The Abuse of Rights Doctrine

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‘Any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right,’ noted Judge Wills in the famous case of Allen v Flood, ‘It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercises of a right given by contract.’

Russian lawyers too were reluctant to depart from the good old brocard *‘dura lex sed lex’*. Yet an uncomfortable feeling that such absolutism in law supports unrestricted egoism made them follow the example of France and Germany where the abuse of rights had been established.

In 1902 the Senate, the Court of Cassation in the Russian Empire, stated that *‘no one is free to exercise his right in such a way as to deprive another the opportunity to use his right. It is impossible to draw a well-defined line between the freedom to exercise one’s right and duty to respect the right of a neighbour - this should be determined by the court on a case to case basis.’*

In Soviet Russia the Bolsheviks embraced the doctrine which was close to their perception of law. *‘Everything in the economy is of public concern to us,’* wrote Lenin, demanding more state intervention in private matters. The abuse of rights principle, capable of a very general application, seemed a useful instrument when the old legal system had been abolished but the new body of laws still lacked sufficient details and qualifications.

But most importantly, it provided a means to control the new bourgeois who started to appear during the era of the New Economic Policy. According to Lenin, Soviet law should be able *‘to protect the interests of the proletarian state in terms of ability to control all private companies without exception and cancel any contracts and private arrangements contrary to the letter of the law or the interests of workers and peasants’.*

The Soviet Civil Code of 1922 began with article 1 which stated that *‘civil rights are protected by the law except in those cases in which there are exercised in a sense contrary to their economic and social purposes.’*

In practice, it was understood as a reason to interfere when private manufacture was not used and was gradually being destroyed, so that the local community suffered; or when an owner did not operate a mill to avoid paying a levy. In the brothers Khazov’s case the mill owners refused to service those who supported the Soviet authorities and tried to persuade the local poor to stand against the Soviet regime. The court considered

this contrary to the socio-economic purpose of property rights, nationalized the mill and passed it to the local council. Soviet lawyers were concerned about how widely the principle was used and tried to restrict its scope. In 1924, the Plenum of Russia's Supreme Court stated that all too often courts ground? rest their decisions on the abuse of rights. 'The trouble is that our whole theory concerning the interpretation of the essence and meaning of this concept did not give a single example of its correct application', they wrote.

In 1925 the Board of Cassation of the Supreme Court stated that *'it would be better if courts used this general principle less frequently and concentrated on specific details of each case'*. Whether this helped or because the New Economic Policy was superseded by Stalin's industrialisation and collectivisation, the references to the abuse of rights appeared in court decisions less often.

The article 5 of the Civil Code of 1961 stated that *'civil rights are protected by law, except when they are carried out in contradiction with their meaning in a socialist society building communism'*. In reality the principle was extended to a wide. It was applied even when a separate wrong could have been used. The term 'abuse' was overworked and lost its original meaning.

A commercial contract, for instance, could be set aside as an abuse despite the fact that it was illegal as breaching the prohibition of private entrepreneurship; subletting a state flat, under certain conditions, could also be an abuse even though such a case could be resolved on other, more narrow, grounds. Article 10 of the current Civil Code of Russia states that actions *'taken exclusively with the intention to cause harm to another person are not allowed, nor is abuse of a legal right allowed in another form'*. Though the Soviet definition of abuse was not perfect, Russian law has avoided the task of definition at all. It is difficult to imagine an act prompted by an intention exclusively to harm someone - a person hardly ever acts with a single motive. What *'other forms of abuse'* are is not specified.

The doctrine of abuse, therefore, is being developed by courts. The mass of precedents shows that the principle is recognised and widely applied but the rationale of court decisions is not always the same. Many separate wrongs are swept up into the net of the word *'abuse'*. Most often, however, the test judges apply is that of Soviet law: one must use one's rights in a manner consistent with the purpose for which such rights are granted by law.

A director of a company abuses his rights if he does not attend for the board's meetings so that other members cannot dismiss him if, according to the company's articles, the board is only competent when all directors are present. A minority shareholder abuses

his right when he repeatedly calls for a general meeting of shareholders to discuss a matter that had already been resolved. Setting the general meeting of shareholders abroad is against the law if such a location is inconvenient to some shareholders. Registration of a trademark in Russia, if a similar well-known trademark exists in another country, is an example of abuse of rights.

Most interestingly, however, the principle can be invoked to set aside a contract when the company's directors have acted in bad faith. A joint stock company, a health resort, sold three buildings. A few days later, the seller rented one of the buildings back to the buyer at a price that recouped the money paid for all the buildings in just three months. The case was resolved with reference to the abuse of rights. This is a big leap forward because now a demonstratively unfair deal can be set aside without the need to prove corruption, pressure or fraud.