

УДК 342.7

On the Essence of Legal Obstacles to Exercising and Protection of Legal Rights and Interests: the Problem Statement

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Received 12.03.2014, received in revised form 14.05.2014, accepted 29.05.2014

Legal obstacles remain to be little-studied in the Russian legal studies, although the expressions “unhindered implementation”, “unhindered exercise” are used as set phrases. This article analyzes essential features of the legal obstacles to exercising of rights and legitimate interests, such as focus on the satisfaction of legally unprotected interests; having an ability typical of legal measures to produce an impact on activities of the subject of law; impediments to the process of rights exercising.

As a starting point we offer the following definition of (legal) obstacles to exercising and protection of rights, liberties and legal interests: it is established legal and (or) legal and factual conditions that complicate (block or hinder) the implementation of legal opportunities (rights, liberties and legal interests) of a particular subject of law in a particular situation requiring the bearer of rights and legitimate interests to pay other, regulatory unstated, or referred to in the established order of rights exercise, but disproportionate, unreasonable organizational, logistical, temporal, intellectual and other costs.

Keywords: legal obstacles in the implementation and protection of rights and legal interests, legal guarantees of rights and liberties, restrictions of rights, implementation (exercising) of law, legal regulation.

Exercising of rights and legal interests as a stage of legal regulation, which aims to meet the needs of real people through their attainment of legally significant results can and should be viewed as “a sum of not the means used in this case, but as a sum of the resolved obstacles” (Bergson, 1913, 85-86).

In modern domestic and foreign legal studies legal obstacles to exercising of rights and legal interests have never been the subject

of independent comprehensive theoretical and applied research, but the literature contains some insights of the authors in relation to some issues of rights exercise and legal interests (Kritzer, H.M., 1998; De Simone, T., Hunter, R., 2009; Hadfield, G.K., 2008; Danner, R.A., 2012). Obstacles remain to be little-studied in the Russian legal studies, although the expressions “unhindered implementation”, “unhindered exercise” are used as set phrases. A.V. Malko was one of the first

scholars to voice the need for a general theoretical concept of obstacles in legal studies (Malko, 1995, 97).

Legal obstacles in exercising of rights and legal interests are considered to be a type of obstacles to the right in general, along with economic, social, political, organizational, and other distinguished by the source of its origin – legal life of society, which is associated primarily with standard or non-standard regulatory acts. Legal obstacles in exercising of rights and legal interests include both objective and subjective aspects: they can influence the process of exercising of rights and legal interests as external factors, and influence the adoption of the decision by the authorized subject on the implementation (non-implementation) of their opportunities due to domestic reasons (ignorance, a fear of clashes with legal life, an inexpedient or unfavorable legal pattern to be implemented for meeting their needs and interests, etc.).

Essential features of the legal obstacles to the exercising of rights and legal interests, in our opinion, are the following: focus on the satisfaction of legally unprotected interests; having an ability typical of legal measures to produce an impact on activities of the subject of law; impediments to the process of rights exercising. Now we shall consider them.

Legal obstacles to exercising and protection of rights and legal interests contribute to the satisfaction of unprotected interests, which are alien to law. The roots of such phenomena in legal life can lie in different reasons: both objective (due to the impossibility of lawmakers, law-enforcement parties to provide all variants of those or other relations), and subjective, related to the human factor. And subjective causes of legal obstacles can basically be an honest mistake by the subjects of lawmaking and law-enforcement, a mistake “without malice” and also can pursue illegal interests and objectives of the different

subjects of law and their associations that become part of a mechanism for implementing the rights and legitimate interests. For example, the Russian Antimonopoly Service gives priority to the quantitative indicators (“cane”) indicators “aimed at increasing of gross indicators” over quality ones, (Paneah,, Novikov 2014, 6) and this does not meet society and state interests in the sphere of protection of rights and liberties of citizens.

Legal obstacles in the implementation of rights and legal interests have all the signs of legal means, however, due to their focus on the satisfaction of illegal interests they are considered to be means, which are “anti-legal” in their effect. Legal obstacles (Malko, 1999):

- express the means of providing interests of subjects, which are contradictory to law;
- reflect the quality and resources of the existing legal system;
- “wedge into” the mechanism of rights, interfering its work;
- do not allow to achieve the purpose of legal regulation or reduce the effectiveness of measures of the rights and legal interests;
- have external attributes of state security, but the state support is granted by mistake.

Legal obstacles are negative legal tools that make the process of exercising and protection of rights and legal interests difficult or even impossible. To overcome the legal obstacles to the law-authorized subject need to apply further efforts of material or non-material nature, which do not meet the requirements of reasonableness and proportionality. “The economic and legal independence does not come by itself” - wrote V.M. Vedyakhin – “it is not enough to adopt an appropriate normative act, you need to create conditions for obtaining this real independence” (Vedyakhin, 1992, 53). Hence, the pair categories of legal obstacles are legal guarantees of rights and liberties. Gaps in law and legal conflicts can

and should be considered as the legal obstacles to implementation of rights and legal interests. Thus, the changes made by the Federal Law of November 25, 2013 № 317-FZ to the Russian Federal Law “On Advertising” consolidated a position that the advertising of medical services shall be accompanied by a warning about the presence of contraindications, a need for expert advice or read the instructions carefully. Meanwhile these requirements do not apply to advertising disseminated in specialized publications and medical events. However, the same law prohibits the promotion of medical services other than in places that do not require a warning. As a result the good purpose to protect citizens from self-treatment and forced imposition of medical services turned into problems of informing about the activities of specialized medical institutions (Neverova, 2014).

It seems that the following definition can be taken as a starting point: legal obstacles in the implementation and protection of rights, liberties and legal interests are normatively established and (or) legal and factual conditions that complicate (block or hinder) the implementation of legal opportunities (rights, liberties and legal interests) of a particular subject of law in a particular situation requiring the bearer of rights and legitimate interests to pay other, regulatory unstated, or referred to in the established order of rights exercise, but disproportionate, unreasonable organizational, logistical, temporal, intellectual and other costs.

Research in the field of legal obstacles to the implementation and protection of rights and legal interests should be focused on the following main areas.

First of all, legal obstacles in the implementation of rights and legal interests should be investigated via complex interdisciplinary methodological positions, involving philosophical, sociological, economic, psychological and other kinds of knowledge-based instrumental-active approaches to law.

Secondly, it is required to undertake a detailed study of signs, types and forms of legal obstacles to the implementation of rights and legal interests, the development of criteria (indicators) of availability and recognition techniques for their particular types.

Thirdly, it is required to develop technologies to overcome the legal obstacles to the implementation of the rights and legal interests, including methods of preliminary expert evaluation of impacts of these or other regulations.

Fourthly, system solutions to the problems of legal obstacles to implementation of rights and legal interests in the practice should be carried out on the basis of the category of “legal policy”, highlighting areas of the Russian legal policies and separate sectors associated with the legal obstacles to the implementation and protection of rights and legal interests in such forms of legal policy as lawmaking, law enforcement, doctrinal, educational, etc.

References

1. Danner, R.A., 2012. Open access to legal scholarship: Dropping the barriers to discourse and dialogue. *Journal of International Commercial Law and Technology*.
2. De Simone, T., Hunter, R., 2009. Causes of inaction: Barriers to accessing legal aid services. *Alternative Law Journal*.
3. Hadfield, G.K., 2008. Legal barriers to innovation: The growing economic cost of professional control over corporate legal markets. *Stanford Law Review*.
4. Kritzer, H.M., 1998. Rethinking barriers to legal practice. *Judicature*

5. V.M. Vedyahin Legal Stimula: Concept, Types [*Pravovie stimuli: kontseptsia, vidi*]. // Jurisprudence. 1992. № 1. Pp. 50 - 55.

6. A. Bergson Creative Evolution // Collected Works [*Tvorcheskaya evolyutsiya // Sobraniye sochineniy*]: 5Vol. V. 1 / translated by M. Bulgakov, revised by B. Bychkovsky. 2nd ed. St. Petersburg: MI Semenov, 1913. 331p.

7. A.V. Malko Incentives and restrictions on the right: Teoret.-Inform. aspect [*Stimuly i ogranicheniya v prave : Teoret.-inform. aspekt*]// dissertation, Saratov, 1995. 362 p.

8. O. Neverova. The Advertisement is Going to be Unfrozen. Available at: <http://www.rg.ru/2014/01/28/reklama.html>, 2014.

9. E.L. Paneah, V.V. Novikov Overly suspicious Office: Consequences “cane” system for the Federal Antimonopoly Service (Series “Briefs Law Enforcement”, February 2014): St. Petersburg: St. Petersburg IPP MU, 2014. - 32.

10. The Russian Federal Law “On Advertising” on 13.03.2006 № 38-F (edition of 28.12.2013) SPS Consultant Plus

11. Federal Law “On Amendments to Certain Legislative Acts of the Russian Federation and the Annulment of Certain Provisions of Legislative Acts of the Russian Federation on the Health of Citizens in the Russian Federation” of 25.11.2013 № 317-FZ // Rossiyskaya Gazeta, 2013. № 267.

О сущности юридических препятствий в реализации и защите прав и законных интересов: постановка проблемы

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Проблематика препятствий остается малоисследованной в российской юридической науке, хотя выражения «беспрепятственное осуществление», «беспрепятственная реализация» являются устойчивыми словосочетаниями. Статья посвящена анализу сущностных черт юридических препятствий в реализации прав и законных интересов, таких как направленность на удовлетворение неохранных правом интересов; обладание способностью воздействия на деятельность субъектов права, характерной для правовых средств; затруднение процесса реализации права.

В качестве отправного предлагается следующее определение юридических (правовых) препятствий в реализации и защите прав, свобод, законных интересов: это нормативно установленные и (или) юридико-фактические условия, осложняющие (затрудняющие либо блокирующие) процесс осуществления правовых возможностей (прав, свобод, законных интересов) конкретного субъекта права в конкретной ситуации, требующие от носителя прав и законных интересов дополнительных, нормативно не запрограммированных, либо предусмотренных в установленном правом порядке реализации права, но несоразмерных, неразумных организационных, материально-технических, временных, интеллектуальных и иных затрат.

Ключевые слова: юридические препятствия в реализации и защите прав и законных интересов, юридические гарантии прав и свобод, ограничения в праве, реализация права, правовое регулирование.
