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Legal nature of cases concerned with recognition of informational materials as extremist from the civil procedure perspective

Abstract: In this article the author refers to the problems associated with the emergence of a new kind of cases – recognition of information materials as extremist. In the author's opinion in order to resolve these problems properly it is necessary to identify correctly the legal nature of such cases. The results of performed analysis give rise to strong doubts about possibility of their existence in civil procedure.

Keywords: extremism; recognition of information materials as extremist; sanction; civil procedure; European Court of Human Rights

Actuality of research

For the last few years a number of civil cases examined by the court of general jurisdiction on recognition of informational materials as extremist have been considerable increased.

But, the courts in various regions of Russia come to resolving such kind of cases differently. This is just caused by that the Civil Procedural Code of the RF does not contain any mention in respect of such category of the cases; and also with uncertainty of the Federal law "On counteraction to extremist activity", in which is only mentioned that the cases about recognition as extremists ones are initiated on presentation of a prosecutor. The Civil Procedural Code of the RF contains mention of a term "presentation of a prosecutor" only as appeal to higher court instance, and the law "On Prosecutor's office of the RF" under presentation is understood an appeal to a body or official, which are authorized to remove violations made, and which is subjected to urgent consideration (art. 24 of Fed. Law "On Prosecutor's office of the RF").

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Correspondingly, in this situation the courts obtain various kinds of procedural appeals of the prosecutor's bodies. So, the prosecutor's bodies of Sankt Petersburg appeal to a court with statements on recognition of the materials as extremist ones indicating as the procedural grounds the article 245 of the Civil Procedural Code of the RF, and it turn supported by the Sankt Petersburg Court (Decisions from 28.09.2009 N 12780 and N 12783; from 10.03.2011 N 4460 and others). Such approach creates an impression of logic since this is a dispute from public legal relations. But, Chapter III of the Civil Procedural Code regulating production on the cases from public legal relations is not absolutely adapted to that kind of cases. It is obvious that existed chapter of the Civil Procedural Code was adapted to the disputes in which the demands are directed to the public institutions, but not opposite. Procedural guarantees established for citizens and their associations are formulated such way that they act only in situation when citizens are the complainants…

In Krasnodar District trying to solve this issue, the District Court and the Prosecutor's office made a joint informational letter from 20.11.2007 "On the order of examination of the cases by the courts foreseen by the Federal law "On counteraction to extremist activity". This letter establishes that the Federal law "On counteraction to extremist activity" does not contain an explanation about the order of the procedural examination of the cases provided by the articles 6-9, 13 of the law and gives explanations, which we believe pertinent to refer: "… it is necessary to apply the following procedural order under examination of the cases about cessation of the mass media' activity carrying out extremist activity, about ban (liquidation) of a public (religion) association implementing an extremist activity, and on recognition informational materials as the extremist ones:

- resolving of cases is carried out according to the rules of claim production;

- obligations of the parties on proving are distributed in compliance with requirements of cl. 1 of article 56 of the Civil Procedural Code: each party has to prove those circumstances on which it is referred as on base of his requirements and objections;

- submitting and reclaiming of the proofs during consideration of cases are carried out in common order, which provided by article 57 of the Civil Procedural Code".

Such approach is quite logic, but it is existed another approaches also. For instance, the court one of the districts of Omsk city remained without continuation a statement on recognition an informational material as extremist. In its decision the court offered to a prosecutor to prepare in established time his claim indicating in it name of a defendant and his location. On presentation of the prosecutor this decision was cancelled by the Decision of the Court board on civil cases of the Omsk District court (4).

In his presentation the prosecutor requested to cancel the decision of the court referring to that the statement is prepared in compliance with effective legislation, and demand on recognition of informational material as extremist is not subjected to consideration as claim production.

Cancelling the decision of the court and sending material to the district court for resolution of an issue about acceptance the statement to production, the Court board of the District court proceed from the following.

"In compliance with §1, p. 1 of article 262 of the Civil Procedural Code, the court examines cases in order of special production including on establishing the facts having a legal significance. By virtue part 1 of article 264 of the Civil Procedural Code, the court determines the facts, from which depends appearance, changing, cancellation personal or property rights of citizens, institutions.

List of the facts having a legal significance determined by part 2 of article 264 of the Civil Procedural Code is not exhausted. In correspondence with §10, part 2 of article 264 of the Civil Procedural Code, the court may determine also other facts having a legal significance.

So, in compliance with part 2 of article 13 of the Federal law from 25 July 2002 N 114-FZ "On counteraction to extremist activity" the informational materials are recognized as the extremist ones by the federal court according to a place of their detection, distribution or location of organization producing such materials, on the

base of presentation of a prosecutor or under production on appropriate case about administrative offense, civil or criminal case.

In the statement of a prosecutor on recognition of the informational material as extremist one is raised question about determination of legal state of informational material, which further can have a legal significance, including not only for bringing individuals to responsibility for distribution, production or keeping an appropriate informational material, but also for seizure, further prevention of distributing of the material by other persons. This statement is subject to consideration in civil proceeding on the rules of special production".

On inadmissibility of examination the cases about recognition informational materials as extremist in special production we wrote earlier, analyzing the procedure of a special production (13) and paying attention on inadmissibility of examination this kind of cases in incontestable procedure. But, the most part of the cases on recognition of informational materials as extremist ones as usual is implemented in incontestable procedure in a special production.

We believe that presence of various approaches of the Courts are caused, first of all, by the fact that procedural doctrine did not take attention on this kind of cases and correspondently it had not worked out a response about legal nature of this kind of cases.

The correct determination of proper court procedure depends on the right definition of the legal nature of cases about recognition informational materials as extremist ones.

At the first sight, a claim of prosecutor on this case, and no less then on cases, about recognition is directed only to the court. But, the fact of purposefulness of the claim only to the court cannot be qualifying feature, which could assist in definition of the legal nature of this kind of cases. Moreover, that the purposefulness of the prosecutor's claims only to the court under attentive consideration is turned out to be in doubt since simultaneously with decision on recognition informational materials as extremist the court has to make a decision about confiscation these materials, i.e. to stop the property rights of a specific owner of these materials. Certainly, in this case the claim is directed against the owner.

Recognition of materials as extremist is the public-legal sanction.

From the name of article 13 of the Federal Law "On counteraction to extremist activity", in which is foreseen a recognition of informational materials as extremist, we can see that this article writes about responsibility for distribution of extremist materials.

Certainly, the responsibility for distribution of the extremist materials is the public-legal form of responsibility.

It should be noted that a norm, which is established responsibility for distribution of public material is a complex. So, the hypothesis of this norm is in various articles of the Federal Law "On counteraction to extremist activity", in articles 280, 282, 282.1 of the Criminal Code of RF and article 20.29 of Code of the Administrative offenses (1, p. 223). The main sanctions are also in the Criminal Code of RF and the Code of the Administrative offenses. The Federal law "On counteraction to extremist activity" contains only additional sanctions, such as recognition of the materials as extremist and publishing them in the federal list of the extremist materials, and confiscation the materials recognized of such.

It should be noted that inclusion of the materials into the federal list of extremist materials is not only a sanction but the hypothesis of the norm about call to the administrative responsibility that established in the article 20.29 of Code of the Administrative offenses. In absence of a fact inclusion the materials in the federal list of the extremists materials the responsibility does not come. That is, a recognition informational materials as extremist presented itself establishing one of the elements of administrative-legal facts, without of which is not existed administrative-legal responsibility… In actually we can recognize that formulating of the provisions on administrative responsibility a lawmaker agreed with fact that description of extremist activity is too wide and indefinite that a calling to administrative responsibility is possible only when that or other material will be in the federal list of extremist materials. Certainly, this causes the questions in respect of conformity the legislation on counteraction to extremist activity to a principle of legal definiteness, which is required that the legal norm would be clear and unambiguous (see please: Decisions of the Constitution Court of RF from 25 April 1995 N 3-P; from 15 July

1999 N 11-P; 17 June 2004 N 12-P), formulated such way that an addressee of the norm could understand what actions or inactions can be the ground to calling him to responsibility (Decision ECHR on the case “Coem vs. Belgium” cl. 145-146; case “OJSC Oil Company YUKOS vs. Russia” cl. 567). Incidentally, discussion of these issues require a separate article; in this article we are limited only consideration of the issues about legal nature of the cases on recognition informational materials as extremist ones.

We suppose that in the light of above mentioned our assert about fact that recognition of the materials as extremist is a sanction is needed to be considered in details as it is existed a point of view that with recognition of the materials as extremist ones the court only “establishes a legal state of the materials”.

But, informational materials are not only an item, which are existed in themselves. This is always a result of someone activity; they have always an author. Consequently, it can be arisen the following questions: What are the legal consequences appeared for an author of informational materials due to recognition them as extremist ones? Can be without calling an author considered the issue on recognition the materials as extremist ones?

In compliance with article 15 of the Federal law “On counteraction to extremist activity”, an author of the printed, audio, audiovisual and other material (works) intended for public usage and containing at least one of the signs provided by article 1 of the present Federal law is recognized as a person carrying out extremist activity and bears responsibility according to the legislation of Russian Federation. Recognition of informational materials as extremist ones is the recognition the fact that they are intended for promulgation and call to performance of extremist activity or is substantiated or justified necessity implementation of such activity (p. 3. Art. 1 of FL “On counteraction to extremist activity”), under this the extremist activity are the actions listed in p. 1 of article 1 of the Federal law “On counteraction to extremist activity”.

Consequently, recognition of informational materials can have a place only when this material was intended for distribution, and not for personal using. At the same time, from above mentioned norms is followed unambiguous conclusion that

recognition of informational materials as extremist ones is always establishment of illegality of the author's actions and is a blame, censure of the author and simultaneously is a restriction of his freedom of opinions expression since such recognition is simultaneously a ban to distribution of informational materials.

In article 13 of the FL "On counteraction to extremist activity" a lawmaker pointed out as a common ban: "Distribution, production and keeping with purpose of distribution are forbidden on the territory of Russian Federation".

Further, a lawmaker specially specified that production, keeping or distribution of extremist materials is an offence and is brought responsibility in the cases foreseen by the legislation of Russian Federation. This proviso is caused a question: does a violation of common ban on production, keeping and distribution of extremist materials not always is an offence? Is it in strictly defined cases? Then, what was a common ban formulated for?

We suppose that here a lawmaker just used unsuccessful juridical technique and trying to refer to administrative and criminal legislation inadvertently called into question a common ban on production, keeping and distribution of extremist materials.

But, the text of the norm should be formulated strictly certain way in order to exclude free interpretation and enforcement body should be linked with literal writing of the norm and has not the right to apply the norms about responsibility on analogy or trying increasingly to interpret the norms of the law.

In actually, a lawmaker created the norm, which is foreseen a recognition by extremist material only under presence specially established in the material right in the cases when production, keeping and distribution of extremist materials is an offence.

Recognition of informational materials as extremist ones and their confiscation

Mention in article 13 of the Federal law "On counteraction to extremist activity" that "simultaneously with decision about recognition informational materials as extremist ones the court makes decision on their confiscation", in our view, is also a confirmation the fact that recognition of the materials as extremist is a measure of

publically-legal, which is simultaneously applied with another publically-legal measure. Certainly, confiscation is a publically-legal measure, but not civil-legal one since it has compensational nature (not punitive one).

Though in Chapter of the Civil Code (dedicated to cessation of the property rights) is had the article about confiscation, but this article (art. 243 of the Civil Code) is not a regulation of sanction. Most likely, it is civil-legal reflection of application of the sanctions for committing of crime or other offence in criminal-procedural or administrative-procedural order. We believe that this article was included in the Civil Code of RF, since a lawmaker adopted this Code under uncompleted codification of administrative legislation, which was consisted at that time from many sublegal acts including departmental acts. Correspondently, article 243 of the Civil Code fixed some guarantees the fact that confiscation would be possible only on the base of the laws and the decision about confiscation (accepted in administrative order) can be disputed in the court order in future. Currently, due to a codification of the administrative legislation, these guarantees are just unnecessary in the Civil Code of RF – art. 3.7 of Codification on Administrative Offences (CAO) are foreseen that confiscation is assigned only by a judge (14, p. 141-148). In compliance with the CAO of RF confiscation is recognized as the main so additional administrative punishment (p. 2, art. 3.3 of CAO of RF).

It should be noted that confiscation and order it application repeatedly considered by the Constitutional Court of the RF.

In a recent Decision of the Constitutional Court from 25 April 2011 N 6-P is reflected that "… the Civil Code of Russian Federation establishes that in the cases provided by the law, a property can be gratis seizure from an owner on decision of the court in form of sanction for committed crime or other offence (cl. 1, art. 243). Such understanding of property confiscation (as special measure of public responsibility for the deed committed by the owner of this property) is directed also the norms of the criminal and criminal-procedural legislation".

Addressing in some its decisions to the issue on common principles of juridical responsibility, which on its essence are related to the basis of law and order, the Constitutional Court of Russian Federation came to the following conclusions:

As it follows from article 54 (part 2) of the Constitution of Russian Federation, juridical responsibility can come only for those actions, which are recognized as offences with the law effective on time of their committing. Presence of a fact of the offence is necessary ground for all kinds of juridical responsibility; under this the features of the fact of offence and content of specific facts of offences should be agreed with constitutional principles of democratic state including a requirement of fairness. In turn, presence of guilt as an element of subjective side of the fact of an offence – commonly accepted principle call to juridical responsibility at all branches of the right, and any exclusion from it should be expressed directly and unambiguously, i.e. fixed in the law.

Thus, in order to confiscate informational materials it needs to be established guilt of a person who created them with purpose of distribution, or distributed extremist material or produced them or kept with purpose distribution.

That is, creation, production, keeping extremist materials is caused responsibility only under presence of intention directed on distribution of extremist materials.

Obviously, this really correct approach, which permits a problem of possession with materials in personal purpose, recognized as extremist, in particular, possession in scientific purposes.

The reality of enforcement

Let us consider, whether is applied above described approach in practice. For analysis let us take a case with confiscation described at the site "Jehovah's Witnesses" (15). This case is suitable for consideration because of the fact that besides of description of the situation, at the site is accessible also juridical verdict, which contents information necessary for analysis.

On October 2010 a chief assistant of the prosecutor of Zavolzhsky District of city of Tver coming at home of 71 years old V. Fomushkina, without her consent confiscated all available religious literature – 471 titles of brochures, journals and books, including Bible.

We believe that such gross intervention in the property right and freedom of religious should be had very strong grounds. Confiscated literature was presented by

the prosecutor as material proofs in the case against other pensioner, L. Belimova. He stated that she "distributed" all literature of V. Fomushkina. Justice of the Peace made to impose to L. Belimova the fine in amount 1000 rubles, a all confiscated materials including the Bible – to confiscate and destroy.

This decision was appealed. The complaint was partially satisfied (16), the Federal judge had agreed with correctness of accepted confiscation measures pointed out on the article 3.7 of the Codification on Administrative Offences, Decisions of the Constitutional Court.

The court realized the problem of a property confiscation that does not belong to an offender and a problem of making a court decision about the rights and obligations of a person not brought to the case, and therefore it made reference on Decisions of the Constitutional court of RF.

The Decision of the Constitutional court pointed out that content of cl. 2 of art. 8.28 CAO of Russian Federation despite the Constitution of RF is allowed as administrative punishment a confiscation of the item of committing administrative offence from an owner of this property not brought to administrative responsibility and was not recognized as guilty in committing of this administrative offence.

What is more if this Decision of the Constitutional court was announced after making of considered court act then legal positions discovering a content of the constitutional right to court defense formulated in previous Decisions had to be know to the court.

In the Decisions, the Constitution court clarified that "the right to court defense is related to the main unalienable rights and freedoms and the time acts as the guarantee of all other rights and freedoms; in force of article 56 (p. 3) of the Constitution of RF it cannot be limited under any circumstances. The right to the court defense supposes specific guarantees of effective restoration in the rights through the justice; from article 46 of the Constitution together with articles 19 (p.1), 47 (p. 1) and 123 (p.3), fixing equality everybody before the law and court, the right of everyone to examination his case in the court and the judge to jurisdiction of which the case is related with the law, and a principle of performance on the base of the competitiveness and equal rights of the parties, follows that constitutional right to the

court defense – this is not only the right to appeal to the court, but also an opportunity obtaining actual court protection in form of restoration violated rights and freedoms in compliance with legislatively fixed criteria, which is allowed to the court (judge), other participants of process, and also interested persons to avoid legal uncertainty in this issue".

The Constitutional court of the RF basing on the legal positions and proceeding from interconnected provisions of the articles 1, 2, 18, 45 and 118 of the Constitution of Russian Federation in its Decisions n 1-P from 20 February 2006 and N 10-P from 21 April 2010 pointed about the duties of the RF as a lawful state to create effective system of guaranteeing of the protection the rights and freedoms of a man and citizen through the justice, an integral element of normative content of the right to court defense is a presence of the rights of interested individuals (including not brought to participation in a case) to appeal to the court for protection their rights and freedoms, which are violated by the wrong court decision. Resolving by the court an issue about the rights and duties of persons nor brought to participation in a case does not allowed to consider the court proceeding as fair, ensuring each of participant the right to fair and public proceeding of the case by the independent and impartial court. A person not brought to participation in a case in respect of which made a court decision violating his rights and freedoms should have effective means restoration his violated rights as it requires article 13 of the Convention on protection human rights and the principle freedoms.

Certainly, these legal positions could be applied to the considered situation since the decision about confiscation of a property of a person not brought to examination of a case will be the act made on the rights and duties of an individual not brought to examination of the case.

The Federal judge left in the list of confiscated items only informational materials, which are in the federal list of extremist materials and also punishment in form a fine.

Not agreed with the courts verdicts Belimova submitted a supervisory complaint (12). District court of Tver in its decision from 18.10.2011 in order of supervisory repealed the decision about bringing to account in compliance with article 20.29 of

the CAO of the RF. Production of this case was cancelled in connection with absence in actions of L. Belimova the facts of administrative offence. At the time the decision about confiscation was left in force.

The classification of literature as extremist materials means a limitation of such materials in circulation and the ban on any deal with them, but the law does not provide their confiscation if an owner does not distribute them and commit appropriate offences.

We believe that in the Federal law "On counteraction to extremist activity" a lawmaker soundly established a confiscation as a sanction to the offender that in full extent meet the provisions part 3 of article 55 of the Constitution in the fact that the rights and freedoms of a man and citizen can be limited by the federal law in measure, which necessary to protect the basis of constitutional order, morality, health, the rights and legal interests of other individuals, ensuring defense and security of the state.

An enforcer cannot go out the bounds of the norms establishing responsibility and broadly to interpret them, replacing a lawmaker.

Confiscation in the civil case is a sanction applied only to a guilty "committed an offence in person… juridical responsibility is a consequence of this offence" (3, p. 9).

Goal of recognition informational materials as extremist ones and tasks of the civil proceeding

Certainly, the civil procedural form cannot be used in order to get the proofs of committing of public offences, for which is determined the administrative and criminal responsibility under the guise of "establishing of legal state of informational materials". Such task is not available in the Civil Procedural Code, and this contradicts to the basic provisions of the CPC and Civil Procedural Code of the RF.

In Decision of the Plenum of the Supreme Court from 28.06.2011 N 11 "On the court practice on criminal cases about crimes of extremist nature" was given the following explanation: "Under examination of the criminal cases about crimes of

extremist nature the court should provide protection of public interests and the rights and freedoms of a man and citizen".

Correspondently, this task lies with the court during examination of the cases about recognition materials as extremist ones. Presence of this task shows that under examination of the cases about recognition materials as extremist ones it always has a dispute about the right free search, obtain, distribute, produce information with any legal way, free study religion books, realizing the right to free conscience and religious.

It should be noted that recognition informational materials as extremist ones has purpose not to allow a distribution of extremist materials, i.e. the ban, prohibition.

Claim on prohibition was known to the Roman law under name prohibition claim (action prohibitoria), assignment of which was in obligating (prohibition) of a defendant to interfere in freedom of an owner (5, p. 333).

Though in the Russian procedural science not so many attentions had paid to the claims on prohibition (6), but for any procedural scholar is known that demand directed to coercion of an defendant to refraining from committing any actions (claim on prohibition) is a claim on sentencing (7).

The object of the claim on sentencing is material-legal demand of a plaintiff to a defendant. The ground of the claim on coercion is legal facts testifying that the right is violated…, i.e. the circumstances (facts), which create, change or redeem the rights and duties of the parties or disturb to appearance of the rights and duties (2).

Correspondently, claims to a ban, prohibition should have addressee to whom this ban is directed.

We think that examination of such kind of the cases in the civil process unlike can provide that level of legal guarantees (which is necessary from the point of view of international standards of fair justice), which under consideration of this kind of the cases are required observance of procedural guarantees providing at criminal accusation.

As brief conclusion, we can express opinion that situation with such category of the disputes requires legislative resolution of the issue since the problem was born by a lawmaker who actually established new kind of the cases without proper analysis

their legal nature and procedural right. Establishing of proper legal procedure is the constitutional duty of a lawmaker.

But, in our place, it would be wrong to state that establishing of the proper legal procedure of recognition informational materials as extremist one enable to solve the problem. Though, in this article we considered the problem only from position of legal procedure, but the problem is also just in a sanction. The sanction is interference into freedom of thoughts.

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