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Theme:

SOME LEGAL ASPECTS OF THE PROBLEM OF ABUSE OF RIGHT IN ENTREPRENEURIAL ACTIVITY

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Introduction

Actuality

The present research paper is devoted to a very interesting legal category of Civil Law called as an "abuse of right". The institution of abuse of right has its roots coming from Roman law, it was studied by European lawyers starting from XVIII century, and came to Russia and Kyrgyzstan much later. Today this legal institution becomes a subject of interest not only to scholars, but to lawyers practitioners as well, which shows the growing "popularity" of this article in practical application.

So, what is so particular about this topic? Why is it necessary to talk about it? When do we talk about abuse of right?

Even though there are numerous works of scholars and lawyers devoted to this topic, many issues still remain uncovered. The only article that talks about the abuse of right in the Kyrgyz legislation is article 9 of the Civil Code of the Kyrgyz Republic called "Limits on Exercising of Civil Rights". This article, unfortunately, does not provide for the very concept of abuse of right, it lacks clearance concerning its forms, responsibility, and etc. As a result of this ambiguity we have a difficult practical application of this norm. Moreover, because of the absence of the proper understanding of this article judges when deciding cases are left one-on-one with their own discretion.

Abuse of right is also a subject to various disputes among scholars arguing on everything starting from the propriety of the term "abuse of right", the concept of abuse of right, its forms, and finishing with responsibility. Probably because of the existing debates, our legislation still did not come up with the ultimate concept, forms and responsibility of this interesting legal phenomenon.
Abuse of right is all about exercising of personal subjective right that a right holder has. Any person has his own subjective rights, for example, right to build a house, right to open and enterprise, right to listen to the music and many others…

Abuse of right occurs when an individual while realizing his subjective right somehow violates the interests of third parties. The controversial part here is that the behavior of this individual is formally legal; he is not violating the positive law, but objectively harms third parties. Here comes another problematic issue: article 9 of the Civil Code of the Kyrgyz Republic is about the limits of exercising the rights, but in reality, this article says nothing about the limits, it just does not establish them. Because of this it is hard to state that an authorized person has violated the law, since his behavior looks legal. The same situation takes place with the concept of abuse of right, its forms, and responsibility. Every single point of this article needs to be interpreted deeply since there

is no unified approach worked out so far. All these uncovered and problematic issues show that there is a real necessity to have a legal research on this topic.

Taking into consideration circumstances mentioned above the purpose of the present research paper is to thoroughly analyze theoretical and practical application of article 9 of the Civil Code of the Kyrgyz Republic, to find out existing gaps that have not been resolved yet, look for cases of abuse of right in entrepreneurial activity, and suggest the common criteria characterizing the abuse of right as a separate legal category.

The importance of this work is determined by the absence of any sources in the Kyrgyz Republic dedicated to this topic, except court practice. Since our courts do not have the proper understanding of this legal category, the general criteria characterizing the abuse of right that I suggest will help the courts to differentiate between abuse of right and other legal categories.

The part of the work concerning the cases of abuse of right in corporate regulation issues had its approbation in the competition announced by Kalikova & Associates law firm in 2009, where the importance of issues raised in the article was noted and recognized.

Methodology of research.

While working on the present research I have used such methods as deduction, analysis, comparison, systematic approach.

Literature review.

Talking about the sources I used, I need to mention that the majority of sources that I relied on were Russian sources. Unfortunately, I could not find any source about abuse of right in the Kyrgyz Republic, except the court practice that I have taken from legal database.

Normative legal acts that I was permanently working with is the Civil Code of the Kyrgyz Republic, part I and part II, Civil Code of the Russian Federation, the Law of the Kyrgyz Republic "On restriction of monopolistic activity, development and protection of competition"[1].

During the work on the present research paper I have used numerous sources that served as a theoretical basis of my research. These sources are books, commentaries, periodicals, analytical articles, dissertations, and electronic articles that I found in Internet.

With regard to the empirical basis of research, I used court cases of the Kyrgyz Republic and judicial practice of Russian Federation.

Structure of the work

The work consists of introduction, two chapters that make the main body of the work, conclusion, and bibliography.

[1] The Law of the Kyrgyz Republic "On restriction of monopolistic activity, development and protection of competition" from April 15, 1994 № 1487 – XII, last amended by the Law of the Kyrgyz Republic from April 29, 2009 № 134.

The paper is, basically, divided into two big chapters, where the first chapter covers theoretical base of the problem of abuse of right, and the second part that talks about abuse of right in entrepreneurial activity.

So, the first chapter is called “Theoretical aspects of the problem of abuse of right” which is divided into three paragraphs.

The first paragraph discusses, mainly, the problems concerning the propriety of the term “abuse of right”, the problems concerning the concept of abuse of right, its essential elements such as subjective right and its limits, comparative analysis of tort and abuse of right, and finally, the criteria that I underlined as characteristics of abuse of right.

Second paragraph talks about the negative consequences that can happen when a person abuses his right. It covers such issues as nature of denial of judicial protection as a sanction for abuse of right, obligation to reimburse the damages, impossibility of deprival from subjective right as well as forcing to perform some activities as a sanction for abuse of right.

Third paragraph completes the first chapter and is devoted to forms of abuse of right established under article 9 of the Civil Code of the Kyrgyz Republic. This paragraph analyzes three forms of abuse of right which are chikane, abuse of right in other forms, and abuse of right related to competitive issues.

Second chapter of the research paper is written about abuse of right taking place in entrepreneurial activity. It also consists of three paragraphs divided depending on the nature of activities.

First paragraph is talking about abuse of right in corporate relations providing examples of corporate violations in Kyrgyzstan and Russia.

Second paragraph provides for examples of abuse of right in banking activity based on examples of Russian federation.

Eventually, the last paragraph is describing problematic moments concerning contractual relations. Particularly, it is about invalidity of contracts linked to abuse of right, and the analysis of Kyrgyz court cases concerning contractual abuses of right.

In my conclusion I summarize my findings, indicating the problematic legal issues concerning the practical application of the category of abuse of right, its concept and criteria, peculiarities of this legal category in entrepreneurial activity.

Chapter I. Theoretical aspects of the problem of abuse of right in entrepreneurial activity.

§ 1.1. The concept of abuse of right.

Today the institute of abuse of right is not well studied and developed in the legal theory, and this is why its application on practice causes much controversy. In particular, these problems occur because of the absence of the very concept of abuse of right in the theory of law, the lack of qualifying criteria of "other forms" of abuse of right, as well as the absence of concrete boundaries which would draw the line between an individual's exercising of subjective right and violation of third parties' interests.

Meanwhile, there is a considerable number of works of different scholars and lawyers practitioners devoted to this topic, so to say that this institution has not been studied, is unnecessary, but despite this, many issues still remain unresolved.

So what shall we understand under the abuse of right?

There are many disputes in legal theory about the propriety of the term "abuse of right". Some scholars argue that the very notion of "abuse of right" is controversial itself , because in their view, since a person in his behavior has gone beyond the content given to him by a subjective right, to that extent he cannot be regarded as the person exercising his right[2].

Thus, according to M. Agarkov, the exercise of a right cannot be wrongful. In particular, he wrote that those actions that are called as abuse of right, in fact, are committed outside the limits of the right[3]. M.V. Samoilova noted that it is impossible to have a wrongful exercise of the right[4] O.A. Porotikova objecting to them, writes that "in terms of the rules of linguistic logic " abuse of right " does not contain internal contradictions ... Shelf anything to harm yourself or others means to draw a good tool for a bad purpose."[5]

Also in her paper "The problem of abuse of subjective civil right" O.A. Porotikova suggests that the internal contradiction contained in that term gives food for various speculations. In particular, as an example, she leads the views of different authors on the application of the term "abuse of right". For example, some authors argue, on the impossiblity to abuse something that is given to you as a legal possibility. Others say, to abuse means to act unlawfully, and then is it

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[2] GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 40.

[3] Agarkov M.M. *Problema Zloupotrebleniya Pravom v Sovetskom Grazhdanskom Prave, 6 IZVESTIYA AN SSSR 427(1946).* (Quotation is taken from GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 40)

[4] Samoilova M.V. Pravo *lichnoy sobstvennosti grazhdan* SSSR: Avtoref. dis... kand. yurid. nauk. L., 1965. P. 11. (Quotation is taken from GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 40)

[5] Porotikova O.A. *Problema zloupotrebleniya subyektivnym grazhdanskim pravom*. P. 18.

possible to have a wrongful subjective right?[6] Let me disagree with this position, because I believe that abuse of right is not about the wrongful subjective right as such. The subjective right in content, presenting a range of rights, is a measure of freedom of a person that initially does not contain anything illegal. This wrongful conduct of a person, which appears in abuse of right, is manifested not in the content of the subjective right, but at the stage of its exercising. Based on this, I think that views of those authors who explain the abuse of right, through the content of a subjective right, and not through its exercising are misleading. Apparently, these authors consider the subjective right as something extremely positive, and therefore it is not possible, in their view, to abuse the right that is given to a person by law. In fact, according to O.A.Porotikova, subjective civil right in the process of its exercising, without changing the undeniably positive content, is well suited for the role of a mean that an individual may use to harm others[7].

M.I. Baru, on the contrary, believes that the term "abuse of right" has a right to exist since it illustrates such relationships existing in reality, where a holder of right allows unauthorized use of his right, but it "always looks as based on a subjective right"[8].

One group denies the legitimacy of the term of "abuse of right", completely replacing it with the notion of "tort", while others believe that where there is an offense, there is no place for abuse of right; others consider abuse of right and tort as similar legal categories[9]. Another group of authors considers it acceptable to use the term "abuse of right" only for scientific needs, believing that its inclusion into legislation would be superfluous. This point of view is motivated, in particular, by the fact that "abuse of civil rights is exhaustively governed by the rules of contractual liability."[10] In my opinion, such view over the problem of abuse of right is more than narrow. If to follow the logic of these authors, the abuse of right occurs only in contractual relationships, while, in fact, abuse of right arises in different spheres, which are not always governed by the rules of contractual liability.

Another view was expressed by N.S. Malein, who questioned the necessity of this legal institution. In his opinion, abuse of right covers those cases where an authorized person acts within the boundaries of his subjective right, but uses such forms of its realization that somehow go beyond the limits on the exercise of the rights established by law. The problem here is that there is a contradiction between "whether a person acts within the boundaries of a subjective

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[6] Porotikova O.A. *Problema zloupotrebleniya subyektivnym grazhdanskim pravom*. P. 18.
[7] *Id.*
[8] Baru M.I., *O st.1 Grazhdanskogo Kodeksa* . 12, SOVETSKOYE GOSUDARSTVO I PRAVO 118 (1958). (Quotation is taken from GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 40)
[9] Yudin A.V. *Zloupotrebleniye grazhdanskimi pravami v grazhdanskom sudoproizvodstve*//provided by "Garant" IS.
[10] YEMELYANOV V.I. *Razumnost, dobrosovestnost, nezloupotreblenoye grazhdanskimi pravami*.P.60.

right belonging to him" or still "goes beyond the limits established by law". If the first one takes place, it follows that the person is not abusing the right, in the case of the second, if the person goes beyond the limits established by law, a person commits a tort[11]. Not seeing it possible to merge these two cases, the author believes that the idea of abuse of right has not received any convincing justification in modern literature.

At the same time, I believe that the term "abuse of right" has a right to exist, since it describes the phenomenon in which the authorized person uses his subjective right in order abuse and cause harm to the interests of third parties. It follows, that it is possible to abuse the subjective right , which no doubt, carries only positive character. I sympathize O.A.Porotikova in the sense that in elucidating the concept of “abuse of right” we should not “break” the term “abuse of right” and consider separately “evil” and “right” since the abuse of right is a definite act which is necessary to explain by the presence of the specific defining characteristics, and not through the linguistic and philosophical interpretation[12].

In the light of existing controversies about the validity of the term "abuse of right", yet most authors acknowledge the special role of the category of abuse of right and necessity in its development; some of these authors interpret the concept of this category too broadly, assigning to it, not only abuse of any subjective right, but abuse of power as well[13].

But, in addition to the debates about the correct application of the term "abuse of right", there are also many disputes among scholars and practitioners regarding the definition of the very concept of such an interesting legal institution as "abuse of right". In light of the existing differences in opinions I suggest to consider the various definitions of the term "abuse of right", developed by scholars.

One of the first scholars who proposed its definition of abuse of right was Gribanov V.P. He understood abuse of right as "a special type of a tort committed by a person empowered in the exercise of right belonging to him, associated with the use of specific unlawful forms falling within a permitted general type of behavior."[14] Basically, he meant that abuse of right is the behavior of an authorized person that formally looks legal, but in reality such a conduct of the authorized party violates the interests of third persons.

Quite a big number of scholars identify abuse of right to a special type of a tort. Thus, Lomakin D. argues that abuse of right is a special type of tort, since the commission of acts that

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[11] Tokarev D. *O Zloupotreblenii Pravom v Otnosheniyah KommercheskikhOorganizatcii,* 4 KHOZYAISTVO I PRAVO 126 (2008).

[12]Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim* Pravom//provided by “Garant” IS.

[13] MALINOVSKII A.A., *Zloupotrebleniye pravom*. P. 39.

[14] GRIBANOV V.P.PREDELY OSUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P.63.

fall under this qualification is nothing more than a violation of statutory prohibitions[15]. O. Sadikov defined abuse of right as a tort (which is a non-contractual breach), and as a breach of terms of an early signed contract or of a unilateral obligation[16]. But, despite the big number of supporters[17] of this concept, there are scholars[18] (lawyers practitioners as well) who do not identify abuse of right to torts. Due to the fact that this issue plays a crucial role in the definition of abuse of right, I consider it necessary to discuss both positions.

I will start with the position of those authors who do not identify abuse of right to torts. V.A.Belov, maintaining this position, challenged the opinion, proposed by I.A. Pokrovsky, who said that "abuse of right is nothing more but a tort."[19]In particular, V.A. Belov explained that the whole complexity of the category of abuse of right is precisely the fact that a person acting under his subjective right formally does not violate another person's rights. Exactly this feature makes abuse of right distinguishable from other categories: since a person does not step over the established limits of his right, and operates within them, then the injury caused by abuse of right is a consequence of lawful actions and, therefore, cannot be a tort. Consequently, the scholar notes that he harm caused by a tort and the harm resulting from abuse of right have a different nature[20].

Not agreeing with this view, opponents prove the identity of a tort and abuse of right through the analysis of the constituent elements of a tort. Thus, any tort must contain the following main elements: wrongfulness of the act, the presence of damage, causal relation of a wrongful act with injury caused, and the guilt of an injurer. For a more convenient method of analysis I suggest to examine the elements of tort through subject, object, subjective side and objective side, respectively.

Talking on the subject, it should be borne in mind that only an authorized person can be considered as a subject of abuse of right, who possesses some definite subjective right. Abuse of right can only take place in the abuse of the own, and not someone else's subjective right. This moment is a significant one because there are cases in practice where courts refuse to qualify actions of a person as abuse of right, if it was established clearly that the person did not actually abuse his right, but just was not fulfilling his duties[21].

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[15] Lomakin D., *Ot Korporativnogo Interesa Cherez Zloupotrebleniye Korporativnum Pravom k Korporativnomu Sporu*, 2 KORPORATIVNYI YURIST (2006).

[16] Sadikov O,. *Zloupotrebleniye Pravom v Grazhdanskom kodekse Rossii*, 2 KHOZYAISTVO I PRAVO 38 (2002).

[17] Porotikova O.A., Yatcenko T.S., Gribanov V.P., Izbrekht P. and many others.

[18] Belov V.A., Ibragimova M.V. and others.

[19] BELOV V.A., AKTUALNYYE PROBLEMY GRAZHDANSKOGO PRAVA (2002) .P. 462.

[20] *Id.*

[21] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom*. P. 63.

This issue was also raised in the draft Concept on improvement of the general provisions of the Civil Code of the Russian Federation, where it was suggested that the Russian article about the limits of exercising civil rights was amended with inadmissibility of abusing the duties[22]. Meanwhile, this draft Concept provides no clarification on that proposal.

The mere possibility of abusing the duties is disputed by scholars. Thus, commenting on a draft Concept Prikhodko, in my opinion, correctly pointed out that it is hardly possible to abuse a duty, since the duties are either performed or not performed, or performed improperly. A person, who has certain duties, has no right not to execute them, and this is why he cannot abuse them[23]. Moreover, the article in question refers only to cases of abuse of right, and there is nothing mentioned about the abuse of duties. I believe that there is no need for such amendment for one more reason: cases where a person improperly performs his duties exhaustively explain why the obligation was not fulfilled, and it is connected with other external or internal factors, but certainly not with abuse of right for performance of duties, which simply does not exist. Duty is always understood as something mandatory which means that a person who has undertaken the obligation should take certain actions in its execution, it "should" and therefore has no right not to execute it.

When interest performs as an object of infringement, in order to recognize the exercising of right as illegal, it is necessary that this interest is directly protected by normative legal acts. Otherwise, the actions of an authorized person shall not be deemed as illegal[24].

The most difficult issue is the objective side. Those supporters who identify abuse of right to torts consider the actions of an authorized person as illegal. The behavior is illegal when it violates the prohibitions imposed by the rule of law[25]. The prohibitions in the case of abuse of right must be referred to the limits on exercise of civil rights, established in article 9 of the Civil Code of the Kyrgyz Republic, which, by the way, are not defined at all. In the situation of abuse of right the actions of an authorized person are formally corresponding to the exercising of right, where “formal correspondence" implies correspondence to legal norms. In our case, the actions of individuals, are consistent with the legal norms, and therefore do not violate any prohibitions. That is why, I think, it is inadmissible to equate abuse of right with torts. Any tort is always

[22] Point 2.3. Proekta o Koncepcii Sovershenstvovaniya Obshikh Polozhenii Grazhdanskogo Kodeksa Rossiyskoy Federacii.
[23] Prikhodko I., *Koncepciya Razvitiya Grazhdanskogo Zakonodatelstva: Spornyye I Nereshennyye Voprosy*, 9 KHOZAISTVO I PRAVO 13 (2009).
[24] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Gazhdanskim Pravom*. P. 63.
[25] VENGEROV A.B., TEORIYA GOSUDARSTVA I PRAVA (2000). P. 463.

directly[26] violates the established bans, and there can be no doubts, because there is the presence of some definite interest, protected by law, there is a ban on outrages upon this interest, and accordingly, any actions aimed at the violation of this prohibition would be unlawful.

A little different situation occurs in the abuse of right: there is no direct violation of the prohibition, because the person is exercising his subjective right in his own will and in his own interest, which is also protected by law. Moreover, for the presence of wrongfulness there must be the breach of a specific limit. It was noted earlier that the content of article 9 of the Civil Code of the Kyrgyz Republic does not provide any clear limit, and then we can fairly raise the question: "Whether it is possible to recognize the actions of an authorized person as wrongful if the specific legal norm does not set any clear limits, going beyond which would result in abuse of right?". I think no, because an authorized person may not even know that while exercising his subjective right, he somehow crossed the line. Until the boundary limits are clearly established by law or limits on exercise of civil rights are clearly defined in article 9, I think, it is incorrect to attribute actions of an individual to illegal ones.

Further, any tort constitutes a wrongful act which may be exercised either in the form of action or inaction. As for the abuse of right, our legislation prohibits the exercising of actions aimed at causing harm and does not mention anything about inaction. Consequently, it is wrong to recognize a person's inaction as abuse of right. For example, there were cases on practice when the requirements of a creditor to a debtor concerning the return of loan were established as abuse of right on the basis that the creditor did not ask the return of his loan immediately after the breach took place. The court said that the creditor's actions performed abuse of rights since , in the view of the court, the creditor on purpose did not sue the debtor in order to claim for more money. I disagree with such a decision of the court because the creditor's behavior makes inaction, and no action. Also, there is no requirement that a creditor immediately sues the debtor, since both parties are aware about their obligations and the debtor knew in advance about forfeit for breach of duty to return the loan on time. The parties are in equal position and there can be no abuse of right performed as in inaction by creditor, since it is a subjective right of a creditor to ask for return of his money at any time he wants. The same point of view was proposed by O.A. Porotikova, who explained that in case of inaction a person refuses to exercise his right, which nevertheless does not entail the termination of right. If a person refused to

[26] Izbrekht P.A., *Zloupotrebleniye Grazhdanskimi Pravami v Sfere Predprinimatelskoi Deyatelnosti* (avtoreferat dissertacii na soiskaniye uchenoi stepeni kandidata yuridicheskih nauk) (2005), available at http://www.law.edu.ru/script/cntSource.asp?cntID=100079741.

exercise his right, then there is no possibility to cause harm by means of the right, accordingly, no abuse of right can take place in such situation[27]. Moreover, if taken literally, the term "abuse of right", is understood as the use of law for evil, the verb "use" already implies nothing more but an action.

Due to the fact that the limits are hardly determinable, O.A.Porotikova proposes to use harm caused to third parties as an interim indicator of wrongfulness (except the cases where causing injury is permitted by law)[28].

An essential indicator of any tort is the presence of the harm caused. Harm can be either proprietary or non-property, taking place in contractual and non-contractual relationships as well. In abuse of right, in the case of chikane, there is a ban on exercising of actions aimed exclusively at causing harm to third parties. The matter is about the intention to cause harm, but the article does not necessarily presuppose the existence of harm, although there is a duty to compensate the damage[29].

Although that article only talks about the intention to cause harm, A. Lukyantsev believes that the presence of harm is required. In his view, if an authorized person was acting with only aim to cause harm to another person, and for some reason this aim was not achieved, his intentions remained known only to him. Consequently, in order to protect his violated right the injured person of abuse of right must prove the existence of harm[30]. Such point of view cannot be fully supported by me. The first reason why, is that the rule of law speaks only about an intention to harm which, in turn, implies the possibility of the injured persons to sue for the protection of their rights already at this point. The second reason follows from the first and is connected with the purpose and nature of the rules prohibiting the abuse of right. The article 9 was included into the Civil Code of the Kyrgyz Republic with the purpose to protect the rights of injured persons, to prevent situations of abuses of rights, and is of a particular preventive nature. If we follow the logic of the author, this preventive mechanism would be "paralyzed" if injured persons will be able to file suits only after the harm is caused. It turns out that the injured person, already knowing that his rights were violated by actions of an authorized person must wait until there is the mandatory presence of harm, which is wrong, in my opinion.

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[27] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Gazhdanskim Pravom//*provided in "Garant" IS.

[28] *Id.*

[29] The question concerning the compensation of damages is discussed in paragraph 1.2. which is devoted to consequences of abuse of right.

[30] Lukyancev A., Yatcenko T., *Uchet Fakta Zloupotrebleniya pravom Pri Grazhdansko-Pravovoq Otvetstvennosti v Sfere Predprinimatelskoy Deyatelnosti*, 8 KHOZYAISTVO I PRAVO 123 (2003).

Accordingly, the presence of harm is not a mandatory criterion in the abuse of right (damage may be caused by lawful actions, but its presence is not required), which, however, is a mandatory criterion for any tort.

Attention should also be paid to remarks made by V.A.Belov concerning the harm that emanates from abuse of right. He said that the harm caused in contractual relationships cannot be eliminated by repair mechanisms of contractual law, because there is no violation of the rights and duties, since the subject is acting within the boundaries of his rights. According to V.A.Belov, there is a paradoxical situation: the result of abuse of rights is harmful, but it does not entail a violation of the rights and duties. Further, the author continues, such harm cannot be considered, as a consequence of tort also, since tort is, in fact, the actual act, carried out outside the law, while the harm resulting from the abuse of right, has a different character. Here, the actions of holders of right are not of factual, but of legal nature[31].

Subjective aspect of torts consists of guilt, which comes in the form of intent or negligence. Both of these forms of guilt are present in the abuse of right. In particular, depending on the goals that a person, abusing subjective right, is going to achieve the law determines the forms of abuse of right. Intent as a form of guilt is manifested as the intent of an authorized person to cause harm to a third party (this may be a case of chikane), and negligence can result in that a person abusing the law, may not even know about the negative character of his acts. It turns out that guilt is always takes place both in a tort and in abuse of right.

Thus, having analyzed the elements of a tort and having compared them to abuse of right, I concluded that abuse of right is not a tort, as the abuse of right is deprived of the element of wrongfulness, and there is no mandatory requirement of having harm. The absence of even one of the elements excludes the presence of the tort. The peculiarity of this institution, which distinguishes it from the tort, lays in the legality of actions of an authorized person, which formally do not violate the limits of exercising the rights. In the case of the tort there is nothing more but a violation of formal prohibitions, which is not taking place in the abuse of right. Furthermore, since Article 9 of the Civil Code of the Kyrgyz Republic does not explain any of the limits, talking about their violation seems to be wrong, because how can you violate something that it is not clearly defined in the law?

As mentioned earlier, the category of abuse of right is embedded in the face of its subjective right. Article 9 of the Civil Code of the Kyrgyz Republic says that actions of citizens and legal entities intended exclusively to cause harm to another person, as well as other abuses shall not be permitted. Although the disposition of this article does not allow identifying the concept of

- [31] BELOV V.A., AKTUALNYYE PROBLEMY GRAZHDANSKOGO PRAVA (2002) .P. 463-464.

abuse of right, it nevertheless allows discerning the principle of non-abuse of right. It is clear from the meaning of Article 9 that it is possible to abuse the right only when an authorized person exercises his subjective right.

Legal regulation of the principle of non-abuse of right is justified primarily by the very social nature of subjective rights. What shall we understand under the subjective right?[32] O.A. Porotikova determines the subjective right as the scope of personal freedom belonging to a participant of civil relations, the content of which gives an opportunity to act independently, to require definite actions from others, and if necessary to apply to jurisdictional authorities for protection of the interests. In his book "Limits of exercising and protection of civil rights" V.P. Gribanov pointed out that any subjective right performs a social value just because only as it can be exercised to meet the material and cultural needs of the holder of a right[33]. Point 2 of Article 2 of the Civil Code of the Kyrgyz Republic says that citizens and legal entities acquire and exercise their civil rights in their own free will and in their own interest. R. Ihering, the founder of the theory of interest, determined a right as the action of strong will, where the will, in turn, is always moved by interest. In this regard, I should also mention about the concept of subjective right proposed by G.S. Gambarov who understood subjective right as a protected interest in the form of providing protection initiatives. Thus, the subjective right and the interest are two inextricably linked elements[34]. If a person acts in the absence of interest, this action goes beyond the exercise of civil rights and should be qualified as abuse of right[35]. This position seems unconvincing to me, since it is not clear what is meant under "absence of interest". If an authorized person knowingly commits actions infringing the rights and interests of third parties (abuses his rights) everything that motivates him to do so is nothing but a personal interest (sort of personal gain) which is negative in the present case. Consequently, there is the presence of interest in this situation is.

Thus, to say that, in the case of abusing personal subjective right, the person acts in the absence of interest, while satisfying personal goals, in my opinion, is erroneous. Different situation takes place when an authorized person is not aware of the wrongfulness of his actions…If we assume that the author equates interest with the destination of right: in this case the interest, of course, deals only with the positive side and, consequently, if a person commits

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[32] GRIBANOV V.P.PREDELY OSUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 17.

[33] GRIBANOV V.P.PREDELY OSUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 17..

[34] Vasilyev Yu.S. *Vzaimodeistbiye Prava i Morali*, 11 SOVETSKOYE GOSUDARSTVO I PRAVO 20 (1966). (quotation was taken from Radchenko S.D. Ponyatie *I sushnost zloupotrebleniya subyektivnym grazhdansim pravom*, 11 JURNAL ROSSIISKOGO PRAVA (2005).

[35] Zakharov Yu.Yi. *Interes v Osushestvlenii Grazhdanskih Prav*, 7 ARBITRAZHNAYA PRAKTIKA 17 (2003). (quotation was taken from Radchenko S.D. Ponyatie *I sushnost zloupotrebleniya subyektivnym grazhdansim pravom*, 11 JURNAL ROSSIISKOGO PRAVA (2005).

an action not according to the destination of his right, we can talk about abuse of right in this situation. But if the interest is identical to such material element, as profit or personal gain, then the proposed formula of abuse of right can not be supported by me. Theory of R. Ihering is questioned by O.A. Porotikova also, who concludes that under the proposed theory, the absence of an interest will result in the termination of subjective rights, while practice showed that there are examples where a person possesses a subjective right, without having personal interest[36].

The main problem or the danger about abuse of right is that a person, while exercising of his subjective right, violates the interests of third parties. Moreover, his actions seem perfectly legitimate, and it is quite difficult or even sometimes impossible to prove the existence of any intent in the actions of abusers.

Subjective right, in the view of professor S.S.Alexeev, must be understood as a measure of permissible conduct, ensured by legal responsibilities of others, and directed to satisfy the interests of an authorized person[37]. This definition seems fair to me, because S.S.Alekseev while defining the concept of subjective right did not limit it to the interests of the authorized person only, the scope that he looked at was much bigger, because he explained the subjective right through the legal responsibilities of others. The provided definition leads us to the need to consider the limits of civil rights. The subjective right of one person can not be unlimited. So, in order to provide the normal realization of individual's right in society it is necessary to oblige every subject to act within the permissible limits and not to violate the freedom and interests of others.

V.P.Gribanov said that the boundaries constitute an inherent part of any subjective right, since in the absence of such boundaries or limits the right transforms into its opposite - a arbitrariness, and thus ceases to be the right[38]. Developing his idea further, V.P.Gribanov wrote that the law aims to guarantee and protect the legal interests of society as a whole, the rights and interests of other citizens and organizations that may be affected by the exercising of the right by an authorized person[39]. Consequently, the state performs as the regulator, which by means of legal instruments influences the subjects of law, setting out certain limits on the exercise of their rights.

The limits on exercise of civil rights are established by the legislature to fulfill such tasks as provision of effective meet of the needs of all subjects of civil relations, avoidance of anti-social and negative behavior, and the encouragement of legal behavior of authorized persons[40].

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[36] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by "Garant" IS.
[37] ALEKSEEV S.S., OBSHAYA TEORIYA PRAVA (1982). P. 114.
[38] GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 18.
[39] *Id.*
[40] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by "Garant" IS.

The issue concerning the limits of exercising of civil rights in the theory of law also gives rise to numerous debates among scholars. The problem is that existing Kyrgyz legislation prohibits the abuse of right but does not define specific limits of subjective rights. For example, Article 9 of the Civil Code is called "The limits on exercise of civil rights", however, the content of the article does not entirely correspond to its name. In particular, Article 9 lists only the forms of abuse of right, without mentioning any of the limits of abuse of right, as it is supposed by the name of the article.

In my opinion, this point is a key one, since the whole problem of abuse of right is reduced to the limits on exercise of the right. Arguing that the abuse of right occurs when a person goes beyond his own subjective right or acts within the limits of his rights, it is necessary to clearly understand what is the limit of the right in question, so as to accurately determine how to characterize the actions of an authorized persons in every single case.

During the Soviet era, many scholars considered the limits on the exercise of the civil rights as exercising of the right in accordance with its purpose or destination. Thus, according to professor O.S. Ioffe, "under the limits of civil rights we need to understand those limits arising [41]from their purpose ..."[42] Professor S.N. Bratus also argued that the limits of exercising the civil right is "an exercise of the right, which corresponds to its destination ..."[43]

Scholar V.P.Gribanov, on the contrary, disagrees with such understanding of the limits on exercising the rights and says that the limits of civil rights should not be restricted only to the destination of the right, they are much broader and include, in addition to the destination of the right other restrictions as well. In this regard, the scholar offers his own classification of limits, which includes subjective, time restrictions, restrictions relating to the manner of exercising and purpose of the right.

However, V.P.Gribanov, does not deny the fact that the destination of the right is one of the most important criteria of the limits of rights, but by no means not the only one. In his opinion, capacity of a person, terms and means of exercising the rights are other appropriate restrictions that must be taken into consideration too.

In my opinion, the proposed restrictions do not reflect the very essence of the extent of the limits of the rights that are necessary for qualification of the acts exactly as abuse of right. There is no doubt that subjective, time or subject restrictions act as some constraints, but they are generally recognized and nobody disputes their nature. For example, in order to become a party

[41] Quotation was taken from GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 48.
[42] *Id.*
[43] GRIBANOV V.P.PREDELY SUSHESTVLENIYA I ZASHITY GRAZHDANSKIKH PRAV (1972). P. 49.

to a transaction a person must be capable of understanding his actions, in order to fulfill the contractual obligations he must follow the terms and provisions of the contract, and etc. These are those conditions that serve as an inalienable requirement for any legal relation, and this factor does not allow us to distinguish them among other limits. For this reason, determination of an action as abuse of right requires more specific concrete limitations.

The classification of limits proposed by V.P.Gribanov has been criticized by O.A. Porotikova. She argues that in such an approach, "there are no clear criteria that would summarize or distinguish these limits among others, there is no necessary relationship between a group of limits and legal consequences of non-compliance with them, and there is no priority of one group of limits over another"[44]. In the view of the author, the classification of limits of the rights should not include those limits (subject, time and subjective limitations), which by their nature, already serve as features of the content of the right[45]. This point of view, I think, deserves attention since the content of law already includes such boundaries as subject, object, and etc. O.A. Porotikova examines the limits of exercising the rights as a type of legal incentives, directed to effectively stimulate the lawful conduct of holders of rights.

In addition, she proposes her own classification of limits, where she divides all the limits into two classes: universal and special. Universal class of limits includes those limits that apply to all subjects of civil relations regardless of the type of the subjective right they are exercising, and therefore have a universal character (universality). These limits include the rights of third parties, the interests of third parties, and the remedies belonging to the person. The special limits are considered by O.A. Porotikova as those limits, that have a close relationship with a type of relation, where the right is being exercised, depending on the specific content of the concrete subjective right. This class includes such limits, as destination of the right, fairness and reasonableness, the means and methods of the right exercising.

Despite the presence of various opinions concerning the limits on exercising of the right, I think, that still destination criterion is the fundamental one, because ideally an authorized person must use his subjective right in good manner. Each subjective right has its own aim, content, and when a person exercises his right he should have the interest to achieve exactly that goal that was meant in subjective right, and this actually makes the destination, in my view. Unfortunately, on practice it is not that easy to establish the limits for each right, and therefore it is hard to prove abuse of right using destination criteria. However, comparing to other limits destination criteria seems to be more universally applied, but I should say that the science of law needs further deep of study of limits of rights, since now they are indistinguishable.

[44] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by “Garant” IS.
[45] *Id. at 29.*

Having concluded that the abuse of right does not fully apply neither to legal acts, nor to the torts, I have offered the following characterizing criteria of the legal category of "abuse of right".

First is that abuse of right can take place when there is an authorized person, who possesses some definite subjective right. It is possible to abuse the right only, and in no way it is possible to abuse obligations.

Second, it is possible to abuse the right only in the process of exercising the subjective right. It has nothing to do with the content of subjective rights, but namely with its exercising.

Third, the abuse of the right is always represented as action, and not as inaction.

Fourth, the abuse of right occurs when exercising of a subjective right by an authorized person looks formally legal but is committed with intent to cause harm to others.

Fifth, the actions of an authorized person can be motivated either by intent or negligence.

Sixth, the harm is a possible, but not the necessary condition of abuse of right.

The ongoing disputes arising about the legal category of abuse of right underline the importance of legal research that is carried out in this sphere. The norm prohibiting abuse of right regulates a type of particular behavior, directly connected with exercising of subjective rights, that exists in our society. Since it is possible to abuse the subjective right and cause harm to other people it is necessary to have a clear understanding of this phenomenon in order to prevent future attempts of such abuses. It follows that our legislation needs to clarify certain provisions of article 9 of the Civil Code of the Kyrgyz Republic with regard to the definition and forms of abuse of right. Such clarification will contribute much to the judicial system of the Kyrgyz Republic, since it will substantially decrease the amount of judicial mistakes in the cases on abuse of right.

I extracted the above mentioned criteria from the wording of abuse of right written in point 1 of article 9 of the Civil Code of the Kyrgyz Republic. Based on my findings I can define abuse of right as the actions performed by an authorized person, who exercises his subjective right, in such a way that his behavior being formally legal violates interests of other people. Such actions can be committed either by intent or negligence. So, if the category of abuse of right due to its particular nature can not be considered as fully legal nor it can be equated to torts, the reasonable question that arises is the consequences… Since subjective rights cannot be unlimited and people abuse their rights there should be mechanisms to influence such actions. What are the consequences for abusing the personal subjective right? Do they differ from other negative consequences that a state usually imposes? What is the nature of the consequences for abuse of right?

§ 1.2. Consequences of abuse of right

Not less interesting in this legal category is the issue of consequences of abuse of right. Due to the fact that the current legislation does not provide a legal definition, criteria of abuse of rights, and does not determine the specific limits of civil rights, there are problems with the qualification consequences of abuse of law in theory and in practice. In particular, disputes exist around the qualification of such a particular sanction for abuse of right, as a denial of judicial protection. In addition, scholars also address the following issues: Whether the denial in judicial protection can be considered as a measure of responsibility? Whether it is possible to refer the sanction for abuse of right to a relatively-certain sanctions? Whether it is possible to force a person who abused the right, to perform any action and whether it will be regarded as a measure of responsibility? Whether the denial in judicial protection is similar to deprival of subjective right?

First and foremost, I consider it necessary to address the question of whether the application of denial in judicial protection (dismissal of a claim) is a right or duty of the court. Paragraph 3 of Article 9 of the Civil Code of the Kyrgyz Republic establishes that the court may deny an individual's protection of civil rights, if a person has committed chikane, abuse of rights in other forms, or actions that resulted in restriction of competition or the abuse of dominant market position. The inaccuracy in the wording of the article is caused by the phrase "the court **may** deny", and here fairly raises the question: "What is the scope of powers that a court has? Is it, in fact, the right or the duty of the court? The verb "may" indicates that the court has a choice either to deny or not the protection of a person's rights, and in this case, the judges would act arbitrarily, guided only by their own judicial discretion. A literal interpretation of the wording suggests exactly this version, otherwise the article would have clearly stated "the court must or should deny".

In this regard, O.A. Porotikova, in particular, wrote that the denial of judicial protection is not a mandatory act for judges even if the court establishes that there is a factual presence of a tort in the actions of abuser. Also, she states that such wording of this legal norm essentially means the absence of any sanctions in for abuse of right[46].

However, I am standing for the opinion of those authors who are inclined to believe that this article of the Civil Code has a bad wording, which is the matter of a legal technique. If you follow the literal interpretation of the article, it turns out that the person, who abused the right, may stay unpunished, even after the court declares his actions as unlawful[47]. This must be

[46] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom //*provided by "Garant" IS.

[47] Quotation was taken from V.V.Pashin, *Posledstviya Zloupotrebleniya Pravom*, 12 ZAKONODATELSTVO (2006).

wrong, because in such circumstances, the court loses its main purpose which is to render justice. If the court establishes the fact of abuse of right, the court must deny such person a protection of his rights and there can be no question of choice.

Furthermore, Article 9 of the Civil Code of the Kyrgyz Republic is not the only one in which has perceived a so-called "judicial initiative"[48].

Truly, no less interesting is the position of O. Sadikov, claiming that sanction for abuse of right in the form of denial of judicial protection allows the court to act more flexibly. Namely, the court may partially or even fully provide the disputing party a remedy if, for example, it is established that abuse of right (except chikane) was partially caused by actions of the party, referring to abuse of right.

Moreover, the author says that in such cases of abuse of right the court recognizes the existence of "non-existent" or "excused" abuse of right, not involving any negative impact on the person who abused the right[49]. This position cannot be supported by me entirely. I agree with O. Sadikov in the place where the court may refuse to protect the right partially, on the basis of that, that the person simply exercises his subjective right, and due to the fact that the limits of exercising the rights are quite vague, and the other person contributed to the abuse, the court may consider these as "mitigating" circumstances. However, I cannot agree with the part, where the court recognizes the existence of "non-existent" or "excused" abuse of rights, which could later give the person a complete defense in court. In particular, applying the "non-existent" or "excused" abuse of right the author by the way of a "set-off" excludes an abuse of right as such(since the recognition of "non-existent" abuse of right is tantamount to saying that if it never happened), but from such a set-off , the fact of abuse of right will not disappear. Perhaps the author did not accurately set out his thoughts, trying to justify the exemption from the sanctions of the person who abused the right. It must be stressed out that such cases are only possible in other forms of abuse of right, as there is no direct intent of inflicting harm, and accordingly, the person might not even realize that his actions are harmful to others.

What constitutes a denial of judicial protection of the rights? Some scholars talk about the dismissal of claim. Paragraph 3 of Article 9 of the Civil Code of the Kyrgyz Republic read as follows: if a person fails to comply with the requirement of non-abuse of right principle, the

[48] Article 320 of the Civil Code of the Kyrgyz Republic establishes that if the sum of forfeit is too disproportionate to the damages caused the court may reduce the award of penalty. The meaning of this article is to prevent unjust enrichment of one party at the expense of another, as the amount of liability shall be the size of the damage caused. Right in this regard V.M.Pashin and S.D.Radchenko who argue that it is unlikely that a court after establishing the fact of abuse o right may not reduce the amount of excessive penalty due to its reasonableness. Thus, I came to the conclusion that dismissal of claim in such cases should not be considered otherwise as the duty of the court.

[49] Sadikov O,. *Zloupotrebleniye Pravom v Grazhdanskom Kodekse Rossii*, 2 KHOZYAISTVO I PRAVO 46 (2002).

court may deny protection of an individual's civil rights. Denial of judicial protection of the rights (and not only dismissal of claim) assumes that a sanction could be applied both to the plaintiff that abused his right and applied to the court and the defendant, abusing his right, who was sued by the plaintiff-victim. O.A. Porotikova pointed out that in narrow understanding of the sanction, in order to deny a judicial protection there must be a prior recourse to the courts of the abuser himself, and then the injured person would have to wait for a court proceeding initiated by the injurer[50].

Such situations must not take place, because the injured person should be entitled to the protection of his rights too and, consequently, apply to the court against an authorized person. Both the plaintiff and the defendant have an equal opportunity to protect their rights. If the plaintiff is an authorized person, the court needs to determine whether plaintiff's actions constitute improper exercise of the right, and if it establishes such a fact the court must not satisfy the claims of that person on the application of one of the remedies listed in Article 11 of the Civil Code of the Kyrgyz Republic, that is to deny the claim. If the plaintiff is presented by the injured party, then when making a decision, the court will not take into consideration the objections of the defendant (an authorized person) if it establishes the case of abuse of right.

Another problem with abuse of right is that when making decisions judges are ofthe left one-on-one with their own discretion. The resolution of the Plenum of the Supreme Court and the Plenum of the Supreme Arbitration Court of the Russian Federation from July 1, 1996 № 6.8 "On some matters relating to the application of the Civil Code of the Russian Federation" stated: when making a decision it should be borne in mind that denial of judicial protection of rights is permitted only in cases where the materials of the case indicate a citizen's commitment of an action that can be qualified as abuse of right, in particular, actions that are intended to cause harm to others.

In the reasoning part of a decision there must be given reasons for the qualification of plaintiff's actions as abuse of right (point 5).
Note concerning the listing of reasons is a good remark, although limited for some reasons only in relation to the plaintiff.

Similar problems exist in the judicial system of the Kyrgyz Republic. It should be noted that the number of cases with the use of Article 9 of the Civil Code of the Kyrgyz Republic is not big, but based on the available cases it can be concluded that the judges in making their decisions do not provide for the grounds that would explain why they used article 9.

[50] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by "Garant" IS.

Considering the nature of denial of judicial protection of rights, certain scholars argued that this sanction must be considered as a relatively-certain sanction. Given that this view is not shared by all scholars, I propose to analyze the sanction in the form of denial of judicial protection.

In theory, a legal norm has three constituent elements: a hypothesis, a disposition and a sanction. Sanction is a part of the legal norm, which indicates the consequences of its breach or improper performance, and provides measures of state influence on its violators[51]. Sanctions, in turn, are either absolutely certain and relatively certain or alternative. If a sanction has precise instructions on what penalties should be imposed on offenders, there is an absolutely certain sanction; if for a committed offense the sanction involves application of different measures of state influence, taking into consideration the gravity of the offense, the offender and other circumstances, it is referred to relatively certain sanctions; and finally, the sanction that alleges the possibility of public authorities to choose one of these coercive measures, then we have an alternative sanction[52].

From the definition of a relatively certain sanction it follows that it should contain certain indicator (amount of fines or duration of time period), which would express the measure, within which the judges may select one. For example, violation of the border crossing regime of the Kyrgyz Republic carries a warning or the imposition of an administrative fine in the amount of one to three thousand estimates (Article 389-2 of the Administrative Code of the Kyrgyz Republic), i.e., the judge has a certain interval (1-3 thousand RP), within which he may imposes a sentence. In our case, article 9 of the Civil Code of the Kyrgyz Republic contains no any analogous intervals, no other options of impact over a person who abused his right, except the denial of judicial protection.

O.A.Porotikova believes that it is hardly possible to refer the sanction for abuse of right to relatively certain sanctions only because it is not suitable to any of the above types[53]. Consequently, the sanction for abuse of right in the form of denial of judicial protection cannot be attributed to the relatively certain sanctions.

Further, it is necessary to understand whether the denial of judicial protection is a measure of responsibility and whether it is tantamount of depriving an authorized person of his subjective right. Before addressing these issues, it is necessary to identify the concept of legal

[51] LEIST O.E., SANKCII I OTVETSTVENNOST PO SOVETSKOMU PRAVU (1981). (Quotation is given from MARCHENKO M.N., TEORIYA GOSUDARSTVA I PRAVA (2009). P. 576.

[52] MARCHENKO M.N., TEORIYA GOSUDARSTVA I PRAVA (2009). P. 582.

[53] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by "Garant" IS.

responsibility. Legal responsibility is a measure of state coercion, applied to the perpetrator[54]. Civil responsibility refers to a measure of state coercion, involving certain adverse consequences for the offender's property. In addition, these adverse effects are associated with some additional losses, which the offender would not be held in the case of omission of an offense[55]; the responsibility, expressed in additional hardships for the offender. This complementarity is expressed for the offender in compensation for damages: losses, damages, and other property losses in favor of the victim.

The norm of article 9[56] of the Civil Code about the limits on exercise of civil rights of the Kyrgyz Republic is slightly different from the same article of the Russian Civil Code (Article 10 of the Civil Code). In particular, article 9 of the Civil Code of the Kyrgyz Republic provides for the obligation of the person who has abused the right to restore the position and to indemnify the losses who is harmed thereby. Article 10 of the Civil Code of the Russian Federation, on the contrary, says nothing about the way on who and how should pay damages, and whether the damages should be recovered at all. Due to the absence of this provision, Russian scholars have explained the duty to compensate damages via a general tort. With regard to the domestic legislation, the person that caused harm to the interests of third persons by lawful actions shall restore the position of the person harmed by compensating the damages.

However, I should note that complementary character of these measures does no bear the nature of civil liability. The latter can occur only when there is a tort, while in this case the damage was caused by actions that do not expressly violate the positive law. It appears that the obligation to pay damages may be imposed for the commission of not wrongful actions as well. As an example, I would like to bring situations when there is an obligation to compensate the damages for acts committed in the interest of other persons. Actions committed in the interests of other persons take place in situations when a third party witnessing some danger or threat to the property of another person takes actions in order to prevent the coming of negative consequences. Usually such persons are motivated with good intentions and sometimes such actions of these people directed to help others can cause damage as well. Here is the parallel link with the abuse of right. In both cases the authorized parties exercise their subjective rights. Even more so, the actions of the person acting in the interests of another person are lawful as well. Despite this such a person according to article 820 of the civil Code of the Kyrgyz Republic is also under the obligation to reimburse the damages caused by his lawful actions. Consequently, the current legislation establishes obligation to compensate the damages for

[54] MARCHENKO M.N., TEORIYA GOSUDARSTVA I PRAVA (2009). P. 630.
[55] *Grazhdanskkoye Pravo*. Chast Pervaya : Uchebnik / Pod red. O.K. Tolstogo A.P. Sergeeva. M (1996). P. 479.
[56] Analogous norms on damages (losses) also exist in the civil codes of Kazakhstan and Tajikistan.

commitment of lawful actions (not only for torts), and this is the situation that is very close to abuse of right.

Scholars also argue over the issue of possible identification of denial of judicial protection to the deprivation of the subjective right. Admissibility of deprivation of a subjective right as a sanction for abuse of right is supported by a significant number of scholars (V.A. Ryasentsev[57], O.A.Porotikova[58]). O.S.Ioffe and V.P.Gribanov considered deprivation of a subjective right in general, deprivation of a subjective right in general with the simultaneous loss of the right to the result obtained from the improper exercising of the right as an impact of exercising the subjective right not according to its destination[59].

I think that there is certain logic in the identification of denial of the claim with the deprivation of the subjective right. If a person cannot protect his subjective rights in a court, then how else he can do it? In this situation, it turns out that, in fact, a person is really deprived of his subjective right. However, I consider that a person cannot be deprived of his subjective right, since he is outside of the protection only for the period of abuse. If you follow the logic of the aforementioned authors, it turns out the person who abused his right is deprived of judicial protection at all (forever), and this will never happen, because the right of judicial protection is an integral part of any subjective right.

I sympathize the view of S.D. Radchenko, who stated that the position of the aforementioned authors in relation to the deprivation of the subjective right used in conflict with its destination had to take place in the Soviet civil law, whereas now such a position is more than vulnerable. Why, because the deprival of a subjective right does not come, neither from the literal meaning of article 9 of the Civil Code, nor from the nature and purpose of subjective civil rights. In fact, Article 9 of the Civil Code of the Kyrgyz Republic says nothing about depriving a person of his subjective right, it is only about a denial in protection of the right that a person has abused. I consider it appropriate in this case refer to the statement of N.A. Berdyaev who said that "we do not need the extermination of the "evil", but rather the enlightenment of "evil". Evil can be defeated only from within, rather than the general enforced prevention and extermination."[60] The aim of this article is to influence the will of a person in such a way as to prevent abuse of right by him. Hence, the inclusion by the legislator measures on deprivation of

[57] Ryasancev V.A. *Usloviya I Yuridicheskiye Posledstviya Otkaza v zashite Grazhdanskih Prav,* 9 SOVETSKAYA YUSTICIYA 9 (1962). (quotation was taken from Radchenko S.D., *Posledstviya Zloupotrebleniya Pravom,* 5 SUDEBNO-ARBITRAZHNAYA PRAKTIKA MOSKOVSKOGO REGIONA. VOPROSY PRAVOPRIMENENIYA (2005).
[58] Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by "Garant" IS.
[59] Quotation from Radchenko S.D., *Posledstviya Zloupotrebleniya Pravom*, 5 SUDEBNO-ARBITRAZHNAYA PRAKTIKA MOSKOVSKOGO REGIONA. VOPROSY PRAVOPRIMENENIYA (2005).
[60] Berdyaev N.A. Ekzistencialnaya dialektika bojestvennogo I chelovecheskogo // Berdyaev N.A. O cheloveke, ego svobode I duhovnosti: Izbrannye trudy // Red. –sost. L.I.Novikova i I.N. Sizemskaya м. Flinta(1999). P. 98.

a person of his subjective right would lose all meaning, as "the deprivation of the right excludes any opportunity for an authorized person to use his right in his own will and interest."[61] Consequently, based on the meaning of article 9 of the Civil Code of the Kyrgyz Republic it is impossible to deprive a person from his subjective rights.

Is it possible to compel a person who abused the right to commission of any act? The issue of forcing the person who abused his right to commit some actions is another controversial facet of the problem of abuse of right. As it was mentioned earlier, an article about the limits of civil rights does not allow to extract precise criteria or signs of abuse of right from it, as a result in most cases, the judges in making decisions on qualification of actions as an abuse of rights are often guided by personal discretion. This fact is not encouraging, as it evidences the existing gaps in legislation - this is the first, and the second is that decisions, abundant of different interpretation of article 9 of the Civil Code of the Kyrgyz Republic can be countless.

The issue of coercion to commit actions is a matter of dispute among scholars and practitioners. Thus, K.I. Sklovsky is supporting a position of forcing the person who abused his right to commit some actions. As an example the author is giving a case where the debtor against whom execution writs have been issued under a loan agreement, inherited a house, but in order to avoid a foreclosure of the house the debtor declined from accepting and registration of the house. The Court in this case made a decision forcing the debtor to take the inheritance. K.I. Sklovsky bases his position on the practice of Roman law where such rulings were practiced[62]. However, this position is disputed by V.M. Pashin who argued that only in exceptional cases, the law may impose on a person duty to act[63], and, as a rule, such cases are expressly specified by law. I support the opinion of the author in the sense that a decision to accept the inheritance is the exclusive prerogative of the heir, his personal subjective right, and the court can not oblige the heir to carry out actions for the adoption of the inheritance in favor of creditors and other persons. Moreover, point 2 of article 2 of the Civil Code of the Kyrgyz Republic regulates the right of citizens and legal persons to exercise their civic rights in their own free will and in their interest, and therefore it is impossible to make a person act against his will and interest.

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[61] Radchenko S.D., *Posledstviya Zloupotrebleniya Pravom*, 5 SUDEBNO-ARBITRAZHNAYA PRAKTIKA MOSKOVSKOGO REGIONA. VOPROSY PRAVOPRIMENENIYA (2005).
[62] Sklovskiy K.I. O Primenenii *Norm o Zloupotreblenii Pravom v Sudebnoi Praktike*, 2 VESTNIK VAS RF (2001).
[63] Pashin V.M., *Posledstviya Zloupotrebleniya Pravom*, 12 ZAKONODATELSTVO (2006).

Summing up the part on consequences of abuse of right, I can conclude the following. A person abusing his right is obliged to bear responsibility for the harm caused to the interests of others. Such responsibility of the person who has abused his right is expressed by the sanction in the form of denial of judicial protection of the rights under point 3 of article 9 of the Civil Code of the Kyrgyz Republic. Denial of judicial protection manifests either in dissatisfaction of requirements claimed by plaintiff (dismissal of claim) if the court finds abuse of rights in his actions or dissatisfaction of respondent's requirements and objections, if he abuses the right.

Denial of judicial protection as a sanction for abuse of right does not refer to relatively-certain sanctions and must not be identified with deprival of a subjective right for judicial protection. Moreover, it is impossible to force an authorized person to commit actions as a matter of responsibility since they will be committed against his will, which is inadmissible.

So, for now I have already examined two issues which are the concept of abuse of right and its consequences. Since every type of behavior is somehow demonstrated, abuse of right is also manifested in different forms which are established in article 9 of the Civil Code of the Kyrgyz Republic. Though the wording of point 1 of this article is vague it is still possible to underline few forms of abuse of right. Another issue is that it is not so easy to differentiate them, since the article does not specify this moment. However, fortunately scholars have agreed on some points and it is now possible to have more or less clear idea of forms of abuse of right. So, in the next paragraph I will be talking about the forms of abuse of right established in the Civil Code, particularly covering such issues as nature, history and differences among them.

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§ 1.3. Forms of abuse of right.

The content of Article 9 of the Civil Code of the Kyrgyz Republic on limits of exercising the civil rights should be that the law provides for several forms of abuse of right and refers to some of them.

The first one is, the so-called “chikane” that is taking actions aimed solely at harming another person. The second one is an abuse of right in other forms, on which this article does not give any explanation. Finally, the third form is performed by the abuse of dominant market position, as well as the use of civil rights directed to restrict competition. It should be noted that this classification of forms of abuse of right is not the only one: scholars lawyers repeatedly subjected it to criticism and suggested their own classification of forms.

Attempts to attach a general theoretical significance to a problem of abuse of right, unfortunately, lead some researchers to mix different concepts, and sometimes to go beyond the legal activity that devalues both scientific and practical value of the classification[64].

One of the striking examples of such classification, in my opinion, is the division of forms of abuse of the right proposed by A.A. Malinowski. The scholar divided abuse of right into legitimate (legal) and illegal forms. Previously, the author also suggested an intermediate form of abuse of right, the so-called "law-limited abuses.”[65] By offering such a classification the author reduced the abuse of right only to legally unguarded relationships. Thus, "lawful abuse of right" was recognized by A.A. Malinowski as the harm caused to legally unguarded relationships, therefore such abuses, depending on particular circumstances can be regarded as immoral or unreasonable[66].

I cannot agree with such separation of forms of abuse of right because I consider that the proposed characteristic of forms as "lawful" or "illegal" abuse of right in no way clarifies the situation, but rather it becomes a source of new contradictions. Due to the fact that the term "abuse of right" itself has repeatedly been the subject of controversy and debated among scholars over its inconsistency, adding of the word "lawful" to it would further aggravate its position. Abuse of right is such a phenomenon where an authorized person, while realizing his subjective right and acting within the law, violates somehow the interests of third parties. So what is meant by a legitimate abuse of right? If the legislator prohibits an authorized person to abuse his right (in whatever form), is it at all possible to talk about legitimate manifestation of abuse of right? I think not. So, following the logic of the author, there is a behavior that violates

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[64] Porotikova O.A. *Formy Zloupotrebleniya Grazhdanskim Pravom*, 23 *EJ*-YURIST, (2003)//provided by “Garant” IS: Kommentarii

[65] MALINOVSKII A.A. ZLOUPOTREBLENIYE PRAVOM (OSNOVY KONCEPCII) (2000), P. 29-34.

[66] *Id*. at 71.

interests of third parties, but because of its legitimacy, it can not be prohibited by law. This behavior, according to the author, is a failure to face the moral standards of human coexistence. The author himself acknowledges the harmlessness of such conduct in relation to other individuals and then the question arises on whether it is really necessary to count this harmless behavior of an authorized person as abuse of right. I totally support the argument of O.A. Porotikova who called the proposed interpretation of "legitimate abuse of right" as an example of a combination of mutually exclusive effects[67].

On the other hand, limiting abuse of right only to the legally unguarded relationships (such as friendship, love, thoughts, etc.), in my opinion, significantly narrows the scope of article 9 of the Civil Code of the Kyrgyz Republic. The content of this article talks about the use of a subjective right to abuse the interests of third parties and absolutely not intended to reduce it to only those relations that are not regulated by law. Therefore, this article should be applied to any conduct of authorized individuals associated with the exercising of subjective rights to the detriment of the interests of other individuals.

From my point of view, even more unconvincing is the phrase "unlawful abuse of the right." If a court recognizes the actions of an individual as abuse of right, then such actions can not be attributed to legitimate because they were committed with intent to cause harm. It means that the author proposes to admit already illegal actions also as wrongful. In light of formulation proposed by Malinowski the term "abuse of right" is undergoing a double "load" and in my opinion is a tautological.

Moreover, classification of forms of abuse of right proposed by the author made it almost impossible to distinguish one form from another. It only superficially reflects the assessment of conduct (lawful or unlawful) of an individual, but does not indicate the essential features of a particular form of abuse of right. Thus, the question on how and what actions should be attributed to the abuse of right still remain open.

Currently existing classification of forms of abuse of right divides forms depending on how an authorized person acted: whether he was motivated by intent or acted through negligence, i.e., here is the examination of the subjective aspect of abuse of right.

The subjective side of an action does not play such an important role in the science of civil law, as it does in criminal or administrative law. In criminal and administrative law subjective side significantly affects the qualification of an action and the measure of responsibility, respectively, while in civil law the criterion for examining liability is the damage caused. Despite this, however, the guilt of an authorized person serves as a criterion that allows

[67]Porotikova O.A. *Problema Zloupotrebleniya Subyektivnym Grazhdanskim Pravom* //provided by "Garant" IS.

distinguish one form of abuse of right from another.

For better understanding of the forms of abuse of right let us look at each of them separately.

1. Chikane and abuse of right in other forms.

The actions of individuals, carried out solely with the intent to cause harm to others, or otherwise known as chikane in the science of law. Even Roman lawyers paid attention to displays of chikane and they already, along with the general principle «qui jure suo utitur, nemini facit injriam»[68], had sayings such as «malitis non est indulgendum»[69], that were banning chikane[70].

Chikane - a term borrowed from German legal science. For the first time, chikane has been recognized as an act prohibited by the State in the Prussian Zemsky Code of 1794. Despite of the prevailing in XVIII century's legal science assumption on the impossibility of bringing to justice a person who caused harm by exercising of his subjective right, the Code provided for sanctions against the person who carried out chikane, in the form of deprivation of his rights[71].

Later on German Civil Code of 1900 proposed the most successful definition of chikane. In particular, section 226 of this code read as follows: "exercising of a right with the exclusive purpose to harm others is impermissible." Virtually the same definition of chikane is reflected in the Civil Code of the Kyrgyz Republic.

Followed by German Civil Code, the prohibition of chikane appeared in the Swiss and French Civil Codes. For example, Article 2 of the Swiss Code states: "Everyone in the exercise of his rights and his duties shall act in good conscience. The obvious abuse of right is unacceptable."[72] Article 6 of the French Civil Code says that "actions of a person committed without a legitimate and tangible benefits for himself, but having as the only one possible result causing injury to another person cannot be recognized as legitimate exercise of right."[73]

The phenomenon described in the laws of the countries mentioned above, in the science of law is called as the principle of "pure chikane." Its essence lies in the fact that the authorized person exercises his subjective right, solely with the intent to cause harm to others. This suggests that the person aims no other purpose than to harm. He lacks interest in the results and

[68] «one, who exercises his right, does not infringe anybody's rights» - lat. (Latin statement is provided from POKROVSKII I.A. OSNOVNYYE PROBLEMY GRAZHDANSKOGO PRAVA (2001), P.113).

[69] «abuse of right cannot be excused» - lat. Latin statement is provided from POKROVSKII I.A. OSNOVNYYE PROBLEMY GRAZHDANSKOGO PRAVA (2001), P.113).

[70] POKROVSKII I.A. OSNOVNYYE PROBLEMY GRAZHDANSKOGO PRAVA (2001), P.113.

[71] Yatcenko T.S., *Shikana Kak Pravovaya Kategoriya v Grazhdanskom Prave* (avtoreferat dissertacii) (2001), available at http://www.disser.h10.ru/autoref/jacenkoTS.html

[72] Quotation taken from POKROVSKIY I.A., OSNOVNYYE PROBLEMY GRAZHDANSKOGO PRAVA (2001), P.114.

[73] *Id.*

does not have any benefit for himself. As an example of chikane in everyday life it is possible to provide a literary example[74], described by N.V.Gogol in "The Tale of How Quarreled Ivan Ivanovich with Ivan Nikiforovich."[75] Ivan Nikiforovich having quarreled with Ivan Ivanovich built goose pen in his plot. It is clear from the plot of the story that the goose pen was built to spite his neighbor since an unbearable smell created inconveniences for the latter. The owner himself did not use the pen and did not have any interest in it. This situation is an obvious case of chikane, since the actions were directed solely to harm a third party.

Another example[76] of chikane can be presented by a case from Russian practice concerning the liquidation "MNVK", CJSC better known as "TV-6"[77]. The following facts are known from this case. Private pension fund "Lukoil-Garant" brought this action on the liquidation of "MNVK", CJSC. The lack of positive correlation of net assets of the defendant with the size of its share capital served as the grounds for the complaint. The plaintiff referred to the point 5 and 6 of article 35 of the Law on Joint Stock Companies, under which, if at the end of the second and each subsequent year in accordance with the balance sheet, proposed for approval by the shareholders of the company, or as a result of the audit, value of net assets of the company is less than the minimum amount of registered capital, a company must decide on self-liquidation If the appropriate decision was not taken by the company, its shareholders, creditors, and the state authorized bodies had the right to demand the liquidation of the company in a court.

Due to the fact that the plaintiff's claims were justified by the above mentioned article of the Law on joint stock Companies, the arbitral court granted the claim, despite the fact that the legitimacy of such decision is questionable. Certainly, the plaintiff had acted within the right belonging to it, but what motivated him? People usually go to courts to protect their violated rights, and here it is relevant to ask how the plaintiff was going to restore his violated rights by eliminating his own company? Each shareholder seeks to ensure his company to be developed and therefore will do everything to thrive. In the present case, the liquidation of the company will not bring any benefit to the plaintiff as a shareholder.

It has been justly observed by V.A. Belov that, if the shareholder is not satisfied with the activities of the company, he can either cease to be a party by selling his shares or to remove executives from the management company. Not any of these actions were made by the pension

[74]This example was Provided from BELOV V.A. ,GRAZHDANSKOYE PRAVO: AKTUALNYYE PROBLEMY TEORII I PRAKTIKI (2008).

[75] GOGOL N.V. SOBRANIYE HUDOZHESTVENNYH PROIZVEDENII (1951).

[76] The case is provided from Belov V.A., *Zashita Prava ili Zloupotrebleniye Zakonom*, 8 ZAKONODATELSTVO (2002).

[77] Resolution of Moscow Arbitrage Court from November 26, 2001 № A40- 15139/01-65-94. By the Resolution of the Presidium of the Supreme Arbitrage Court of RF from January 11, 2002 № 32/02 the former decision was affirmed.

fund so here we can talk about the chikane. The plaintiff, by liquidating his company, absolutely has not received any benefit from it, acted without interest for himself, within his rights, but with causing harm to others.

Cases of "pure chikane" are rare, and over time, by the middle of XX century, German lawyers have attempted to broaden the content of this category due to the shift in emphasis from law-establishing individuality and exclusivity intention of the person to prove intent and an assessment of other incentives for such acts[78]. This suggests that the notion of chikane has to cover the situations of the exercising of the right, accompanied with other legal selfish purposes. The need for a broader approach was justified with the fact that chikane in a pure form meets rarely, and most cases of abuse of right were aimed not so much to cause harm but rather to the fulfillment of selfish and other purposes. As a result, such cases of abuse of right remained outside of the legal regulatory framework[79].

The broader approach to the chikane, is supported by T.S. Yatsenko in her work "Chikane as a Legal Category in the Civil Law." The author proposes to amend and supplement point 1 of article 10 ("The Limits on Excercise of Civil Rights") of the Civil Code of the Russian Federation with the following formulation: "Actions of citizens and legal entities carried out solely with the intent to harm or pursued with other objectives, along with injury, as well as abuse of the right in other forms are not permitted." Another view is held by V.A. Belov. In his view, chikane is limited to actions exclusively directed at harming other persons, while all other purposes, including receipt of benefits by an authorized person are related to abuse of the right in other forms. This thesis is quite logical because the literal content of an article states directly this.

In the light of existing divisions of opinions, I suggest to focus on this issue and study it through the manifestation of chikane in the entrepreneurial activity.

National judicial practice, unfortunately, in solving the cases with abuse of right is far from unambiguous. In some cases the courts understand chikane as only actions aimed to cause harm, while in others they relate it to the actions pursuing other goals[80].

O.A. Porotikova proposed the following algorithm for featuring extraction of the general content of abuse of the right. Since chikane is recognized by actions carried out solely with the intent to harm another person, the presence of another target in the behavior of an

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[78] Porotikova O.A. *Porblema Zloupotrebleniya Subyektivnym Grashdasnskim Pravom*//provided in "GARANT" IS.

[79] *Id.*

[80] Lukyancev F., Yatcenko T., *Uchet Fakta Zloupotrebleniya Pravom pri Primenenii Grazhdansko-Pravovoi Otvetstvennosti v Sfere Predprinimatelskoi Deyatelnosti*, 8 KHOZYAISTVO I PRAVO 122-126 (2003).

individual, as well as involuntary (negligent) actions also represent "other forms of" abuse of right[81].

I agree with the proposed algorithm for the separation of forms and assume that the chikane should include those actions that are aimed at causing harm, accompanied by selfish motives. From my point of view, the viewpoint of P. Izbrekht[82] deserves particular attention. This viewpoint considers two cases where there has been an exclusive intent to cause harm to another person. The first is when the sole and immediate purpose of the authorized person is to offend another person with other harmful effects which are in a direct causal connection with the actions of owner and does not entail favorable changes in the sphere of material or immaterial rights of the holder. This is a case of pure chikane, which was reviewed by me earlier. It should be noted that cases of pure chikane in business relationships are very rare, since the main goal of any entrepreneur is to make a profit, and I doubt that he will perform any act aimed at harming anyone without a personal interest in nurturing.

Interesting is the second case proposed by the author. According to him, chikane also occurs when the realization by entrepreneurs of their rights does not directly give them favorable effects, but allows them to make a profit in the future after committing a number of additional steps. As an example, the author cites the actions to oust competitors from the market, acquisition of rights to participate in enterprise management, etc.

It is important that the initial purpose of the entrepreneur was an adverse effect with ultimate goal to pursue profit[83]. It turns out that the chikane in business relationships allows the presence of other selfish purposes. However, there must be fulfilled the condition on intention to cause harm: the actions are aimed primarily at causing damage, and receiving of a profit by the authorized person is not in direct causal connection with the actions for the implementation of a subjective right.

As an example, P. Izbrekht has given the case number KA-A40/658-99 addressed by the Federal Arbitration Court, Moscow District on March 17, 1999. In this case, the former owner of the trademark filed a claim against the defendant obliging him to stop using the trademark that violated the exclusive rights of the plaintiff. According to the facts of this case, the claimant has registered in Russia in his own name more than 20 trademarks containing some indications already used by other foreign firms in the business designation. The defendant carries on the Russian market sales of American manufacturer products, marked with the

[81]Porotikova O.A. *Porblema Zloupotrebleniya Subyektivnym Grashdasnskim Pravom*//provided in "GARANT" IS.

[82]IZbrekht P., *Shikana v Predprinimatelskih Otnosheniyah kak Raznovidnost zloupotrebleniya pravom*, 10 KHOZYAISTVO I PRAVO 110 (2006).

[83] *Id. at 111.*

relevant trademark in 1993. The manufacturer has put into circulation products with this trademark but has not registered it in Russia. The plaintiff received a certificate for a trademark registered in the State Register of Trademarks and Service Marks from15 May, 1998. In addition, there was no evidence in the materials of the case that the plaintiff was engaged in business activities with the use of a trademark, and the correspondence between the parties reflects the intention of the plaintiff to create obstacles for the activities of the defendant with the aim of obtaining money from him.

The combination of all these circumstances allowed the court to conclude that there was the presence of abuse of right in the plaintiff's actions, and the court rejected the claim[84].

Chikane in this case is illustrated in the way that the defendant's cease of the activities in sale of goods will not bring any benefit to the plaintiff (moreover, he is not using these trademarks) and at the same time it serves as a factor that creates obstacles to the activities of the defendant. In the case of satisfaction of his requirements, the plaintiff could also apply to the court with a claim for damages. In the request for damages there is no direct causal link since this requirement follows after the requirement to prohibit the use of a trademark, and preceding the onset of favorable implications for the rights holder in the form of receiving compensation. Consequently, chikane can be also manifested in the actions of an authorized person directed for satisfaction of other selfish goals.

The most important distinguishing feature of chikane from the abuse of right in other forms lays down in a subjective aspect. Chikane is always characterized by the presence of intent, while the abuse of right in other forms may be a consequence of exercising of subjective right in the form of direct and indirect intent, plus negligence. Another situation takes place in practice, since sometimes it is very hard and even impossible to prove intent, especially direct one, because actions of the authorized persons do not violate law. Chikane is always performed by the main purpose to cause harm, while other forms of abuse of rights are deprived of such negative purpose, but overall abuse of right in other forms violates interests of third parties. Consequently, other forms of abuse of right also admit the presence of intent, the only thing that differentiates it from chikane is difference in aim, which is not directed to cause harm

Regarding the abuse of right in other forms, it also takes place when a person pursues selfish aims. However, the difference between the chikane and other forms in this case lies in the fact that chikane has the original intent of causing harm and only then for the enrichment. In other forms of abuse of right the immediate goal is enrichment itself.

[84]Izbrekht P., *Shikana v Predprinimatelskih Otnosheniyah kak Raznovidnost zloupotrebleniya pravom*, 10 KHOZYAISTVO I PRAVO 110 (2006).

As an example we can use widespread cases associated with bank guarantee when the beneficiary aware of the proper performance by the principal of his obligation secured by the guarantee, still addresses to the guarantor about payments under the guarantee. The guarantor can not deny the beneficiary upon repeated appeal. Some authors refer the actions of the beneficiary to chikane[85], others refer them to neither the first nor the second form of abuse of right. In my opinion, the actions of the beneficiary refer to other forms of abuse of rights[86]; since distinct from chikane, the main purpose of the beneficiary is not to damage the bank but purely to have personal enrichment. So, here there is a particular goal (personal gain) that is different from the intention to cause harm.

2. Abuse of right in relation to competitive relations.

Two previous forms of abuse of right (chikane and abuse of right in other forms) are now more or less understandable but there is another third form of abuse of right that is written in the law.

Point 2 of article 9 of the Civil Code of the Kyrgyz Republic does not permit use of civil rights with the purpose of restricting competition, as well as abuse of one's dominant market position, shall not be permitted.

It is logical to suppose that if actions on restriction of competition and abuse of one's dominant market position were pointed out by a legislator as a separate form of abuse of right they must possess some characteristics that do not allow considering them neither as chikane nor as abuse of right in other forms.

There are different opinions on this issue existing among scholars. For example, T.S.Yatcenko considers that cases concerning restriction of competition and abuse of one's dominant market position refer to chikane, while Porotikova O.A. is sure that these cases are wholly covered by abuse of right in other forms. What unites these scholars is that both of them do not examine abuse of right concerning competition as a separate form of abuse of right.

So, let me briefly discuss the arguments suggested by scholars. In the view of T.S.Yatcenko, the abuse of right taking place in competition sphere can be in the form of chikane since very often the only goal that entrepreneurs aim at is to damage a competitor. This damage can be performed in the form of losses, lost profit, damage caused to business reputation, and etc. Of course, after achieving his goal entrepreneur satisfies other interests, such as consumers'

[85] YATCENKO T.S., KATEGORIYA SHYKANY V GRAZHDANSKOM PRAVE. ISTORIYA I SOVREMENNOCT (2003). P. 98, Shennikova L.V., *Zloupotrebleniye Pravom (Duh I Bukva Zakona)*// provided in "GARANT" IS.

[86] Izbrekht P., *Shikana v Predprinimatelskih Otnosheniyakh Kak Raznovidnost Zloupotrebleniya Pravom,* 10 KHOZYAISTVO I PRAVO (113) 2006.

attraction, increase the volume of sales. I agree with the author in the sense any entrepreneur desires his business to become prosperous in order to do so some businessmen want to get rid of competitors, behaving in the way that violates interests of the third parties. Accordingly, if the primary goal of an authorized person is to cause harm to a competitor such actions can be qualified as chikane.

In my view, there is no principal necessity to differentiate whether competitive abuse of right refers to chikane or abuse of right in other forms. Firstly, since the only thing that differentiates these two forms is the difference in purposes and intention, I consider that depending on circumstances a case in question can be attributed either to chikane or to abuse of right in other forms respectively. Secondly, no matter where competitive abuse of rights will be attributed to the consequences applied to each form are similar. Overall, cases of abuse of right in competitive relations, in my opinion, are covered by these two forms and there is no necessity to distinguish them as a separate form of this legal category.

It is obvious that legislator wanted to emphasize the importance of violations in competitive sphere and O.A. Porotikova said that at the end of XX century there was a big problem when entrepreneurs used their civil rights to create unfavorable conditions for their competitors[87].

Today, the Kyrgyz Republic like many other countries has antimonopoly legislation that restricts monopolistic activity and governs development and protection of competition. There is a special Law of the Kyrgyz Republic "On restriction of monopolistic activity, development and protection of competition"[88] that already regulates unfair competition and inadmissibility in creating a dominant market position. This law, in contrast to article 9 of the Civil Code, provides for definitions, responsibility and conditions to qualify an activity as unfair competition or abuse of dominant market position. It follows, that article 9 of the Civil Code provides for situations that are already regulated by special norms. Therefore, in my view, there is no necessity in maintaining the point 2 of article 9 of the Civil Code of the Kyrgyz Republic as separate form of abuse of right.

Now, due to the disputes concerning different forms of abuse of right, I would like to raise another important question concerning the consequences of abuse of right. From the article 9 of the Civil Code of the Kyrgyz Republic we see that it provides for three forms of abuse of right. They differ from each other; each possesses its own peculiarities, since the law separates chikane from abuse of right in other forms, or abuses taking place in competition sphere. It is

[87] Porotikova O.A. *Problema Zloupotrebleniya subyektivnym Grajdanskim Pravom*// provided in "GARANT" IS.
[88] The Law of the Kyrgyz Republic "On restriction of monopolistic activity, development and protection of competition" from April 15, 1994 № 1487 – XII, last updated by the Law of the Kyrgyz Republic fro April 29, 2009 № 134.

done on purpose since some forms are more dangerous comparing to others, due to the specifics of intention that an individual carries on. Now the question is why we differentiate between these forms if we have only one negative consequence for all of them. It follows that no matter how you behave the only negative consequence that an abuser has is the denial of judicial protection of his right. Of course, there is an obligation to reimburse caused damages, but it also can take place in all three forms. This means that chikane which is understood as the most dangerous form of abuse of right enjoys the same consequence as abuse of right in other forms, and it seems to be illogical and unfair because a person that abused his right by negligence will be treated the same way as someone who intentionally caused harm to other people.

Resuming up the findings I have made concerning the forms of abuse of right I need to say that there are three forms of abuse of right indicated in the article 9 of the Civil Code. They are chikane, abuse of right in other forms, and abuse of right in competitive relations. This article provides for forms but says nothing about the way they needed to be differentiated. This is the problematic moment that is a subject to various disputes arising among scholars interpreting them in different ways. So, chikane is the form of abuse right where an authorized person acts in such a way as to exclusively harm the interests of third persons. However, this may not be the only goal of an authorized person since he can purpose other selfish goals as well but these selfish goals are always linked to primary desire to cause harm. Other forms of abuse of right differ from chikane in the way that an authorized individual has other goals (no intention to cause harm), he may act having direct and indirect intention or even carelessness. The third form of abuse of right concerns abuse of right concerning competition issues. I cannot consider this case as a separate form of abuse of right since it does not have any special criteria that would distinguish it from chikane or abuses in other forms. Moreover, competition issues are widely covered by special legislation devoted to competition, which means that this provision in article 9 of the Civil Code is not necessary. Due to the gaps that our legislation has concerning the forms, I suppose that it is necessary to indicate the forms of abuse of right in a more concrete manner so that judges while qualifying the actions would not make mistakes.

This is the end of the 1 Chapter of my research devoted to theoretical aspects of the problem of abuse of right. Basically the 1 Chapter covered such important issues about of the category of abuse of right as the propriety of the term “Abuse of right”, the very concept of this phenomenon, including problematic aspects and gaps existing in the current legislation of the Kyrgyz Republic. Summarizing my research on this stage I can say that the very essence of abuse of right is connected with the exercising of a subjective right by an authorized person,

where the authorized persons uses his subjective right in such a form that it violates interests of other people. The problem here is the difficulty in qualification of such actions. The uniqueness of this legal institution is that formally such actions of an individual are falling within legal norms, thus not violating them. But what shall we do with the negative consequences that such actions carry out? Abuse of right is not usual type of behavior, since it is not absolutely legal and cannot be considered as illegal as well. This moment influenced the legislator to impose such a rare sanction as denial of judicial protection, which, however, cannot be identified to deprival of subjective right. The obligation of an authorized person to restore the position of injured person cannot be referred to civil responsibility, since abuse of right is not a tort.

The current legislation provides for few forms of abuse of right which include chikane, abuse of right in other forms and abuse of right with respect to competitive relations. The important note that was made is that the legislator differentiated the forms but applies the similar consequence to each of the forms which seems to be incorrect. It follows that the most serious form of abuse of right, which is chikane, enjoys the same consequence as the most harmless form of it… Also the first chapter suggests the general criteria that can help to distinguish abuse of right form other legal institutions.

Researching of the theoretical aspects of abuse of right is necessary in order to understand particular cases on practice. As the boundaries of rights are hardly distinguishable it is hard to qualify actions, looking formally legal, as abuse of right. The second chapter is talking about abuse of right in entrepreneurial activity, which would be hardly understandable without studying of the first chapter. So, the second chapter is devoted to abuse of rights in corporate, banking and contractual spheres.

Chapter II. Abuse of right in entrepreneurial activity.

Nowadays the cases when parties abuse their rights grow tremendously. Unfortunately, we do not have that big judicial practice on application of article 9 of the Civil Code in the Kyrgyz Republic, but on the example of Russian Federation I can say that Russian judicial system now counts numerous cases on abuse of right taking place in entrepreneurial activity. Therefore, in order to have a better understanding and manifestation of this legal institution in entrepreneurial activity, besides the cases provided from Kyrgyz practice I will provide examples taken from Russian practice as well.

The present chapter will talk about abuse of right that happen in entrepreneurial activity with respect to corporate relations, banking activity and contractual relations. Since it is impossible to cover every single issue or case concerning the abuse of right in above mentioned areas of entrepreneurship the following paragraphs will cover only some legal aspects of abuse of rights so far raised on practice.

§ 2.1. Abuse of right in corporate relations.

During their functioning legal entities very often face various situations of corporate conflicts where one party of a conflict believes that her opponent abuses subjective right. Such situations serve as a basis for corporate conflicts that can take place either between shareholders and management body, between shareholders themselves or between shareholders and legal entity. Such conflicts can be of different character and nature, concerning the abuse of right with regard to minority shareholders' rights, abuse of right of management bodies towards their shareholders, the case of abuse of right on access to information and many others.

The absence of a uniform approach in defining the boundaries between the exercising of subjective right and using it to harm, as well as lack of clear criteria of the legal category of abuse of right, predetermined controversial application of the rule in practice. Also, since it is not simply enough to prove the existence of intent in the actions of individuals who abuse their rights, it also makes another difficulty in this rule's practical application.

As mentioned before, the judicial system of the Kyrgyz Republic does not have big and sufficient practice using the rule on abuse of right. The whole number of cases where article 9 of the Civil Code of the Kyrgyz Republic is mentioned is hardly exceeding ten. With regard to corporate conflicts, fortunately, we do have few cases.

It is necessary to point out that there are cases (within this ten) where parties to a conflict themselves refer to article 9 of the Civil Code as a legal basis to their claim. However, the courts when making the final decisions rarely rely on article 9 and it can be seen from the number of cases where judges based their decision using this legal norm. Such number counts less than five cases. Moreover, while referring to this article judges either use it improperly or do not interpret it at all.

Now I would like to examine those cases concerning corporate conflicts that we had in our republic.

Thus, in one case the Supreme Court of the Kyrgyz Republic interpreted the actions of "Kyrgyzgiprostroy", OJSC that aimed to hinder the process of liquidation of the "KOPE WEST", LLC by the end of the period for which it was created, as the abuse of their right[89].

Constitutive documents of "KOPE WEST", LLC provide that the company can be reorganized or liquidated only by decision of the General Meeting of the founders adopted by 2/3 of the total number of votes, representing 66,7% of votes. The total number of votes of the

[89] Resolution of the judicial panel on administrative and economic affairs of the Supreme Court of the Kyrgyz Republic from October 15, 2008 on the case ED-0348/08mbs N,N ED-413/08mbs, # 07-317/08ED (On supervisory complaint of "Kyrgyzgiprostroy", OJSC to the decision of Bishkek Inter-district court from May 14, 2008) // "Toktom yurist" IS.

two founders – physical persons makes only 65%. Consequently, in the present case, when "Kyrgyzgiprostroy", OJSC objects or abstains to participate in general meeting, the decision of the two remaining members of "KOPE WEST", LLC on the liquidation of the company is incompetent. Thus, in the opinion of the court "Kyrgyzgiprostroy", OJSC, that owns 35 % stake in "KOPE WEST", LLC by not signing the minutes of the liquidation commission, blocks the process of liquidation of the company and, therefore, acts with intent to cause harm, i.e., abuses the right.

In my opinion, the court erroneously classifies the company's inaction as the abuse of right. Paragraph 1 of Article 9 of the Civil Code does not allow the actions of persons undertaken for sole purpose of causing harm to third persons, while in the above stated decision the court evaluated the factual inaction of "Kyrgyzgyprostroy", OJSC as the abuse of right. Since the court did not interpret the norm it used, it is not understandable which form of abuse of right, in the view of the court, took place. At the same time, I do not think that this case contains abuse of right at all. When we are talking about abuse of right we must remember that abuse of right takes place when a person abuses his own subjective right, and not the obligation. In the present case initially all three members of the "KOPE WEST", LLC have agreed on liquidation at the General Meeting which is proved by minutes of General meeting. It means that after the members of the company decided to liquidate it, it is now their obligation to do this; obligation and no more the right. Therefore actions of "Kyrgyzgyprostroy", OJSC must be qualified as improper execution of duties, and not as the abuse of right.

The lack of clear guidelines, developed by the science of civil law and enshrined in legislation, leaves judges in deciding the case one-on-one with their own discretion, which might lead to the possibility of judicial errors. The following example also confirms my findings.

In this case, the subject of the claim was the requirement of one of the founders of the «Golden Way», LLC to disband the CEO and suppress the acts of CEO infringing the rights of the founder to participate in managing the company[90]. The plaintiff and the defendant owned equal number of shares in the company. The defendant was appointed as CEO at the general meeting of the founders of the company. Subsequently, the founders could not come to a common decision on the dismissal of the CEO; as a result, the activity of the company was paralyzed. In parallel, the defendant filed an application for recognition the "Golden Way", LLC as a bankrupt on the grounds that it fails to return a provided loan.

[90] The decision of Pervomayskiy District court of Bishkek city from June 3, 2004 on the case # 2-778 (at the suit of the founder of the "Golden Way", LLC Ma Veyning to the founder and CEO Zhang Li Ping on early termination of authority of the Director-General)

Court has evaluated the defendant's actions as the abuse of right, since the defendant acted contrary to the interests of the company, as well as he failed to follow the requirements of the law on good faith and reasonableness while representing the interests of the company, that he was appointed to lead. Since both founders have an equal number of votes, the plaintiff has no right to call a general meeting. For this reason, it was impossible under present circumstances to resolve the issue of premature withdrawal of CEO out of the court.

Interestingly, after the defendant's actions were qualified as the abuse of right, the bankruptcy process of the «Golden Way», LLC has not been terminated, while Article 9 of the Civil Code speaks of the need to reject the claim of the person abusing the right. Moreover, the following recognition of the bankrupt company served as the basis for termination of the appeal hearing on the abuse of right. It turns out that the application of the rule in practice is not quite effective because it does not comply with the requirements of article 9 of the Civil Code.

In general, I still hold the view that the cause of the situation in this case lies in the poorly thought-out corporate charter. If such provisions, where one of the participants could easily influence the decision making process of a whole company included in a charter, the work of the company might be often blocked.

For example, today some companies practice inclusion into a charter of organization minority shareholders' right of "veto". Using this right, minority shareholders can easily block the work of an entire company, having a relatively small number of shares (share). The problem here is that current Kyrgyz legislation does not regulate the right of "veto" in any way. The Law of the Kyrgyz Republic "On Business Partnerships and Companies", in contrast, establishes the procedure of decision-making by general meeting of members, as well as the procedure of determining the portion of shareholders' property in a company property. Automatic inclusion of "veto" right into constituent documents of a company without a comprehensive solution of a question, also, under certain conditions can be regarded as the abuse of right.

In this regard there was a judicial decision[91] in Russian Federation when a court denied applying provisions of company's charter that created preconditions for abuse of right. The decision of the court stated that "Provisions of the charter of "Yei port elevator", which established that decisions of the board of directors concerning the issues of appointment of Director General and early termination of his powers that must taken with obligatory presence of all members of Board of Directors (7 persons), permit Director General and his supporters to block decision making procedure on these issues by not coming to appropriate meetings. Such charter provisions serve as base for abuse of right, and therefore cannot be taken into

[91] Resolution of Federal Arbitrage Court of North-Caucasian district from December 25, 2003 on the case # F08-5017/2003.

consideration by the court while examining the claims of those interested in blocking the work of the company[92].

Interesting cases of abuse of rights are mentioned by A.Molotnikov[93], who found abuse of rights in actions of minority shareholders who abuse their rights for information. As an example he provides a situation when a shareholder who owns 0,1% of shares of a total number of company's voting shares demanded copies of founding documents of the company, all internal documentation, minutes of general meeting. Additionally, he required all documentation, certifying company's rights for all property that it has on balance, including documentation on real estate, office technique and even writing materials…

In order to establish a case of abuse of right it is necessary that few conditions are met. First of all a person, asking for information must be a holder of the right. In the present case, a shareholder enjoyed his right for access to information, because it was established by the Law on joint stock companies. The shareholder was a member of that company and, therefore, was the holder of the right for access to information. Second, in order to abuse the right it is necessary to exercise it, i.e., make some concrete actions using this right. The shareholder in this case exercised his right by requiring management body of the company to provide him with all documentation. Third, such behavior of shareholder must be within the limits, established by law but causing harm to other persons. Here, the shareholder exercises his subjective right for information, he acts within the law, since he does not require anything extra. He just realizes one of his rights, which is participation in managing the company , that he as a shareholder of the company has. Now, the question is whether his requirement for information is causing harm to company? No doubt, that the requirement to provide documentation for every single thing that the company owns will be problematic for that company, since will take much time. This is normal, if shareholders ask for founding documents or other internal documentation, but if every single minor shareholder asks for such detailed information the only thing that the company will be busy with is just making copies for them. I hardly believe that a shareholder himself really needs all this detailed information. It is hard to prove an intention in his actions but obviously, his actions will harm the company: it is time wasting, bringing additional

[92] The present case was taken from Lomakin D., *Ot Korporativnogo Interesa Cherez Zloupotrebleniye Pravom k Korporativnomu Sporu*, 2 KORPORATIVNYI YURIST (2006).

[93] Molotnikov A., *Problema Zloupotreblemiya Pravami v Korporativnykh Konfliktah* (Dec.29, 2004) (article), available at http://www.ippnou.ru/article.php?idarticle=000825.

expenses, disturbing the work of the company. So, there is abuse of right in the actions of that shareholder[94].

Consequently, abuse of right can take place in different forms and in various relations between the parties of corporate conflict. Judicial practice of the Kyrgyz Republic showed that judges misinterpret this article and therefore use it incorrectly, which is leading to erroneous decisions. Many cases of abuse of right in corporate conflicts occur because of imperfect provisions established in company's founding documents concerning procedures on taking decisions, appointment of executive bodies and etc. Before qualifying any actions as abuse of right it is necessary to test whether such actions conform to criteria of abuse of right.

[94] Other similar examples are provided by Ivanova E. *Zloupotrebleniye pravom akcionera na polucheniye informacii ob akcionernom obshestve*, 12 KHOZYAISTVO I PRAVO 34-38 (2008).

§ 2.2. Abuse of right in banking activity

Abuse of right is a legal category that starts to be using by individuals and legal entities in various civil relations, such as бытовые relations and business relations. The latter one includes all possible business spheres where the category of abuse of rights can be manifested. Another thing that such practice where parties and courts rely on article 9 of the Civil Code of the Kyrgyz Republic is very poor and not widespread. We have a lack of cases in entrepreneurial activity where the rule on abuse of right was used as such. We do have few cases on corporate abuses of right and have nothing at all concerning abuse of right that takes place in banking activity. In this sense, in order to illustrate some examples of abuse of right in this particular sphere I will provide examples taken from Russian judicial practice.

It is now a common situation that individuals and legal entities keep their capital in banks and other credit organizations. Unfortunately, nobody is safe from economic crisis and other negative situations happening in the world economy. In order to somehow save their deposits individuals and legal entities sometimes take such measures that can be considered as incompatible to laws.

So, let me start from one of the most interesting cases of abuse of right in banking activity that I have read so far while doing the present research. This situation was analyzed by professor L.Yefimova in her article "Division of deposits during the bankruptcy of banks as the abuse of right"[95].

Russia has a Federal Law[96] "On insurance of deposits of physical persons in banks of Russian Federation" which guarantees depositors return of their deposits. However, this law has some limitations, because, firstly, not all depositors can have their deposits returned, and, secondly, deposits cannot be returned fully. According to this law the:

- insurance does not cover deposits of legal entities, since the law concerns only deposits of physical persons;
- insurance does not cover deposits of physical persons involved in entrepreneurial activity;
- only those deposits can be insured that were opened in banks authorized with special permission of Bank of Russia;
- 100% return will be provided to those depositors whose deposits do not exceed 700 000 rubles, which means that state only partially returns deposits.

[95] L.Yefimova. *Drobleniye Vkladov Vo Vremya Bankrotstva Kak Zloupitrebleniye Pravom*, 6 KHOZYAISTVO I PRAVO, 44-51 (2009).

[96] Federal Law of Russian Federation "On insurance of deposits of physical persons in banks of Russian Federation" adopted on December 23, 2003 № 177-F3.

In order to save their money, those depositors whose deposits exceed 700 000 rubles transferring the difference to accounts of other physical persons (dummy depositors), bringing the deposit sum to amount of insurance compensation established by the law. By doing so, depositors divide their deposits and transfer parts of it to other people, and at the end they will be able to have their deposit returned entirely. Usually, family members and relatives become such dummy depositors. Of course, such actions violate the interests of other depositors, who are waiting for their turn to come and who can stay without compensation.

Another trick is practiced by legal entities who are not subjects to this law at all. What do they do? These legal entities conclude informal agreements with physical persons with the aim to transfer some amount of sum on the accounts of these persons and, eventually, have their deposits returned. The problem here is that such actions destruct the priority of claims in bankruptcy. According to point 3 of article 50 of the Law of Russian Federation "On bankruptcy of credit organizations"[97] claims of individuals - creditors of a credit organization удовлетворяются в первую очередь, while the same claims of legal entities are satisfied only in third turn. As a result of such operations, where money is transferred from accounts of legal entities to accounts of physical persons, claims of legal entities to bank are replaced form the third turn to the first one. Consequently, these actions (the author calls them as "division of deposits") also violate interests of other depositors – physical persons whose claims for deposit return can be interrupted by fake depositors.

Is there abuse of right in the actions committed by depositors who divided their deposits?
In order to answer this question it is necessary to return to criteria of abuse of right underlined in the first chapter of the present work.

First of all, there must be a subjective right and its holder. In the present case depositors were the holders of right, and their subjective right заключается в том that the law actually does not prohibit division of deposits, since depositors are the owners of their property and can do various operations with their deposits. Secondly, holders of right must be exercising their rights. Depositors by dividing their deposits and making informal agreements with fake depositors exercised their rights. Third, the behavior of a right holder must be formally legal, but objectively violating interests of third parties. Since depositors had a right to divide deposits their actions are formally legal. However, such actions cause harm in various ways: material damage is caused to those law obedient depositors who have legal right to get insurance compensation, but they might not because of a possible exhaustion of the insurance foundation; the material damage is caused to insurance foundation as well, since there is unjustified decrease of sums designated for

[97] The Law of Russian Federation "On bankruptcy of credit organizations" adopted on February 25, 1999 № 40-F3.

compensation and etc. So, there is a formally legal behavior and possibility of causing damage. Additionally, the author also discusses the destination of subjective right. She argues, that in the present case the actions of depositors were not directed for exercising of their rights according to the contracts signed with bank, rather they were directed to avoid the established restrictions on insurance compensation. Such actions are going against the proper destination of subjective right and therefore here is the case of abuse of right.

Another case of abuse of right is connected with the situation when a legal entity opens current account in "problematic bank" and transferred taxes from it. However, taxes did not reach the budget due to the fact that the credit institution did not have the required amount of money on their correspondent account. Tax authorities demanded that legal entity performed its obligation to pay taxes, and then the latter, in its turn, filed a suit against tax authorities, assuming their actions as illegal. Judicial practice over time developed a clear approach to this situation: a court denied plaintiff's claim if it turned out, that he opened a current account in crisis bank having an appropriate account in solvent credit institution. Such actions of plaintiff were considered as abuse of right.

So, again, the law does not prohibit a company to open its bank account in "problematic" bank, this is a subjective right of a legal entity which is a holder of this subjective right. Since it is not expressly prohibited by the law, such actions are formally legal. Next, it is necessary to establish intent, and this is the most difficult part here. In my view, we should analyze why the legal entity opened an account in the bank which was in advance known as "problematic" one. If this legal entity has an account in "normally working bank" it is now questionable why it needs an account in "problematic bank". Also, it is important to track the tax payment scheme, i.e., how it differs in "normally working bank" and in "problematic bank". If opening an account in "problematic bank" will somehow stop tax payment procedure it is understandable why the legal entity decided to have an account here. If intent is proved and all other criteria of abuse of right are satisfied we have a case of abuse of right, and claims of that legal entity must be rejected in a court.

From above mentioned examples we can see that there is no one single scheme of abuses, they differ from case to case and are present in various spheres, and banking is not an exception. Regardless of the sphere where abuse of right takes place the nature of this legal category pursuant to different cases remains the same. In every single case where there is a question of abuse of right it is necessary to carefully examine the behavior of a holder of a right to avoid mixing it with other categories, test it through criteria of abuse of right, and only then apply the norms on responsibility.

§ 2.3. Abuse of right in contractual relations

There is an interesting issue related to abuse of right in contractual relations that has been disputed a lot by scholars of civil law. The dispute is going around the application of the category of abuse of right as a basis for invalidating a transaction. Some scholars argue that it is possible to apply article 9 of the Civil Code of the Kyrgyz Republic as an independent ground for invalidating transactions and, actually, there are cases on practice where parties themselves and a court refer to this article as well. According to Yu.S.Vasilyev, exercising of a right against its destination is an illegal act and therefore must be regarded as an independent ground for its invalidation. In this case there is an objective contradiction between exercising of a concrete subjective right and its destination[98].

However, such a position was not widely supported in the science of civil law; it counts many opponents such as O.N.Sadikov, K.I.Sklovskiy, O.A.Porotikova, S.D.Radchenko, and others.

As for me, I support the view of the latter group of authors who think that it is impossible to use article 9 of the Civil Code as a basis for invalidating a transaction.

First of all, there are special provisions provided in the Civil Code that regulate invalidation of transactions. This is a part called "Invalidation of transactions", articles 183-199 that list grounds and situations when a transaction in question can be considered as invalid. Moreover, it is necessary to underline article 185 of the Civil Code which states that a transaction which does not comply with the requirements of law is void, unless the law establishes that such a transaction is voidable or provides other consequences for the violation of law. If there is a situation when other grounds of invalidation are not suitable it is always possible to refer to article 185 which is of a more general character covering all transactions that are not compatible with current legislation. Consequently, the presence of special provisions covering invalidation of transaction, in my view, already excludes necessity of referring to article 9.

Second, abuse of right has a particular nature that distinguishes it from other categories. Abuse of right is the behavior of a right holder who uses his subjective right in the way that formally looks legal, but somehow causes harm to other people. Because of this particular nature, there is a difference in sanctions applied to those who abuse their right. When we talk about invalidation of transactions, there is always a clear violation of positive norms of law, i.e., actions of an individual directly fall under provisions of one of the articles (articles 185-197) mentioned in the Civil Code. On the contrary, abuse of right, does not violate any positive norms. In this respect, there is a good argument proposed by K.I.Sklovskiy who said that the meaning of article 168 (article 185 in the Civil Code of the Kyrgyz Republic) of the Civil Code is that it violates the well-

[98] Vasilyev Yu.S. Vzaimodeistvie prava I morali, 11 SOVETSKOYE GOSUDARSTVO I PRAVO 19 (1996).

known positive law, and as a consequence, the transaction is void, in other words, the scope of article 168 of the Civil Code is not of subjective but objective character, whereas abuse of right most often is a product of ill will directed against a specific person"[99]. Since the abuse of right is not a violation of legal norms, it is wrong to apply articles on invalidation of transactions to abuse of right, as well as it is impossible to apply norms of abuse of right to invalidation of transactions.

O.A. Porotikova argues that irrelativeness of consequences established by the category of abuse of right and common consequences of invalid transactions (article 184 of the Civil Code) makes application of article 9 meaningless. If a court finds abuse of right in actions of a holder of a right it will reject the claim and deny judicial protection. There are two ways of possible use of both articles in relation to invalidation of transactions. First is when a party invalidates a transaction referring only to article 9. Since abuse of right is a separate legal category this party can refer only to norms of this article where the only consequence of abuse of right is denial of judicial protection (reimbursement of damages takes place when there is a concrete fact of presence of damage). Nothing is said about invalidation of transaction or any other consequences except denial of judicial protection. Therefore, in this case a transaction in question cannot be invalidated based only on article 9 of the Civil Code. Second case is when a party invalidates a transaction applying article 185 of the Civil Code through article 9. If a person abused his right he must bear responsibility for this. In this regard, it makes sense to deprive him of judicial protection. Recognition by a court of transaction as invalid will mean that the court acts in the interests of the abuser, since as the consequence there will be a bilateral restitution[100].It is also mentioned in literature that claims on recognition of transactions as void often serve as means of protection for unfair party from counterparty's claims. Consequently, it is impossible to invalidate transaction in the second case as well.

Because of this misunderstanding there can be a wrong judicial practice concerning this issue in courts of the Kyrgyz Republic. I would like to bring the case where the parties to the conflict erroneously refer to article 9 of the Civil Code of the Kyrgyz Republic as the basis for their claim.

[99] Quotation was taken from Porotikova O.A. *Porblema Zloupotrebleniya Subyektivnym Grashdasnskim Pravom*//provided in "GARANT" IS.

[100] According to article 184 of the Civil Code of the Kyrgyz Republic the common consequence of invalid transactions is bilateral restitution which means that each party must return to another everything received in the transaction.

So, according to this case[101] the appellant "Scan-East Holding Ltd." wants to invalidate the amicable agreement concluded between "DEBRA" Agency and "Silk Way Investment Ltd." according to which "DEBRA" Agency ,the initial creditor of Scan-East Holding Ltd.", assigns its creditor's right to "Silk Way Investment Ltd." who after that agreement is considered to be a new creditor. Later on, the appellant decided to void the agreement stating that he was forced to conclude such unprofitable deal, that he was threatened, did not have any real intention to sign such an agreement, and that the defendants abused his right to freedom of contract. I am not going to discuss all facts of the case, since I am interested in the way the parties interpret and use article 9 of the Civil Code.

The first mistake of the appellant is that there was no necessity to refer to article 9, since his claims are already covered by special norms on "Invalidity of Transactions", precisely article 197 of the Civil Code. As it was argued earlier article 9 cannot be used as a basis for voiding a transaction if there are special norms that regulate such relationships.

Second mistake, is that the appellant says that the defendant abuses the subjective right of appellant. Such claim illustrates the complete misunderstanding of the category of abuse of right. Just to remind, abuse of right takes place when the authorized person abuses his own, and not somebody's subjective right, and as a result of such abuse the interest of third persons are harmed. The right interpretation would be if the defendant by using his (defendant's) subjective right somehow caused harm to appellant. In the present case the appellant said that defendant abused the plaintiff's subjective right, but due to the nature of abuse of right, the defendant could violate the appellant's right for freedom of the contract, but not abuse, and these are two different categories. When you violate you directly intend to infringe other's rights, going beyond the permissible boundaries, but when you abuse you, first of all, exercise your subjective right and this formally legal exercise takes such forms that you somehow harm other people. This was the example of improper interpretation and understanding of this norm by parties to a conflict.

Another interesting example is about the credit agreement and its term concerning the establishment of disproportionate forfeit. According to the facts of the case[102] a bank signed a credit agreement with organization and established a 300% forfeit as a measure of responsibility for

[101] Resolution of the judicial panel on administrative and economic affairs of the Supreme Court of the Kyrgyz Republic from may 26, 2006 on the case № Ed-000920/05.MB (on supervision complaint of 'Scan0East Holding Ltd." Over the decision of Bishkek interdistrict court from December 14, 2005 and decision of panel of administrative and economic affairs of Bishkek city court from February 22, 2006.

[102] Resolution of the Plenum of Supreme Arbitrage court of RF № 964/97 from December 16, 1997. The case provided from Tarasenko Yu.A., *Zloupotrebleniye Pravom: Teoriya Problemy s Tochki Zreniya Primeneniya v Arbitrazhnom Processe*, 4 VESTNIK FEDERALNOGO ARBITRAZHNOGO SUDA ZAPADNO-SIBIRSKOGO OKRUGA (2004).

failure to fulfill obligations. The court in this case stated that the establishment of unjustifiably high forfeit is abuse of right, since bank losses in the case of failure will be exhaustively covered by 150% forfeit. Generally, I agree with the court in the sense, that the bank used its subjective right to establish a forfeit, but his actions violate the interests of organization, therefore here is the case of abuse of right.

It is now understandable that it is impossible to predict all cases of abuse of right, since they can occur in different spheres of entrepreneurial and everyday activity. The important thing in contractual relations is to avoid mixture of the abuse of right and the violation of right. It is important to see the difference in application of article 9 of the Civil Code and special provisions on void transactions of the Civil Code of the Kyrgyz Republic. As long as there is a presence of special norms regulating definite relationships the application of article 9 should be excluded.

In the present chapter I tried to illustrate the manifestation of abuse of right in such spheres of entrepreneurship as corporate regulation, banking activity and contractual relations, since these spheres seem to have the majority of cases where abuse of right takes place. Due to the fact that is impossible to cover every single case of abuse of right and every single issue of it, I tried to focus on some problematic moments relating to the practical application of this norm. As a result of my findings and analysis I can say that even the small number of cases that we have so far practiced in the Kyrgyz Republic shows that there is misinterpretation and misunderstanding of this norm by parties and judges as well. Such misinterpretation leads to wrong decision making, and therefore, in my view, article 9 of the Civil code of the Kyrgyz republic needs to be clarified with respect to the concept of abuse of rights, its forms, and sanctions.

Conclusion

The purpose of the present research paper was to thoroughly analyze theoretical and practical application of article 9 of the Civil Code of the Kyrgyz Republic, to find out existing gaps that have not been resolved yet, look for cases of abuse of right in entrepreneurial activity, and suggest the common criteria characterizing the abuse of right as a separate legal category.

This legal institution is a young and quite new for the Kyrgyz Republic. There is only one norm in the Civil Code of the Kyrgyz Republic that regulates abuse of right, which is article 9 called “Limits on exercise of abuse of right”. So, what is that so particular about this topic and why do we need to study it?

First of all, there is no universal understanding of the concept of abuse of right. If you read article 9 attentively, you will see that every single point of this legal norm needs to be interpreted additionally. For now we have a situation when the law prohibits some sort of behavior which, in fact, is not really defined. Due to the disputes among scholars concerning the concept of abuse of right there are many definitions of abuse of rights existing in the theory. However, fortunately, majority of them agree that abuse of right performs such a behavior where the authorized person exercises his own subjective right, using such forms of behavior that violate the interests of third parties, plus, such exercising of the right does not violate positive legal norms, i.e., is formally legal. In this respect, I have offered the following characterizing criteria of the legal category of "abuse of right".

First is that abuse of right can take place when there is an authorized person, who possesses some definite subjective right. It is possible to abuse the right only, and in no way it is possible to abuse obligations.

Second, it is possible to abuse the right only in the process of exercising the subjective right. It has nothing to do with the content of subjective rights, but namely with its exercising.

Third, the abuse of the right is always represented as action, and not as inaction.

Fourth, the abuse of right occurs when exercising of a subjective right by an authorized person looks formally legal but is committed with intent to cause harm to others.

Fifth, the actions of an authorized person can be motivated either by intent or negligence.

Sixth, the harm is a possible, but not the necessary condition of abuse of right.

Due to the absence of the very concept of abuse of right in the theory of law, the lack of qualifying criteria of “other forms” of abuse of right, as well as the absence of concrete boundaries which would draw the line between an individual’s exercising of subjective right

and violation of third parties' interests, the judicial practice concerning the application of article 9 is very poor. All this give rise to the second reason of why it is necessary to talk about this issue.

Second, judicial practice shows that neither parties nor the judges understand and interpret this legal norm properly. Analysis of the judicial practice showed that there is a very small number of cases where judges refer to article 9 of the Civil Code of the Kyrgyz Republic. It should be noted that while making their decisions the judges just copy the disposition of the norm into the decision but never interpret and provide reasons for using this norm. Lack of clearance concerning the concept of abuse of right leaves judges while making decisions one-on-one with their judicial discretion which, of course, can lead to countless mistakes.

Since abuse of right is prohibited under the current legislation, logically it follows that a state needs to somehow influence abusers. Thus, according to article 9 a person abusing his right is obliged to bear responsibility for the harm caused to the interests of others. Such responsibility of the person who has abused his right is expressed by the sanction in the form of denial of judicial protection of the rights under point 3 of article 9 of the Civil Code of the Kyrgyz Republic. Denial of judicial protection manifests either in dissatisfaction of requirements claimed by plaintiff (dismissal of claim) if the court finds abuse of rights in his actions or dissatisfaction of respondent's requirements and objections, if he abuses the right.

Denial of judicial protection as a sanction for abuse of right does not refer to relatively-certain sanctions and must not be identified with deprival of a subjective right for judicial protection. Moreover, it is impossible to force an authorized person to commit actions as a matter of responsibility since they will be committed against his will, which is inadmissible.

With respect to forms, I need to say that article 9 underlines few of them. They are chikane, abuse of right in other forms, and abuse of right in competitive relations. Though article provides for forms it says nothing about the way they needed to be differentiated. This is the problematic moment that is a subject to various disputes arising among scholars interpreting them in different ways. So, chikane is the form of abuse right where an authorized person acts in such a way as to exclusively harm the interests of third persons. However, this may not be the only goal of an authorized person since he can purpose other selfish goals as well but these selfish goals are always linked to primary desire to cause harm. Other forms of abuse of right differ from chikane in the way that an authorized individual has other goals (no intention to cause harm), he may act having direct and indirect intention or even carelessness. The third form of abuse of right concerns abuse of right concerning competition issues. I cannot consider this case as a separate form of abuse of right since it does not have any special criteria that

would distinguish it from chikane or abuses in other forms. Moreover, competition issues are widely covered by special legislation devoted to competition, which means that this provision in article 9 of the Civil Code is not necessary. Due to the gaps that our legislation has concerning the forms, I suppose that it is necessary to indicate the forms of abuse of right in a more concrete manner so that judges while qualifying the actions would not make mistakes.

Abuse of right in entrepreneurial activity is presented with the analysis of court cases in each of the selected areas of entrepreneurial activity. I should say that before starting analysis of practical application it was necessary to deeply research on the theoretical base, because it is not enough to have just one view over the problem, it is important to know different positions of scholars, so that my point would not be superficial.

Due to the fact that is impossible to cover every single case of abuse of right and every single issue of it, I tried to focus on some problematic moments relating to the practical application of this norm. As a result of my findings and analysis I can say that even the small number of cases that we have so far practiced in the Kyrgyz Republic shows that there is wrong application of this norm by parties and judges as well. Such misinterpretation leads to wrong decision making, and therefore, in my view, article 9 of the Civil Code of the Kyrgyz Republic needs to be clarified with respect to the concept of abuse of right, its forms, and sanctions.

Until such measures are taken, it is hard to talk about appropriate implementation of this norm on practice, it is hard to talk about the safety of interests of third people, since clear limits are not established yet… I hope, that the present paper will somehow change the situation, I hope that the work done is not the waste of time, and will be a starting point for continuous research studies devoted to this topic.

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