

THE ANALOGY OF LAW IN CIVIL LAW PRACTICE

A ANALOGIA NA PRÁTICA DO DIREITO CIVIL

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ABSTRACT

The relevance of the research was determined by the increase in practical significance of the analogy of law as a tool to resolve legal uncertainty, as well as a growing interest for analogy method implementation in civil jurisprudence. The goal of the research was to show how actively the legal analogy mechanism is applied in current civil law practice, to identify the reasons for the increasing role of legal analogy as an active tool in jurisprudence, and to prove the necessity to avoid the doctrinal qualification of legal analogy as an extraordinary and exceptional phenomenon in the process of justice administration. The method of analogy was regarded as the key tool as well as the object of the study. Moreover, alongside with the special comparative legal and technical legal instruments, the author applied such general logical methods, which are characteristic for the most civilized studies, as the analysis and synthesis, induction and deduction, comparison and generalization. The author defined some prominent cases that were decided by means of legal analogy application and can form the basis for further research and the development of the relevant judicial practice. In addition, the derogation of the real role and socially positive significance of civil law application in legal analogy practice have been criticized. Furthermore, the author introduced a new concept of the correlation between the legal standards' development and itemization and the degree of legal analogy demand in jurisprudence. The work contributes to the development of theoretical ideas about the essence of legal analogy in civil law practice, and it serves as the basis for a wider and more effective application of this mechanism not only as a means of political and legal expediency of existing legal norms interpretation, but also for ensuring good faith and justice in specific dispute resolution.

Keywords: legal analogy, civil law, principles of law, justice, good faith, lawmaking.

RESUMO

A relevância da pesquisa foi determinada pelo aumento do significado prático da analogia como uma ferramenta para resolver a incerteza jurídica, bem como um crescente interesse pela implementação do método da analogia na jurisprudência civil. O objetivo da pesquisa foi mostrar o quão ativamente o mecanismo de analogia jurídica é aplicado na prática do direito civil atual, identificar as razões para o crescente papel da analogia jurídica como uma ferramenta ativa na jurisprudência, e provar a necessidade de evitar a qualificação doutrinária da analogia jurídica como fenômeno extraordinário e excepcional no processo de administração

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da justiça. O método da analogia foi considerado a ferramenta-chave e também o objeto de estudo. Além disso, a par dos instrumentos jurídicos comparativos e técnicos especiais, o autor aplicou métodos lógicos gerais, próprios dos estudos mais civilizados, como a análise e síntese, indução e dedução, comparação e generalização. O autor definiu alguns casos proeminentes que foram decididos por meio da aplicação de analogia jurídica e podem servir de base para futuras pesquisas e o desenvolvimento da prática jurídica relevante. Além disso, a derrogação do papel real e do significado socialmente positivo da aplicação do direito civil na prática da analogia jurídica foi criticada. Além disso, o autor introduziu um novo conceito de correlação entre o desenvolvimento e a discriminação dos padrões jurídicos e o grau de exigência de analogia jurídica na jurisprudência. O trabalho contribui para o desenvolvimento de ideias teóricas sobre a essência da analogia jurídica na prática do direito civil e serve de base para uma aplicação mais ampla e efetiva desse mecanismo não apenas como meio de expediente político e jurídico das normas jurídicas existentes de interpretação, mas também para garantir a boa fé e a justiça na resolução de litígios específicos.

Palavras-chave: analogia jurídica, direito civil, princípios de direito, justiça, boa-fé, legislador.

INTRODUCTION

Legal gap is regarded as the key reason for legal uncertainty, which is considered a negative factor and a defect in the legal system that impedes the achievements of the necessary legal results (Davis, 2011). Legal gaps are situations that occur when the social relations, included in the subject of civil law, are not directly regulated by law or contract and there is no custom applicable for such relations, i.e., when there is a gap between a fact requiring the reaction of the legislator and relevant regulatory material.

A condition of legal uncertainty is also observed when there is no formal legal gap; however, existing legislation is not able to respond adequately to some “mutations” of social relations, when the latter take new features in specific socio-economic conditions. It is impossible to ignore these characteristics to provide harmonious implementation of basic civil legal principles, such as participants’ equality, inviolability of property, freedom of contract, impermissibility of any arbitrary interference with private affairs, the necessity of unhindered exercise of civil rights, and ensuring the guaranty of restoration of violated rights and their legal protection (Section 1, Article 1 of the Civil Code of RF).

The inertia of the legislative process impedes instant overcoming of any emerging legal uncertainty in a normative way. The author of the present work points out the fundamental importance of striving to achieve absolute legal certainty around civil law responsibility as well

as the inadmissibility of denial of justice and ensuring the civil rights protection in terms of the absence of proper regulatory material. In this context, it is worth highlighting such a powerful tool to address legal shortcomings as the analogy of law. Nowadays, the study of the mechanism of the analogy of law depends on the continuous complication of economic life, i.e., the intensification of the implementation of information and telecommunication networks and electronic technologies, the development of robotics and artificial intelligence, and the active genomic research and interventions in the human genome. Thus, new unidentifiable regulations are being introduced and the number of relations to be included in the sphere of legal impact is increasing. These relations fall outside existing civil law regulation. At the same time, there is no law (or other normative act) that would regulate similar relations, and could be applied for the analogy of law.

2. LITERATURE REVIEW

The analogy method in legal argument is regarded as a very common, convenient, and effective means “to bridge the gap between facts and rule”. In the theory of law, the relevant application of legislative rules governing relations similar to the disputed (not directly regulated) is defined as the analogy of law (“*analogia legis*”, statutory analogy) (Weinreb, 2005). According to the analogical reasoning under the rules of statutory analogy, a judicial conclusion is drawn from the case that has already been classified (normatively identified) and assessed on another case based on similarities. Therefore, legal norms are applied to the situations that are not direct subjects to the relevant classification (Macagno, 2009). In Russia, the application of civil law by means of *analogia legis* is directly permitted for civil disputes (Section 1, Article 6 of the Civil Code of RF). If such a legal gap was identified, and it is impossible to apply the analogy of law to overcome it, Section 2 of Article 6 of the Civil Code of the Russian Federation provides a mechanism of the legal analogy (“*analogia iuris*”), i.e., the determination of the rights and obligations of the participants in a disputed relationship based on the general principles and meaning of civil law, as well as the requirements of good faith, reasonableness, and justice.

According to juristic theory, legal analogy is established not according to specific norms, but according to the so-called “general principle of law” (Damele, 2014), which is regarded as “more mysterious and puzzling than *analogia legis*”, as it is associated with

axiology and the necessity to ensure internal consistency of the legal system (Koszowski, 2017). Therefore, the analogy of law can be an instrumental for the prompt perfection of the law, and can serve as “something more” than the logical device used by the court (Tsikhotsky, 2011).

The author of the present work points out the important positive role of the mechanism in question, its significance in the legal regulation of civil relations basing on the direct legislative consolidation of the analogy of law as an acceptable way to overcome legal gaps. Furthermore, its consistency forms the basis for the legality of judicial acts (Section 2 of the Decree of the Plenum of the Supreme Court of the Russian Federation of December 19, 2003 No. 23 “On court decision”). In addition, the analogy of law effectiveness in exercise the subjective potential of the law enforcer (personal experience and worldview) contributes to the resolution of the most difficult legal situations (Shindyapina and Boshno, 2006), ensuring the spirit of law (Anisimov, 2016) and the implementation of the real (immediate, direct) functioning of the basic principles and the meaning of legislation (Kuznetsova, 2006).

The implementation of the mechanism of the analogy of law in making legal decisions contributes to a serious discretion of the executor, which sometimes qualifies analogical reasoning as “a mask for unrecognized judicial lawmaking” (Schauer and Spellman, 2017). Therefore, there is a certain amount of uncertainty in the mechanism of legal impact. However, the analogy of law can be reasonably considered the most effective way to achieve legal certainty. Thus, some authors aptly note that the certainty, which lawyers really care about, is often better achieved through nebulous and vague legal standards that often more accurately meet people’s real expectations and forecasts (Raban, 2010). Since the tendency to increase the uncertainty in the law is “extreme” (D’Amato, 2010), it is logical to assume that the role of *analogia iuris* in legal regulation should increase.

In the doctrine, the analogy of law is mostly regarded as “spare”, “the worst” (Rovny, 2011) and “exceptional” instrument, used when all other means have been exhausted (Balashov and Mishutina, 2009), which is below the last stage in the hierarchy of permissible civil legal regulations (Braginsky and Vitryansky, 2001). Some authors approved the practice of overcoming legal gaps by means of the analogy of specific rules of the law. However, they pointed out the impossibility or at least undesirability of the implementation of the analogy of law, since the latter is less consistent with the requirements of legality consolidation, and creates the basis for abuse while using discretionary capabilities of the officials that is inevitable in terms of the analogy of law application (Szabo, 1964). An additional barrier to a positive

perception of the mechanism under consideration is caused by the attempts to challenge the existence of the analogy of law as one of the varieties of the legal analogy method (Albov, 2013).

Contemporary scientists and law practitioners note that although the application of the analogy of law in substantive and procedural matters is not excluded, it is implemented “relatively rarely” (Slepenkova, 2011), “rather rarely” (Malyushin, 2015), “rarely” (Kulakov, 2013), and “extremely rarely” (Alieskerov, 2002). In courts, the analogy of law as a method of overcoming gaps in civil law is applied “sporadically” (Panova, 2012), “inappreciably” (Polyakov, 2014) or “not involved at all” (Bevzenko, 2010). It is noted that when the theoretical considerations about the analogy of law and legal analogy are transferred to the practical aspect of a particular industry, the application of analogy becomes a very controversial institution, which is difficult to implement). This situation is usually explained by the development and extensiveness of civil law, the improbability of the relations that are beyond the scope of civil law regulation in the near future, the absence of the relevant conditions for the analogy of law, general or partial underdevelopment and deficiency of legislation, weaknesses (deficits) of contractual regulation, and underdevelopment of commercial practice.

Because of the logical development of this idea, we can conclude that the demand for the analogy of law in resolving civil law disputes will tend to zero or disappear completely. According to such reasoning, as well as in the view of the comments on the “threat” and “destructive nature” of the analogy of law, it is worth highlighting that while considering those rare cases that require turning to the analogy, the judges face the complications that can cause certain judicial errors (Balashov and Mishutina, 2009). Therefore, the assumption that it is inappropriate to correlate the analogy of law with the establishment of the legislation meaning, as well as the reasons to exclude the analogy of law from the provisions, are to be considered as grounded and promising. However, relying on a general assessment of analogy as a fundamental process that plays a central role in any legal reasoning (Hunter, 2008) and impacts the entire legal process, it is worth highlighting the falseness of such ideas in terms of both the approach and argumentation.

3. METHODS AND MATERIALS

The source study results allow us to consider the present research as the doctrinal one,

i.e., based on the analysis of legal premise that follow the legal theories, laws, and judicial practice materials (Smits, 2015). The key feature of the work is the reference to both the provisions of well-known generalizing acts of the supreme judicial authority as well as judicial acts that were not previously discussed theoretically, and when the executors of law resolved the dispute by means of the analogy of law. A distinctive feature of the methodological basis of the work was the concurrent application of the analogy method and other logical methods of analysis and synthesis, induction and deduction, comparison and generalization, typology and analogy, which are characteristic for civil law research (Luneva, 2015). It is worth highlighting that the method of analogy being the logical foundation of the legal mechanism of the analogy of law was introduced as the main object of the research

4. RESULTS

The improvement of the qualitative and quantitative function of the studied legal technique in modern conditions is shown, requiring the judiciary not only to achieve political and legal expediency in interpreting existing legal norms, but also to ensure good faith and justice in individual disputes resolving. The author turned to the specific cases in order to refute the scientifically accepted notion that the consequent complication and itemization of civil legislation will lead to the fact that the analogy of law will not be necessary, and the norm of Section 2 of Article 6 of the Civil Code of the Russian Federation on the admissibility of such a technique by the courts will actually acquire a metaphysical character. On the contrary, according to the analogy with the principle of intellectual intimidation attributed to Socrates, the idea was expressed that an increase in the normative array (the inside of the sphere) inevitably entails the contact of law with the legal void (the outside of the sphere), i.e., the larger the volume of law is, the larger the surface of the sphere is, which leads to the contact with “lawless”.

The idea has been suggested that if the law executor follows the principle of good faith and other basic principles of civil law while solving a civil law conflict, the judicial act will objectively reflect the necessity to amend or supplement current legislation (the court work outside the “sphere” of law is indicated). Courts directly implementing the mechanism of the analogy of law in resolving a specific dispute are recommended not only to argue specifically the necessity of applying this mechanism in a judicial act (including direct reference to Section

2 of Article 6 of the Civil Code of RF), but also to give the legislator a clear and unambiguous signal (incentive advice) on the necessity of specific legislative changes.

5. DISCUSSION

Opposing the opinion of legal scholars and practicing lawyers, who consider the analogy of law as an extraordinary and exceptional tool, applied rarely and even “sporadically” due to its complexity, internal uncertainty and even threat to the legal system, it seems possible to provide some solid arguments. There is a misguided concept that a qualitative improvement and a quantitative increase in the civil regulatory normative array as a whole reduces the necessity for law enforcers to apply the method under study for overcoming legal uncertainty.

At any rate, it is clear that the larger the text of the normative act is, the more likely it is it will contain an error or a contradiction. In addition, if we draw an analogy between the correlation of knowledge and ignorance in the process of cognitive activity and the correlation of legal certainty with an increase in the amount of normative material, it turns out that the criticized idea conflicts with the principle of intellectual intimidation attributed to Socrates, namely: “He among you is wisest who, like Socrates, knows that his wisdom is really worth nothing at all” (Plato, 2006) or “I only know that I know nothing” (Diogenes Laërtius, 1979). If we present a normative array as the inside of a sphere, then an increase in the volume of this sphere will inevitably increase its surface, and consequently the number of touch points between existing norms (law) and unknown social connections (lawlessness).

To confirm the present comparison and the discovered contradiction, we can offer numerous examples when legislative innovations that introduce new spheres of public life into the area of civil law or regulate certain issues in more detail, lead to new legal gaps and, as a result, increase the importance of legal analogy. In particular, the legislative consolidation of the shareholders’ agreement and the recognition of the rights of the parties of such an agreement as the subject to judicial protection required the authorization of not just well known coercive measures such as damages and penalties (fines, penalties). The difficulty of proving possible losses, which may not arise at all, as well as the awareness of the low disciplining potential of the penalty, which is the subject to systemic judicial reduction, predetermined the introduction of such a new form of liability as the payment of compensation, i.e. a fixed amount of money or the amount specified in the shareholders’ agreement (Sections 1, 7, Article 32.1 of The

Federal Law of December 26, 1995 No. 208-FL “On Joint Stock Companies”). A clear, normative definition of compensation affixed by law with the penalty as a special, independent measure of liability removes any uncertainty about a court’s ability to reduce seemingly excessive compensation. However, courts must make decisions that, while consistent with the letter of the law, also meet the requirements of socio-economic justice (Laptev, 2015). Judges must require legislators to disclose the consequences of approval of excessive amounts of compensation. Therefore, according to the rules of Article 333 of the Civil Code of RF regarding penalties, courts must consider analogous cases to assess (and if necessary, reduce) any civil law sanctions (Mikryukov, 2017). Civil law, which was developed to coordinate the behavior of independent individuals, is not able to keep up with the complexity of modern life. Individuals are able to enter into contractual obligations not specified by law and to create objects that do not conform to current regulatory statutes.

In this regard, the secure position of analogy in the system of civil law instruments is determined by the fundamental methodological and functional precepts of civil legislation on ensuring freedom and multivariance of economic behavior, the absence of an exhaustive list of legal facts that can cause the emergence, change or termination of civil rights and obligations. Entities, which are independent in terms of creativity, property and equal to each other, are able to create unique legal relations. In this context, it is impossible to foresee the regulation of the entire volume of social relations, which comprise the subject of the civil law. It is also obvious that general development and complication of the factors of civil law interaction provide new areas of implementation of the analogy of law, including: private relations that nowadays are insufficiently regulated, the application of genomic technologies (Maleina, 2019), introduction of robots (Arkhipov and Naumov, 2017) and artificial intelligence systems (Laptev, 2019), and the development of the digital economy as a whole (Vaipan, 2017). Being a channel of direct application of the basic principles of civil law, the analogy of law provides the necessity to include more actively civil law principles into the legal regulation of public relations.

The relevance of positive and increasing assessment of the role of the analogy of law in legislation is caused by the fact that the tool in question is rightly qualified in science as a channel for direct application of the basic principles of civil law in general (Kulakov, 2013), and received direct legislative consolidation of the principle of good faith in particular (Ulyanov, 2014). Some scholars generally assume that legal principles constitute the analogy of law (Sizemova, 2015). The regulatory role of the analogy of law should not be

underestimated in neither doctrinal nor practical aspects, since there actually observed general increase in the importance of civil law principles in the legal impact on public relations (Golubtsov, 2016), as well as the calls for their greater influence not only on the process of creating legal norms, but also on the practice of law enforcement (Bondarenko, 2013). Providing civil law impact on public relations according to the requirements of good faith, reasonableness and justice, the analogy of law becomes not only the means of gap overcoming, but also an effective way to resist the attempts of law evasion (Veter, 2015) and other abuse of law (Volkov, 2010).

Judicial practice confirms the present consideration. In this regard, there is a prominent example of the case No. A40-13353 / 09-158-149, which was concluded with the adoption of the Resolution No. 67/10 of the Presidium of the Supreme Arbitration Court of the Russian Federation dated April 27, 2010. The cause for the dispute was the fact that a plurality of the majority shareholders approved the regulation on the board of directors of the joint-stock company, according to which (unless otherwise provided by the law) the procedure for exercising powers by the members of the council, including the procedure of obtaining corporate information, was developed in accordance with the model of general meetings of shareholders in such a way that the possibilities of each member were narrowed, and the exercise of their right to participate in decision-making and obtaining the necessary information was actually obstructed. In particular, according to the approved document, the chairperson of the board of directors determines the form of decision-making, basing on the importance of issues submitted for consideration. The members of the board of directors can receive informational materials for the meeting of the board of directors, the agenda and the voting ballots only personally against signature at the place of the meeting. In order to get the access to the documents and information on the activity of the company, a member of the board of directors must send a written request. The members of the board of directors are prohibited to copy the materials containing confidential information without the written permission of the chairperson of the board of directors. Considering their interests, minority shareholders sued to declare the introduced rules invalid. Firstly, the courts revealed a gap in the regulation of the functioning of the board of directors of the joint-stock company. Subsequently, the courts established the impossibility to apply to the disputed relations by the analogy of law (Section 1, Article 6 of the Civil Code of RF) for the rules of general meetings of shareholders, since the board of directors is a special body of a joint stock company that performs other functions than

the general meeting of shareholders. Therefore, such an analogy would contradict the essence of gap relations. Finally, making a decision in favor of the plaintiffs, and declaring the impugned provisions invalid, the courts indicated that the absence of special provisions of the law on organizing the functioning of the board of directors does not exclude the necessity to comply with the requirements of good faith, reasonableness and justice, as required in Section 2 of Article 6 of the Civil Code (the analogy of law).

In another case, the Presidium of the Supreme Arbitration Court of the Russian Federation by the Resolution No. 12499/11 as of February 21, 2012, relying on the norm of Section 2 of Article 6 of the Civil Code of the Russian Federation on the analogy of law focused the attention of lower courts on the obligation of all the participants in civil turnover to act in good faith. The specified dispute was related to the provision by the respondent to the plaintiff with the property, which formally met the requirements of the contract, although was not suitable for performing the operations required by the plaintiff. The Presidium upheld the claims of the plaintiff, who, instead of benefiting from the use of the rented property, sustained damages caused by the eliminating the consequences of the defendant's misbehavior, who did not reveal the due diligence and reasonableness. The administration of justice using the analogy of law appears to be an effective means to ensure civil law flexibility and a factor of its relevant development, since it is directly related to the provision the judges with a significant discretion.

Such a vivid and significant feature of analogy as its direct contact with legal creativity (Taylor, 2009) implies the ability of the analogy of law to perform a creative function in the process of justice administration and to contribute to the development of law. It is not bad at all that there is some uncertainty, introduced into the sphere of civil law through the analogy of law providing a judge with certain discretion. Moreover, it is dialectically determined by the need for a regulatory system in such institutions that can minimize the gap between state legislative efforts and objective reality (Tsikhotsky, 2011). This specific feature of the analogy of law determines and justifies the fact that in certain cases a judge can and even must create new rules and directly amend the law, ensuring the proper level of its flexibility. In this context, positive impact of the present feature of the analogy of law is clearly demonstrated by judicial acts of higher courts, which not only solved promptly the national wide-scale and high-profile problems, but also led to a relevant adjustment of current legislation.

The author of the present work points out the significance of the position of the Plenum of the Supreme Arbitration Court of the Russian Federation declaring that justice and the

general principles of civil law imply the inadmissibility of foreclosure on mortgaged movable property acquired on an indemnity basis from a mortgagor by a person who in good faith did not know, and should not have known that the acquiring property was encumbered with a pledge. The introduced provision contributed to the development of the “living” nature of the norm of Section 2 of Article 6 of the Civil Code of the Russian Federation and to the understanding that the ability to anticipate normative changes is included in the analogy of law functional (Section 25 of the Resolution No. 10 of February 17, 2011 “On Certain issues of application of legislation on pledge”). On the one hand, the Plenum is not actually authorized to make law, although it specified (for cases of acquisitions on good faith) the norm of Section 1 of Article 353 of the Civil Code of the Russian Federation on the preservation of the pledge holder's rights, regardless of the category of the owner of the pledged property, and introduced a rule on the termination of the pledge right when the pledged property is transferred to the acquirer on good faith. On the other hand, the Plenum not only ensured the immediate application of the principles of civil law and protected a large number of car owners who bought cars pledged to banks, previously purchased by their counterparties on credit, but also anticipated the adoption of a new legal provision Subsection 2 of Section 1 of Article 352 of the Civil Code of RF supplemented properly the list of grounds for the pledge termination.

An example can be set of the civil law provision with a new institution through the analogy of law, i.e., a judicial penalty, known as *astreinte* in European system of justice (Ferrari and Bocharova, 2015). Currently, the norm of Section 1 of Article 308 of the Civil Code of the Russian Federation, introduced by the Federal Law No. 42-FL in March 8, 2015 explicitly provides a special remedy for the protection of a creditor rights under an obligation. It was stipulated that a court, in the event of failure to execute a judicial act at the creditor's demand, be entitled to cast a penalty (fine) in favor of the latter in the amount determined by the court according to the principles of justice, proportionality and inadmissibility of deriving the benefit from illegal or unfair behavior. However, almost a year before the adoption of this regulation, in Section 3 of the Resolution No. 22 of the Plenum of the Supreme Arbitration Court of the RF of April 4, 2014 “On Certain issues of money judgment to the recoverer for non-execution of a judicial act” a position was already enshrined that gave the courts the right to recover monetary means (fine) from the defendant in favor of the plaintiff in case of non-execution of a judicial act on a non-monetary demand in order to provide timely execution of the judicial act, and compensation to the plaintiff waiting for the corresponding execution. In this example,

the Plenum did not formally refer to Section 2 of Article 6 of the Civil Code of the Russian Federation in order to support their creative position. However, there can hardly be any doubt that it was an appeal to the analogy of law that allowed the court to turn to global principles and rules for resolving civil disputes (Erokhova, 2014). The attempt of the court not to wait for a legislative decision, but to set independently a new vector for the development of civil law is to be supported. Therefore, the court not only indicated the necessity to create a new institution, but also directly participated in its formation. However, it is necessary to point out that in the context of the implementation of a justified measure of judicial procedure, law enforcers should substantiate decisions that go beyond the letter of the law by referring directly to the analogy of law (Section 2 of Article 6 of the Civil Code RF), since its unreasoned and latent application does not only devalue the analogy as an effective socially-positive legal remedy, but also creates a threat of assessing the activity of the court as undermining regulatory stability.

Nowadays, there is insufficient scientific research, as well as insufficient educational and methodological coverage of the cases, of the analogy of law implementation in civil law practice, although there is not any absence or shortage of such cases. Until recently, the “*Martsinyuk Case*”, considered in 1940 by the Supreme Court of the USSR, remained the only practical illustration of the theoretical construction of the application of civil legislation through the analogy of law. Since, there have been no legislative regulations on the consequences of material damage to a citizen who, on his own initiative, took steps to save socialist property. The court, applying the analogy of law, accepted Martsinyuk’s motion for damages from injuries he received while protecting state property from a fire (Ioffe, 2004). Law theorists and specialist in civil law were deprived of empirical material for the development of the analogy of law as an active, “living” institution.

Currently, there is an increase in the demand for the analogy of law in the administration of justice. In addition to several examples that have been already introduced in the present article, in order to highlight certain positive aspects of the analogy of law, a number of litigations can be provided, which were resolved through *intra ius*, but *extra legem*.

Thus, considering case No. A32-19056 / 2014, the Supreme Court of the Russian Federation in Decision No. 308-ES17-1556 (1) of July 6, 2017 stated that current bankruptcy law does not contain provisions to reduce the priority of claims of affiliated (related) creditors for civil liabilities that are not corporate. It was admitted that the obligations that are contributed by the fact of corporate participation, include not only those provided for by the corporate law

(payment of dividends, the actual value of a share, etc.), but also obligations, which formally, but not practically, are civil in nature (if their occurrence and existence would have been impossible if the lender had not participated in the debtor's capital). Therefore, the Court decided that according to the requirements of good faith, reasonableness and justice (Section 2, Article 6 of the Civil Code of the Russian Federation) in the event of the subsequent insolvency of the debtor, the risk of bankruptcy should be distributed to the participant who negatively affected the debtor's activity. Moreover, it will be prohibited to oppose his claims with the requirements of other (independent) creditors.

The absence of direct legislative consolidation of the concept of "cryptocurrency" caused uncertainty and a debate as to whether the digital instruments, actually used in economic activity, can be identified as objects in the system of civil legislation and, in particular, whether the subject's digital assets (cryptocurrency) should be included in the bankruptcy asset in the context of the bankruptcy of the subject. Resolving such a dispute, Moscow Arbitration Court dated March 05, 2018 in the framework of case No. A40-124668/17-71-160F on the bankruptcy of a citizen refused to satisfy the requirements of the financial manager, when he revealed such an asset as "the cryptocurrency wallet" and filed a petition to include this asset in the bankruptcy asset. It was noted that according to the direct interpretation of the rule of law, cryptocurrency is not included in the list of civil law objects, it is outside the Russian legal environment, and transactions of such "currency" are not provided with the compulsory force of the state. The court also explained that since the concept of "cryptocurrency" is absent in the legislation, it is impossible to determine unambiguously to which category the phenomenon refers, such as: "property", "asset", "information" or "surrogate". Therefore, the essence of the relations, connected with the cryptocurrency circulation, being unclear for the legal system, does not allow application of the analogy for the corresponding digital "values" in terms of the regulations governing similar relations. However, the Ninth Arbitration Court of Appeal in the Decree No. 09AP-16416/2018 of May 15, 2018 on the specified case canceled the act of a lower court and satisfied the claim of the financial manager, obliging the debtor to transfer to the latter the password for the crypto wallet. The Court pointed out that due to the dispositive character of civil law, the list of the civil law objects defined in the Civil Code is not limited. It means that, in terms of modern economic realities and the level of the development of digital information technologies, there provided the widest possible interpretation of the concept of "other property", named in Article 128 of the Civil Code of the Russian Federation "Objects of

civil law”. Moreover, the appellate court rejected the argument that it is impossible to apply the analogy of law to regulate relations on the creation and turnover of cryptocurrency. Otherwise, it would contradict the provisions of Article 6 of the Civil Code of the Russian Federation, according to which, if there is no opportunity to use the analogy of law, the rights and obligations of the parties should be determined (for the analogy of law) in accordance with the general principles and meaning of civil law and the requirements of good faith, reasonableness, and justice. Indeed, the abandonment of the analogy of law and the exclusion of digital property from the bankruptcy estate of the debtor, for reasons not prescribed by law, would deprive bankruptcy creditors of the opportunity to obtain maximum satisfaction in their claims in bankruptcy procedures. On the other hand, unscrupulous debtors could find a loophole for removing assets from the bankruptcy estate to illegal digital environments.

The Supreme Court of the Russian Federation in Decision No. 20-KG16-5 demonstrated another obvious result of overcoming legal uncertainty through the analogy of law, September 20, 2016, on a claim made by the owner of a land plot with a residential building located on it against the owner of the adjoining premises. Since the requirements for an isolation and fire prevention lane between the houses had been violated, the plaintiff demanded the right to demolish part of the controversial unauthorized premises that had been built by the defendant close to the plaintiff’s house. During the trial, it was expertly established that the plaintiff’s premises, although legalized by a court decision, as well as the defendant’s premises were originally built without proper setback from the border of the defendant’s plot, thus violating building standards and regulations. Therefore, the court refused to satisfy the claim. However, the lack of legal regulation did not impede the Supreme Court of the Russian Federation from concluding that if the claim was denied, both constructions would remain, although their simultaneous existence, in terms of a clear and substantial violation of planning rules and standards, is impossible. The Court sent the case for consideration, drawing the attention of lower courts to the necessity of determining the rights and obligations of participants in disputed relations in accordance with the general principles and meaning of civil law, i.e., through the analogy of law.

CONCLUSION

The results of this study confirm the idea of the current and inevitable in the future

significance of the analogy of law in civil law practice. It is necessary to intensify work on collecting, analyzing, and summarizing examples of the immediate implementation of the basic principles of civil law through the analogy of law. The increase in the number of disputes where law enforcers appeal to the analogy of law requires adequate consideration in the civilized research of lawmaking as well as in its educational process.

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