

The Creative Function of the Analogy Method in Civil Law Practice

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The relevance of the research was determined by the scientific and practical significance of the analogy method in the context of civil law implementation. The goal of the research was to strengthen the doctrinal foundations of the analogy implementation of civil legislation and to identify the functional characteristics of the analogy method as a creative source of regulatory activity. The method of analogy was regarded as the key tool and the object of study. Additionally, alongside the special rather-legal and technical legal instruments, the authors applied general logical methods of analysis and synthesis, induction and deduction, comparison, and generalization. The socially positive character of the analogy method implementation in civil law practice was confirmed. The multifunctionality of the analogy method was indicated, its positive role in lawmaking activity was revealed. In addition, the author highlighted the risk of hasty and impetuous use of the creative potential of analogy. The work contributes to the development of theoretical ideas about the essence of analogy in civil law practice and serves as the basis for a wider and more effective use of analogy, not only as a means for legal violation of the letter of the law, but also as a productive mechanism that promotes rule-making.

Key words: *Analogy Method, Civil Law, Legal Gap, Lawmaking, Creative Function.*

Introduction

In the legal theory and civil jurisprudence, the use of the analogy of law was essentially recognised as an effective legal tool to avoid legal gaps (Romanenko, 2016), the existence of which in positive law is obvious (Savigny, 1867). In the sphere of civil law, it was recognised as inherent to the lawmaking process (Gordley and Mehren, 2006). Indeed, even the most precise rule is potentially inaccurate due to our imperfect knowledge of the world and our limited ability to foresee the future (Gribnau, 2007). On the other hand, we perceive and interpret the new

circumstances, following the process of schematic cognition, analogizing them with the structures of knowledge embedded in our memory (Berger, 2013).

Vaskovsky, who supported the idea of logical isolation of law, declared that the most correct and efficient means of filling gaps is to use the available legislative material, i.e. to extract from the existing norms the others that are not explicitly expressed, but implicitly presented. Thus, firstly, the courts follow the current, i.e. authorised and promulgated legislation and, secondly, they are guided by the methods of universal human logic, consciously or unconsciously applied by all people (Vaskovsky, 1901). The adherents of the fundamental idea of positive law gaps supported the judge's freedom for cases with imperfect or completely unavailable legislative norms (Taranovsky, 1917), pointing to the active position of the court in civil law practice (Muromtsev, 1880).

Currently, in most cases, the analogy is recognised as the “traditional” (Malyushin, 2015), and the “universal” (Demin, 2017) method of legal gaps overcoming. In other words, the analogy directly sanctioned by modern law (Article 6 of the Civil Code of the Russian Federation (CC RF)) is generally regarded as the natural way of thinking for the lawmaking bodies and an indispensable assistant to the legislator, who due to the freedom and multivariate character of the economic behavior of the participants in civil turnover proclaimed in Russia, is not capable of normatively ensuring the property and non-property interests and resolving all possible civil-law social relations.

Recently, they observed the significant interest of scholars and practicing lawyers regarding the phenomenon of the analogy of law (Mikryukov, 2018). The method under consideration is regarded not only as a way of legally violating the letter of the law that does not cover a specific controversial issue, but more broadly, as a “fundamental process” in legal reasoning with a set of functions (Hunter, 2008). Therefore, the study of the analogy method in the framework of new functional aspects is getting relevant.

Methods and Materials

Any scientific research, including civil law research, cannot be conducted without traditional logical methods of the analysis and synthesis, induction and deduction, comparison and generalization, typology and analogy (Luneva, 2015). Therefore, the authors applied these methods in this work to the full extent. It is worth highlighting that the method of analogy was not only the basic methodological element of the research, but at the same time was regarded as its key (main) object.

This study can be classified as doctrinal (Smits, 2015), based on the study of legal proposals that arise from legal theories, laws, and judicial practice materials. In relation to this study, it was

fundamentally important to use normative prescriptions and judicial positions interconnected genetically, i.e. generating each other, as the material of the work.

Integration, unification trends in civil regulation of comparable economic relations in Russia and abroad contributed to the implementation of the comparative analysis (Gordley and Mehren, 2006). Thus, the authors appealed to foreign experience of the legal perception of the analogy in civil law practice.

Results

The multifunctionality of the analogy method in civil law practice was ascertained. Particular attention was paid to the creative component of this method in the civil law sphere.

The authors have discovered and classified the cases of the development of legal positions formulated with the help of the analogy to legislative decisions. The empirical material has been compiled illustrating the results of the lawmaking intuition and initiative based on analogy. The analogy is characterised as a way of law enforcement, inevitably related to lawmaking. The ability of legal practitioners to promote the principle of good faith using the analogy is defined as an additional reason for the active implementation of the creative function of the analogy method in civil law practice. The authors pointed out the inadmissibility of a hasty reaction to random and destructive analogies that can reduce the potential of the legal system to self-fulfill and self-preserve.

Literature Review

The method of analogy in jurisprudence in general and in the sphere of civil law, in particular, has been most fully studied and is actively used as a means of overcoming legal gaps (Petrovsky, 2009). The analogy is considered as such an instrument of logical “self-fulfillment” of law (Savigny, 1867), which, although it correlates with the discretion of the law enforcer (Kirillova, 2017), introduces a certain uncertainty in the legal regulation mechanism and even verges on recognising the admissibility of judicial lawmaking (Schauer and Spellman, 2017). It serves effectively to achieve legal certainty, sometimes referred to in science as the predictability of litigated case results (Mak, 2017). Indeed, it seems quite natural for the sphere of law to deal with similar cases in a similar way. If the legislature established a norm on how to relate to one of them, then the other case requires a similar resolution (Langenbucher, 1998).

The analogical reasoning provides the fill in legal gaps. The analogy of the law regulations are legally enshrined as a means of legal incompleteness overcoming (Article 6 of the CC RF). Thus, considering the legal practice needs, the problem of the legal gap “is narrowed to the specific case solution if there observed the gap in the law” (Shchelokaeva, 2007).

At the same time, there is no doubt that the analogy in civil law also serves as a means of developing the legislative character of civil law regulation. It provides the rights that are not enshrined by the law, but do not contradict the main content of the legal capacity of the person (Yakovlev, 2006). It is also true that the possibility of using an analogy for legal decisions making in civil relations guarantees the participants that any case, in particular, related to the agreements concluded, can be, and therefore, must be judged in accordance with the current legislation (Braginsky and Vitryansky, 2001).

The authors highlight the fact that the positive role of the analogy method in the civil law practice is not limited to legal gaps overcoming by individual acts of enforcement, practical support of the permissible character of civil law and the adaptation of existing legal tools to the current conditions in the context of subjective civil rights protection. The analogy method introduces the person's ability to "see with the mind's eye" (Manzhosov, 2018) and reflects the work of human intuition (Lamond, 2014). It forms a creative basis for lawmaking, eliminating existing gaps or predicting potential deficiencies. At the same time, the legislator does not only regard the facts of the real (mass or especially significant) application of analogy as an incentive to adopt an act that can help to overcome the revealed deficiency, but also actively uses a substantial (creative, intuitive) law-enforcement hint for choosing a specific legislative decision. However, this application of the analogy method in the civil law practice was not regarded as scientifically significant.

Discussion

It is indisputable that any legislative field is not free from terminological errors and fragmentation to one degree or another. This is caused by the situations that reveal a lack of a doctrinal base regarding a particular phenomenon that claims to be a legal one. It means that science cannot offer theoretically developed ready-made options for the required legal structure (Golubtsov, 2018).

Based on this analogy, law fills up the legal gaps and gradually develops and expands "from case to case" without an urgent need to formulate unifying rules at any given stage (Duarte d'Almeida and Michelon, 2016). At the same time, judicial practice does not only reveal legal gaps and contradictions in the current legislation (Schubert, 2016) but also helps to formulate and consolidate such general rules.

It is logical to assume that the absence of developed projects of normative decisions contributes to the formation of the creative basis for filling in the gaps and eliminating the contradictions of lawmaking using the practical results of the analogy of law implementation. To confirm and clarify this assumption, it is necessary to identify, analyse, and characterise the most significant manifestations of the analogy of law function. This determines the circumstances in which this

analogy works most effectively and indicate the conditions for the transition from the creative analogy of law implementation to specific legislative decisions.

The creative foundation for the analogy within the framework of the mechanism of repayment of claims for homogeneous obligations

For a long time, the courts used the analogical rules of repayment of claims for homogeneous obligations (Article 522 of the CC RF). This determined the procedure for homogeneous obligations payment for several supply contracts in cases where the buyer pays for the namesake goods received under several supply contracts and the amount of payment is not sufficient. The corresponding generalization was formulated in paragraph 19 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation (SAC RF) dated December 29, 2001 No. 65 “Review of the practice of resolving disputes related to the termination of obligations by offsetting counterclaims of uniform requirements”. The Court pointed out that civil law does not contain rules governing cases of insufficient amount of the counterclaim of the debtor to terminate the set-off of all its obligations under several contracts, and therefore, according to paragraph 1 of Article 6 of the CC RF, it is necessary to apply the analogy of law. The similarity of legal mechanisms for the proper fulfillment of an obligation and its termination by set-off allows, by analogy, to apply the norm of Paragraph 3 of Article 522 of the CC RF. It declares that the fulfillment of an obligation is counted as the repayment of obligations under an earlier contract, and in the case when the deadline for fulfillment of obligations under several contracts has come simultaneously, the performance granted is counted in proportion to the repayment of obligations under all contracts.

Accordingly, when resolving disputes, the courts were advised to proceed from the fact that if the amount of the counterclaim is insufficient to terminate the set-off of all obligations arising from several contracts, the obligation under the contract that was due earlier is considered to be terminated, unless otherwise indicated in the set-off statement. However, a legislative gap in the regulation of the repayment of homogeneous claims under several contracts was observed not only in situations related to offsetting. Currently, the analogy of law is used for the rules of Article 522 of the CC RF for the resolution of disputes from lease agreements (Resolution of the Federal Antimonopoly Service (FAS) of the Ural District of November 25, 2009 No. F09-9253 / 09-C6), compensated rendering of services (Resolution of the FAS of the Ural District of November 08, 2011 No. F09-6399 / 11; Resolution of FAS of the North-Western District of February 17, 2011 No. A56-46149 / 2009), works performance (Decision of the FAS of the Central District of April 15, 2010 No. F10-872 / 10; Resolution of the FAS of the North Caucasus District of April 29, 2009 No. A63 -7092/2008), loans (Decision of the FAS of the North Caucasus District of March 27, 2013 No. A53-5344 / 2012), credits (Information letter of the Presidium of the SAC RF dated September 13, 2011 No. 147 “Review of judicial practice in resolving disputes related to the application of the provisions of the CC RF on a loan

agreement”), agency services (Resolution of the FAS of the Central District dated December 27, 2012 No. A09-238 / 2012). As a result, the accumulated law enforcement experience provided the opportunity to generalize the relevant rules and adopt the general norm 319.1 of the CC RF, developed to determine the procedure for repayment of claims for any homogeneous obligations, and not just related to the supply. According to Paragraph 3 of Article 319.1 of the CC RF, unless otherwise provided by law or by agreement of the parties, in cases where the debtor has not indicated which of the homogeneous obligations has been fulfilled, the obligation whose fulfillment date is or will be earlier will benefit, or, when the obligation does not have a due date, the obligation that arose earlier will benefit. If the deadlines for the fulfillment of obligations have come simultaneously, the fulfillment shall be credited proportionally.

Creative function of the analogy within the regime of legally significant messages determination

Until recently, in civil law practice, there was an acute shortage of legal regulation of the procedure for sending and receiving legally significant messages, especially to UGRLE (the so-called “legal address”) addresses, while the organisation was located at a different (actual) address. The very concept of legally significant messages is not enshrined in civil law. However, it was used in law for various statements, notifications, notices, claims or other messages related to the civil consequences for another person (Dolinskaya, 2014). Moreover, according to the rules enshrined in the procedural legislation, there is an approach, according to which a legal entity bears the risk of not receiving legally significant messages at the address registered in the Unified State Register of Legal Entities, as well as the risk of the absence of its representative at the indicated place. According to subparagraph 2 of paragraph 4 of Article 123 of the Arbitration Procedure Code of the Russian Federation, the persons participating in the case are considered duly notified by the Arbitration Court even if, despite the postal notice, the addressee did not appear to receive a copy of the judicial act sent by the Arbitration Court in the prescribed manner, about which the postal service organisation notified the Arbitration Court. This approach was implemented by the courts in several separate cases (Resolution of the FAS of the Volga Region dated May 21, 2013 in case No. A55-23900 / 2012; Resolution of the FAS of the West Siberian District of April 30, 2013 No. F04-2006 / 13) and was summarized in Clause 1 of the Resolution of the Plenum of the SAC RF dated July 30, 2013 No. 61 “On Certain Issues of the Practice of the Dispute Resolution Related to the Reliability of the Address of a Legal Entity”. In one of the cases, the Court directly referred to the provisions of Article 6 of the Civil Code in the following very characteristic situation. The claimant (the contractor) sent the defendant (customer) certificates of acceptance of the work performed, certificates of their value, and an invoice for the disputed period, which was confirmed by postal receipt and a description of the attachment to the letter. The defendant did not sign the indicated documents, although they did not submit a reasoned refusal to do it. He declared that the above documents had not been sent to him by the claimant because according to the postal identifier indicated on the receipt, the

shipment was returned to the claimant after the storage period expired. When resolving the dispute, the Court concluded that the fact that the defendant had not received the corresponding letter due to the expiration of the storage period did not mean that the claimant had not properly sent the relevant documents. Thus, the defendant was duly notified about the result of the work and the need for acceptance.

The Court based this conclusion on the mentioned procedural norm of subparagraph 2 of Paragraph 4 of Article 123 of Arbitration Procedure Code of the Russian Federation, indicating that this rule of law is applicable to the disputed relationship between the claimant and the defendant according to paragraph 1 of Article 6 of the CC RF. It provides the analogy to the law, which is determined by the necessity to fill in the certain gaps in the legal regulation and is aimed at protecting the rights and legitimate interests of citizens and proper justice provision (Resolution of the Twelfth Arbitration Court of Appeal of January 16, 2013 No. A12-19181 / 2012). Having appropriately perceived the indicated use of the analogy mechanism, the legislator adopted the Federal Law of May 7, 2013 No. 100-FL “On Amendments to Subsections 4 and 5 of Section I of Part One and Article 1153 of Part Three of the CC RF” and supplemented the Civil Code with new Article (Article 165.1 “Legally Significant Messages”). According to the Article, statements, notifications, claims or other legally significant messages related to civil consequences for another person entail such consequences for that person from the moment the corresponding message is delivered to him or his representative. At the same time, the message is regarded to be delivered even if it arrived to the person to whom it was sent (to the addressee). However, due to circumstances depending on him, it was not delivered to him or the addressee did not study it.

Analogy as a creative basis for improving public contract legislation

One more very indicative example can be given of how the constructive practice of applying a specific civil law norm by analogy, approved in the legal literature, formed a creative basis for improving the existing legislative material.

According to Article 426 of the CC RF, as amended before the adoption of the Federal Law of March 8, 2015 No. 42-FL “On Amending Part One of the CC RF”, a contract is considered to be a public agreement if it was concluded by a commercial organisation and established its obligations to sell goods, perform work or provide the services that such an organisation should carry out with respect to everyone who demands it (retail, transportation by public transport, communication services, energy, medical, hotel service, etc.). This norm clearly and unequivocally considered only a commercial organisation as the consumer’s counterparty in the public contract. However, it is clear that in many cases the activity of individual entrepreneurs and non-profit organisations also implied (and implies) the obligation to conclude relevant agreements on terms that are common for all the consumers. In relation to individual

entrepreneurs, we can apply Clause 3, Article 23 of the CC RF on the “appropriate application” of the rules of the CC RF regulating the activities of commercial organisations. Therefore, a positive answer to the question of the spread of the norm of Article 426 of the CC RF to entrepreneurs follows directly from the law. In special literature, it has been correctly noted that the question of the ability of a public contract to regulate relations with the participation of individual entrepreneurs does not constitute a real scientific problem (Kuznetsova, 2013).

With respect to non-profit organisations, such a question performs a legal gap. Some courts, when resolving consumer disputes with non-profit organisations providing services, refused to consider the contracts concluded by the latter as public, pointing to the failure of references to an analogy, since the application of Article 426 of the CC RF in relation to non-profit organisations contradicts not only the provisions of the current legislation but also the activity of a non-profit organisation (Resolution of the FAS of the Central District of August 25, 2008 No. F10-3829 / 08). On the other hand, admitting the obvious groundlessness of the formal narrowing of the circle of subjects of a public contract according to the text of Article 426 of the CC RF, but not being able to apply the rules of public contract to the agreements concluded by non-profit organisations, the courts found it possible to implement an analogy. Thus, the FAS of the North-Western District in its Decree of 05 November 2003 No. A05-1936 / 03-72 / 24 recognised the decision on the obligation of the Arkhangelsk Mayor’s Office to conclude an energy supply agreement with “Maimaks-1”, establishing that it has the ability to supply the claimant with thermal energy in hot water, being for the latter the only available supplier of such energy, and the claimant has the opportunity to receive it. Thus, the Court applied the norm of Article 426 of the CC RF on the inadmissibility of refusal to conclude a public contract through reference to Article 6 of the CC RF.

In scientific works, the practice of applying the rules of the public contract by analogy to non-profit organisations carrying out activities that should be carried out in relation to any person, who demanded it, was generally regarded as positive. The legislator cannot be qualified if he deliberately limits the scope of subjects of a public contract. In fact, there was a legal gap caused by a legislation defect (incompleteness, inaccuracy of the norm). Therefore, it was noted that a public contract norms protecting the weak side imply the dependence of the law on the obligation to conclude a public contract in accordance with the legal form, but with the activity of an economically strong counterparty (Levchenko, 2008). Some researchers express absolute confidence that the rules of Article 426 of the CC RF, can and should be applied by analogy, in particular, to collective rights management agreements concluded with a non-profit organisation on the active side (Gavrilov and Yeremenko, 2009). According to Savelyev, the necessity of justice, weak party protection and the discrimination prevention in contractual relations require the implementation of the principles of Article 426 of the CC RF for non-profit organisations performing socially significant activities (Savelyev, 2009). The use of analogy in the situation under consideration contradicts the requirement for the freedom of contract inadmissibility

introduced in the law (Article 1 of the CC RF). Such an analogy does not contradict the essence of regulated relations. The adequacy of the law formulated by analogy to the true goals of the legislator predetermined the adjustment of the provisions of Article 426 of the CC RF. Currently, a public contract is an agreement concluded by a person engaged in entrepreneurial or other income-generating activities and establishing his obligations to sell goods, perform work or provide services that such a person should perform in relation to everyone who addresses him (retail, transportation by public transport, communication services, energy supply, medical, hotel services, etc.).

General assessment of the implementation of the creative function of analogy in civil law practice

The above examples generally confirm the idea that the analogy is inherent to human thinking, everyday practical and theoretical reasoning, promotes doctrinal stability and systemic coherence and provides the principle of reproducibility of the way to achieve a legal goal (O'Donnell, 2011). At the same time, the justified, adequate use of the analogy method in civil law practice contributes to the formation of stable judicial positions, which become both an incentive and a creative foundation for new legislative decisions that improve the legal system.

It is worth highlighting that cases when creative judicial positions related to the filling of legal gaps with the help of the analogy of the law became legislative norms that are relevant in the content are not limited to the most striking, significant and typical examples presented above. Among the other very noticeable cases of the creative function of the analogy with legislation improvement, we can mention the practice of avoiding the disproportion of the recoverable interest for the use of borrowed money by analogy with the reduction of excessively high penalties motivated to extend Article 395 of the CC RF with a special (for interest, not forfeit) rule on the admissibility of judicial reduction. The Court has the right to apply to (by analogy) Article 333 of the CC RF to reduce the rate of such interest according to paragraph 7 of the Decree of the Plenum of the Supreme Court of the Russian Federation (SC RF) and the Plenum of the SAC RF No. 13/14 dated October 08, 1998 “On the case law applying the provisions of the CC RF regarding annual interest for the use of another’s funds” if determined in accordance with Article 395 of the CC RF the size (rate) of interest charged for the delay in debt repayment is clearly disproportionate to the consequences of the delay.

It is also appropriate to cite a less ambitious, but no less characteristic case. Thus, according to Paragraph 1 of Article 417 of the CC RF, which was in force from the moment the Code was adopted in 1995 until June 1, 2015, the civil obligation is terminated (in whole or in part) if the fulfillment of such an obligation becomes impossible in whole or in part as a result of the publication of an act of a state body. This wording left open the question of an impediment for the obligation fulfillment by the act issued by a local government that is not related to the

impediment of the state system. Therefore, the courts applied the analogy of the law. Since impediment for the obligation fulfillment by the act issued by a local government is not directly regulated by the law, they applied Article 417 of the CC RF, which was developed for similar cases (paragraph 5 of the Information Letter of the Presidium of the SAC RF dated December 21, 2005 No. 104 “Overview of the Practice of Arbitration Courts of the CC RF for Termination of Obligations”). Having doctrinal confirmation (Dolgov, 2015), this positive result of judicial work contributed to the fact that Article 417 of the CC RF was amended in 2015. The words “act of a state body” were replaced by the words “act of a state authority or local government”.

Moreover, it should be expected that other creative judicial positions that have become well-known in the practice of applying civil law by analogy will acquire a normative form in the near future. They are:

- A creative assessment of the rule of Clause 3 of Article 551 of the CC RF on the possibility of making a judicial decision on state registration of the transfer of ownership of real estate in the event that one of the parties evades the implementation of registration measures. Applying this rule by analogy to situations where the obligation of the seller of real estate to participate in state registration cannot be executed due to the death of the seller - citizen or liquidation of the seller - legal entity (determination of the SAC RF of August 08, 2012 No. SAC-9889/12; Resolution of the Arbitration Court Central District of October 15, 2015 No. F10-3649 / 2015).

Creative indication that, in accordance with Paragraph 1 of Article 6 of the CC RF (by analogy) about the relations of owners of premises located in a non-residential building arising from common property in such a building, the rules of law governing similar relations are subject to application, namely the norms of Articles 249, 289 and 290 of the CC RF (paragraph 41 of the Resolution of the Plenum of the SC RF of June 23, 2015 No. 25 “On the application by courts of certain provisions of Section I of Part One of the CC RF”).

It is very likely that soon an innovative decision (formulated by analogy in the process of preliminary overcoming the gap of Article 157.1. of CC RF on the regime of consent to conclude a transaction) will also turn into a specific legislative decision on the availability of a third party, who has given preliminary consent to commit of any transaction, the right to revoke the consent if the parties are notified before it is completed. As there are no legislative rules on the implementation of such rights, Article 439 of the CC RF should be applied by analogy. According to its provisions, the withdrawal of consent, the message of which was received by the parties after the transaction completion, should be considered invalid (paragraph 57 of the Resolution of the Plenum of the SC RF of June 23, 2015 No. 25 “On application by the courts Certain Provisions of Section I of Part One of the CC RF”).

The authors consider that it is obviously urgent to transfer the judicial positions on the application of rules on the invalidity of transactions by analogy to the lawmaking context. As relevant examples of such positions aimed not at maintaining, but at breaking down civil law ties, we can provide the following cases:

- An explanation of the possibility of recognising (if there are appropriate grounds) assurances invalid by analogy with transactions (Paragraph 37 of the Resolution of the Plenum of the SC RF of December 25, 2018 No. 49 “On some issues of the application of the general provisions of the CC RF on the conclusion and interpretation of an agreement”).
- An indication that decisions made at the meetings of business participants which were not certified by a notary or a person maintaining the register of shareholders and performing the functions of a counting commission, in the manner prescribed by subparagraphs 1–3 p. 3 of article 67.1 of the CC RF, are considered void by analogy with the rule of Clause 3 of Article 163 of the CC RF on the nihility of a notarized transaction, if its certificate was mandatory (Clause 107 of the Resolution of the Plenum of the SC RF of June 23, 2015 No. 25 “On the application by courts of certain provisions of Section I of part one of CC RF Federation”).

An analysis of the above cases of constructive judicial approaches implementation (based on the analogy) in the rule-making process reveals another important aspect of the creative function of analogy of law. The rules of Article 6 of the CC RF, when using an analogy, require the law enforcer to proceed from the requirements of good faith, reasonableness, and justice. Thus, the analogy of the law is the reason for the creative development of these most important assessment categories with non-obvious meaning and motivates the promotion of the idea of good morals in legislative practice (Golubtsov, 2016). In some cases, the courts try to give the exact meaning of these categories in the context of implementing the requirements of Article 6 of the CC RF:

“good faith” - the actual honesty of the subjects in their behavior;

“rationality” - the awareness of the legitimacy of their behavior;

“justice” – the correspondence of the behavior to moral and ethical standards (Resolution of the FAS of Central District of August 6, 2007 in case No. A14-1437 / 2006/37/12).

The highlighted aspect additionally convinces of the correctness of the idea of socially positive character of the analogy method in the context of civil law practice. This makes some lawmakers admit the necessity to perceive any case of application of the norms of civil law by analogy as detecting a gap in the current legislation, which needs to be urgently filled by improving the existing normative act or adoption of a new special act (Gavrilov, 2012).

However, it is quite clear that immediate norm-setting reaction to the legal gap is not always

possible and is hardly necessary in all cases. The legislator cannot and should not tend at all costs to formalise every atypical (abnormal) situation. Hasty implementation of the position developed by analogy (adapted to the atypical situation of the existing normative rule) into the legislation may lead to the legal excess or destructive consequences.

For example, until recently, joint-stock legislation contained a gap about the shareholder's ability to use the mechanism of contributions to property that is not related to the increase in the authorised capital of the company. As there was no mention of a mechanism for increasing net assets in the Federal Law of December 26, 1995 No. 208-FL "On Joint-Stock Companies", there was an acute question of the possibility of using joint practice by analogy with the norms of Article 27 FL of February 8, 1998 No. 14-FL "On Limited Liability Companies". This law allows the provision in the constituent document of the organisation that its participants, by the decision of the general meeting, undertake to make contributions to the property of the company that does not entail an increase in the authorised capital and do not change the size and nominal value of the shares of participants in the authorised capital. Basing on the similarity of the legal structure of limited liability companies and joint-stock companies and taking into account the doctrinal argumentation of the principle of the possibility to extend the regime of contributions to the property by analogy to related corporate relations (Galperin, 2007), the legislator hastened to include a special article in the Law "On Joint-Stock Companies" 32.2, which aimed at direct legislative elimination of this gap. On the one hand, the creative function of the analogy of law has worked, which has led to the expansion of opportunities for joint-stock companies to receive economic support from its shareholders and the possibility of an additional anti-crisis mechanism.

On the other hand, adapting the "donor" norms to joint-stock relations, the legislator provided a number of significant and at the same time ambiguous differences for the "recipient". Firstly, the attention was focused on the shareholders' right (not the obligation, as established for participants in limited liability companies) to make contributions to property at any time. It seems excessive, because if it is allowed to decide on the obligation of all (or some) participants of the company to contribute to the property of the corporation, then by virtue of the *argumentum a majori ad minis* nothing can prevent to make a voluntary contribution. Secondly, it was established that shareholders make mandatory or proactive contributions to the property of a joint-stock company according to the agreement concluded with the company. However, an appropriate decision of the general meeting of participants is necessary for the implementation of property assistance to a limited liability company. It does not draw any objections as the contract is a natural tool for civil law interaction. The absence of clear normative guidelines for determining the subject and content of such contracts, and their real or consensual characteristics contribute to a new legal uncertainty. Thirdly, the new norm specifies that property contributed by shareholders as a contribution must correspond strictly to paragraph 1 of Article 66.1 of the CC RF. This phenomenon can be regarded as a legal and technical miscalculation of the

legislator, since there was an unreasonable duplication of the general legal norm, equally developed to determine the acceptable contributions to the property of any business companies. Thus, legal pleonasm occurred.

As another example of the unsuccessful use of the creative potential of analogy, we can cite the practice of judicial qualification of agreements on the transfer of structural elements of a building (facades, roofs) for use. Relations arising from the conclusion of such agreements were not recognised as rental but were regulated through an analogy mechanism. In paragraph 1 of the Information Letter of the Presidium of the SAC RF dated January 11, 2002 No. 66 “Review of the practice of resolving disputes related to rent”, it was stated that the roof is a structural element of the building and is not an independent element that can be transferred to use separately. Thus, the roof cannot be considered an acceptable rental object. According to paragraph 7 of the Decree of the Plenum of the SAC RF of July 23, 2009 No. 64 “On some issues of the practice of resolving disputes on the rights of owners of premises to the common property of a building” in relation to the general property use of the building, it was explained that parts of the building can be transferred for use by third parties. For example, it is possible to use a load-bearing wall or roof for the placement of an advertising sign. The corresponding agreements by analogy can be applied to this lease agreement, and they are a subject for state registration, as well as the entire building leases concluded for a period not less than one year. As a result, on the one hand, the analogy was used as a tool of real obligation.

In fact, the Plenum of the SAC RF, using an analogy, provided the rights of the third parties to use the structural element (part) of the building with the property of “sticking” to the thing. According to Clause 1 of Article 617 of the CC RF transfer of ownership of the leased property to another person is not a reason to change or terminate the lease agreement. However, it clearly contradicts the principle of a limiting regulatory list of property rights. On the other hand, the application of rental standards by analogy in relation to the compensated temporary use of a part of a building called into question the viability of the contractual form of rent, its ability to legally provide any temporary use. In this case, it can be stated that a creative law enforcement approach based on analogy worked destructively, creating a threat to the system of property relations and the system of a lease agreement. Therefore, it was necessary to adopt the Resolution of the SAC RF dated November 17, 2011 No. 73 “On Certain Issues of Practicing the Rules of the CC RF on a Lease Agreement”. It was clarified in Paragraph 9 that the provision of 607 of the CC RF, which defines rental objects as land plots and other separate natural objects, enterprises and other property complexes, buildings, structures, equipment, vehicles and other things that do not lose their properties in the process of their use (non-consumable items). Article 606 of the CC RF on the possibility of transferring the leased object only for use by the lessee does not limit the right of the parties to conclude such a lease agreement, under which the lessee is not provided with the whole thing, but only a separate part of it.

Conclusion

The author points out that lawmakers must pay close attention to the situations of the widespread, mass application of analogy to a certain group of relations, or if the law enforcer tends to overcome the discovered gap in the regulation of especially important and urgent issues (especially in cases where the practice of applying some norms has been objectified in the legal framework of higher judicial instances).

The quick reaction of the legislator, relying on the creative basis of the analogy, is especially necessary in situations where the analogy is used as a means of restricting and encumbering civil rights, as well as a way of obstructing legal but undesirable behavior.

However, it should be borne in mind that the analogy should dialectically combine not only creative, but also conservative, stabilising basis of civil law. Creative (analogical) comprehension of certain norms (or groups of norms) of the law should not lead to destructive consequences. The issue of transferring the legal provisions developed by analogy to the sphere of the current legislation improvement should be considered carefully and thoughtfully.



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