, harmoniously combining the individual interests with the general ones of the whole society. This indissoluble link between law, public order and morality is accentuated by the norm introduced by the local legislator at paragraph (1) and paragraph (3) in art. 334 of the Civil Code of the Republic of Moldova. This principle finds its applicability in other norms of the Civil Code of the Republic of Moldova, as follows: art. 182 paragraph (4), art. 224 paragraph 1 letter (d), art. 249 paragraph 2 letter (b), art. 774 paragraph 3, art. 1918 and others. The exercise of the rights and the execution of the obligations according to the principle of legality presupposes that the actions of the holder of the rights are not contrary to the legal norms. Likewise, the means of exercising rights must be legal.

The presentation of these principles proves that subjective law is at the same time a basis for claiming certain subjective rights from other holders of certain rights, as well as a

limitation on the exercise by its holder of the exercise of civil rights recognized and guaranteed by law. The exercise is not unrestricted, but must naturally fit within certain limits.

Conclusions

The deviation of the right from its intrinsic reason, expressed in the purpose for which it was recognized and guaranteed, or, in other words, the "use" of the right for purposes other than those considered by the legal norm underlying it - purposes considered incompatible with the public interest and the requirements of the norms of social coexistence - represent not the use, but the abuse of right, the transition from the exercise of right from normal to abnormal, removal from legal protection and exposure to sanction. It is the phenomenon designated by the concept of abuse of right. Analysing the principles of exercise of subjective rights, we conclude that subjective rights are conferred in order to achieve the ultimate purpose of the right holder, being absolutely contrary to the idea that rights are conferred to fulfill interests contrary to the spirit and essence of right. In this context, we formulate the opinion that the abuse of law presupposes the exercise of the subjective right within its external limits, but by disregarding, exceeding its internal limits. Only the exceeding of the internal limits of a concrete subjective right by diverting it from the social and economic purpose for which it was established, constitutes an abuse of law and attracts the civil liability of the author, being an aspect that differentiates the abuse of right from the wrongful act, which is committed in the absence of a subjective right or by exceeding its material limits. The distinction between these two notions is often difficult to make, and civil legal doctrine has expressed various views on the legal nature of abuse of law. In other words, the abuse of right implies the observance of the letter of the law, but the violation of its spirit.

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