Information for citation:
Morozov S. Yu. Metod yuridicheskogo ravenstva storon i printsip podchineniya v korporativnom prave Rossii [The Method of Legal Equality of the Parties and the Principle of Subordination in Corporate Law of Russia]. *Vestnik Permskogo Universiteta. Juridicheskie Nauki* – Perm University Herald. Juridical Sciences. 2017. Issue 36. Pp. 181–191. (In Russ.). DOI: 10.17072/1995-4190-2017-36-181-191.

UDC 347.1
DOI: 10.17072/1995-4190-2017-36-181-191

THE METHOD OF LEGAL EQUALITY OF THE PARTIES AND THE PRINCIPLE OF SUBORDINATION IN CORPORATE LAW OF RUSSIA

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Introduction: *the article discusses the legal nature of corporate relations. In civil law, it is assumed that the relations connected with corporate governance are based on the principle of subordination, but are not actually the relations of power and subordination. There is an opinion that relations of corporate governance are regulated by civil law and are a form of civil organizational relations. According to another position, such relations should be governed by two methods of legal regulation concurrently. Thus, of great importance is the task of answering the question on the possibility to regard relations of corporate governance as the subject of civil regulation.* ***Purpose:*** *to develop a scientific understanding of what branch of law relations of corporate governance belong to, based on the analysis of scientific literature and civil legislation.* ***Methods:*** *a systemic approach, methods of comparison, description, interpretation, theoretical methods of formal and dialectical logic were applied, as well as specific scientific methods as follows: a comparative legal method and interpretation of legal norms.* ***Results:*** *the analysis of the positions of scientists and the current civil legislation has shown that corporate governance relations are an integral part of the subject of civil law, different from property, personal non-property and organizational relations.* ***Conclusions:*** *it is necessary to distinguish between the power of public law and power of private law. Despite the opinion prevailing in the doctrine of civil law that relations of governance can only refer to public law, it is proved that these relations can be part of the subject of civil law. Such relations of power and subordination are regulated by the method of legal equality of the parties. At the same time, it is important not to confuse the subject and the method of civil regulation.*

Keywords: corporate management; method of legal equality of the parties; principle of subordination; relations of power and subordination; relations of governance; organizational relations; powers and authority; subject of civil regulation

Information in Russian

МЕТОД ЮРИДИЧЕСКОГО РАВЕНСТВА СТОРОН И ПРИНЦИП ПОДЧИНЕНИЯ В КОРПОРАТИВНОМ ПРАВЕ РОССИИ

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Введение: *статья посвящена правовой природе корпоративных отношений. В цивилистике принято считать, что отношения, связанные с корпоративным управлением, основаны на принципе подчинения, но не являются отношениями власти и подчинения. Согласно одной из точек зрения, отношения корпоративного управления регулируются нормами гражданского права и являются разновидностью гражданско-правовых организационных отношений. Высказано также мнение, согласно которому к отношениям корпоративного управления следует применять одновременно два метода правового регулирования. В связи с этим решение вопроса о возможности отнесения отношений корпоративного управления к предмету гражданско-правового регулирования приобретает важное значение.* ***Цель:*** *сформировать научное представление об отраслевой принадлежности отношений корпоративного управления на основе анализа научной литературы и гражданского законодательства.* ***Методы:*** *системный подход, методы сравнения, описания, интерпретации; теоретические методы формальной и диалектической логики. Применялись частнонаучные методы: сравнительно-правовой и метод толкования правовых норм.* ***Результаты:*** *анализ позиций ученых и действующего гражданского законодательства показал, что отношения корпоративного управления являются составной частью предмета гражданского права, отличаясь при этом от имущественных, личных неимущественных и организационных отношений.* ***Выводы:*** *следует различать публично-правовую и частноправовую власть. Несмотря на господствующую в цивилистической доктрине точку зрения о том, что отношения управления могут иметь только публично-правовую принадлежность, доказывается, что данные отношения могут быть составляющей предмета гражданского права. К таким отношениям власти и подчинения применяется метод юридического равенства сторон. При этом не следует смешивать предмет и метод гражданско-правового регулирования.*

Ключевые слова: корпоративное управление; метод юридического равенства сторон; принцип подчинения; отношения власти и подчинения; отношения управления; организационные отношения; властные полномочия; предмет гражданско-правового регулирования

Introduction

Issues concerning corporate governance and determination of the legal nature of corporate relations are nowadays remain the focus of lawyers' attention in many countries.

As is known, Russian civil legislation regulates the relations connected with the governance of corporate organizations (Art. 2 of the Civil Code of the Russian Federation)[1]. In this connection, the question of the implementation of the principle of subordination of one person to another in civil law is debatable, because, in accordance with Art. 1 of the Civil Code, civil law is based on the recognition of equality of participants in relationships regulated by it. Traditionally it is considered that the relations of power and subordination characterize only public branches of law. Meanwhile, as Professor Judith Kelleher Schafer notes, there should be a clear distinction between private and public law that based on the civil law tradition [31].

Under the Chinese civil law it is noted that, regardless of whether enterprises are large or small, their position is high or low, their economic power is great or weak and regardless of whether their type of ownership is state, collective or individual, they have equal legal status and they are independent and equal subjects. No entity can use its own administrative

[1] Civil Code of the Russian Federation. Part One: Federal Law of the Russian Federation of November 30, 1994 No. 51-FZ (as revised of 28.12.2016). *Collection of Legislative Acts of the Russian Federation.* 1994. No. 32. Art. 3301.

influence and power to put itself in the privileged position of the subject of civil law [53, p. 160].

Main content

1. Belonging of relations connected with governance to the civil regulation sphere: problem statement

It is generally prohibited for a transaction made by one person to generate or modify duties of others, which is determined by one of the most important principles of civil law – the principle of equality of the participants in relations regulated by it (Art. 1 of the Civil Code). In particular, this is noted by B. M. Gongalo and P. V. Krasheninnikov. According to the authors, a subject cannot rule over another one, between subjects of civil law there are no relations based on the authoritative subordination of one party to another [21, p. 469]. This statement is consistent with the p. 3 of Art. 2 of the Civil Code, according to which civil law is not applicable to property relations based on administrative or other authoritative subordination of one party to another, unless otherwise provided by law.

How then do relations connected with governance correlate with p. 3 of the Art. 2 of the Civil Code? In legal literature there is a variety of opinions on this issue which require a comprehensive judgment as applied to the current state of jurisprudence. As it is rightly pointed out, the main task of a legal scholar is not to create their own little theory, which is of interest only for amateurs, but to consider many theories reflecting life, select and summarize those ideas that match the era, the requirements of life and reveal the essence of phenomena [38, p. 307]. Let us consider the main views in the context of the stated problem.

N. V. Kozlova believes that corporate relations are relations of power and subordination, the same way as administrative ones, but indicates a specificity of their power and subordination [15, p. 245]. O. V. Gutnikov expresses a similar view, according to which relations of participation can be characterized as a special kind of relations of power and subordination of the local character, including the duty of participants to abide by decisions of the majority of other participants even against their will [25, p. 142].

Another position is held by V. P. Mozolin, who classifies corporate law as a non-civil legal area [18, p. 7]. In our view, this statement is too categorical.

V. S. Em believes that in this case there is a combination of the principle of legal equality of the subjects with the principle of subordination. According to the author, entering into a corporate legal relationship allows the subject to influence the formation of the will of the partner, thus participating in corporate governance [11, p. 103]. The combination of the two principles, V. S. Em writes about, unwittingly leads to the idea about a combination of the methods of legal regulation, which we cannot agree with. In this context, one more position deserves attention, according to which in those cases where formal equality of the parties leads to infringement of the rights of one party, the legislator deviates from the principle of equality of the parties [10, p. 23]. Based on the above position, we may also conclude that the author finds it possible to combine the two methods in the regulation of civil relations.

V. A. Belov sees nothing radically incongruous with the nature and the principles of civil law in the regulation of relations based on the principle of legal subordination [3, pp. 79–80]. At the same time, the author avoids using the term “power”.

2. On the existence of private power

As noted by V. F. Yakovlev, “granting a person the right to demand certain behavior from another does not mean here the simultaneous empowering of the first person and subordinating the second person to the first person’s will” [27, p. 109]. The scholar also notes that management of a legal entity, which is carried out by the founders, members, is fundamentally different from authoritative governance in public law. Corporate governance [30] is based on coordination. On the one hand, it should be accepted that civil law governance is different from public law governance, and that there is no automatic legal subordination of one party of the relations to the other while this other person is the only one who has received the power.

At the same time, it is possible to put forward a version that the presence of powers of authority is inherent to corporate governance. As correctly noted by N. V. Kozlova, in private corporations internal rights are ranked as private law and form a special class of private rights of the power [15, p. 211]. The point is that the concept “governance” is a general scientific concept, and all the necessary attributes of governance manifest themselves in natural and human sciences. An integral part of governance is the controlling action to an object, which always has an authoritative character in the social sphere.

In addition, governance does not exist without a governing subject, who, based solely on their authorities, lead the object of control to the desired state. Therefore, in our opinion it is wrong to say that governance is present, the principle of subordination functions, but the governing subject does not have powers of authority. If one party in a civil law relationship has to subordinate their will to the instructions of another party or of the majority of the participants, it means that between the participants there are dependency relations, relations of power.

However, it is now possible to distinguish between two basic governance types (regimes): governance in public law systems (public administration) and governance in private law systems (for example, management of an organization) [9, p. 144]. It should be noted that the term "governance in private law" is used in foreign literature [39, 40]. To be more precise, we are talking about relations of governance, i.e. relations of power and subordination, which are governed by both branches of public law and civil law. Thus, powers of the governing subject in civil law are authoritative.

3. Combination of relations of power and subordination in civil law with the method of legal equality of the parties

It is possible that there is no contradiction between the presence of relations of power and subordination in the realm of civil law and the method of civil regulation. In opinion of V. F. Yakovlev, the method of legal regulation entirely depends on the nature and content of the regulated relations. A method is applied in accordance with the branch of law [12, p. 49; 17, p. 68]. With respect for the opinion of the eminent scientist and making no pretense to ultimate truth, we dare suggest, nevertheless, that this statement is not entirely accurate. Relations regulated within the civil law branch, though united by a common basis (they all are somehow connected with property relations) may significantly differ from each other. And this does not prevent their being regulated by means of the same method. Exactly the same way not all property relations should be regulated by the method of civil law. In addition, we should pay attention to the fact that civil law is not applied only to property relations based on power and subordination (p. 3 of Art. 2 of the Civil Code). In regard to non-property relationships, this rule, proceeding from the norms of the Civil Code of the Russian Federation, does not work.

However, before considering the specificity of private law relations of governance, let us emphasize that the method of civil regulation remains unchanged. In other words, there are relations of power and subordination in civil law but there is no and cannot be the method of power and subordination. Therefore, in relation to this situation the statement of S. S. Alekseev that in each method of legal regulation (including the method of civil law regulation) one can find elements of the "power and subordination" is not that obvious. But "...the thing is in what the ratio of these elements is... that is the specificity of the forms of their expression" [2, p. 11]. From our point of view, in civil law it is possible to find relations of power and subordination as elements of the realm of legal regulation rather than elements of the method of public law branches.

As for the specificity of civil law relations of power and subordination, firstly, it must be said that they are not property relations because they only establish a certain order (procedure) of activity. In this connection, the assertion that all the corporate rights and responsibilities are of the property nature should be recognized untenable [15, p. 219]. Indeed, civil law proceeds from the idea that corporate relations of governance are conditioned by property relations. As noted by the Canadian scholar Ernst Freund, implementation of governance rights by a corporation's body is usually the result of possessing some property [30]. In one of the American courts' decisions, it is stressed that the right only implies that the property and personality of the corporation are separated from the property and personality of its members [52, p. 202]. At the same time, relations connected with governance are of the procedural nature. No wonder in foreign literature it is noted that interaction of a corporation members is based on common procedural rules [40, p. 1; 42, p. 3].

Corporate relations of governance, despite being full-fledged independent relations, have a complementary and subordinate character with respect to property relations. Governance relationship are needed only because they provide that in the future property interests of the subjects of civil law may be satisfied. These findings, coupled with the fact that organization should be regarded as one of the functions of governance, are the basis for

raising the question of the recognition of these relationships as organizational ones. We believe that the sphere of civil regulation, together with property and personal non-property relations, includes both organizational relationships and not identical with them relations of governance.

4. Correlation between civil organizational relations and governance relations

The common ground of civil organizational and governance relations manifests itself in the fact that some time ago, due to changes in the economic paradigm, both of these kinds of relations partially "moved" time from administrative law to civil law. During the period of a command economy, M. A. Agarkov and S. N. Bratus emphasized that organizational relations are relations of power and subordination, and are subject of administrative law [1, p. 290; 8, p. 64]. At the same time, according to S. N. Bratus, organizational relations appeared and existed in the field of public administration [7, p. 104]. Another noteworthy statement is that governance and organizational activity are not a method of legal regulation but a special kind of social relations [8, p. 64].

O. A. Krasavchikov was the first to declare in 1960s that organizational relations can be found in the sphere of civil law. Under the organizational relations he understood social bonds constructed on the principles of coordination and subordination and aimed at streamlining (normalization) of other social relations and actions of their participants or on the formation of social structures [16, p. 163]. Further on, the concept was developed in writings of many lawyers who recognized civil organizational relations along with administrative organizational ones. The orientation of the former towards streamlining of other social relations was also considered to be their qualifying feature [22, p. 217]. Many scientific studies have been devoted to organizational contracts. Due to the accumulated experience and knowledge, we now no longer doubt the existence of civil organizational relations, which it is already indecent to ignore.

Apparently, the fact that in administrative law relations of governance are considered to be organizational served as a basis for extending this situation to the sphere of civil law. Currently, there is a tendency to equate organizational civil relations with relations of governance. In German literature there is an opinion that corporate relations are organizational and property ones [34, pp. 1–2; 42, p. 2; 43, pp. 2–3]. Yu. S. Kharitonova expressed an opinion that organizational actions should be seen as an element of governance as a notion of a broader sense. At the same time, governance presents a function of domination and manifests itself in civil-law relations as an organizational element [24, p. 211]. According to N. D. Egorova, organizational relations develop in the course of governance activity of one party (organizing) in relation to the other (subordinate) [13, pp. 10–11]. It is also noted that during the term of the organizational contract management activity is carried out [23, p. 217]. The organizational relations characteristic of the modern market economy principally differ from the organizational relations of the Soviet period economy. Nowadays, subjects of civil law act for their own benefit [48, p. 548], they organize and manage the activity of a corporation according to civil law principles [55, p. 151]. As E. V. Bogdanov states: "Relations on managing a corporation (governance relations) should also be referred to organizational legal relations. A complicating factor here is that for individual organizational relationships power connections between their parties are possible, for example such as relations between the board of directors and the general meeting of shareholders, between the auditing commission and the board of directors, while civil law relations are based on equality, autonomy of the will and property independence of the parties" [4, p. 31].

Let us disagree with this position proceeding from the following considerations. Organizational relations are always directed at the organization of other civil law relations, without which they are just meaningless. The same cannot be said about relations of governance, many of which do not imply emergence of other legal relations in the future. They are legal relations that are subject to organization while activity, things, intellectual property rights are subject to governance. Organizational relations, as opposed to governance relations, do not apply the principle of subordination. "Governance without power does not exist, i. e., without a possibility to dispose behavior of people in the process

of governance. Power, therefore, is an attribute and inherent property of governance" [5, p. 136]. Relations of governance always assume preliminary vesting the governing subject with the powers of authority, implementation of which allows it to control the behavior of subordinate persons or property. Such requirements are not imposed on organizational relations. Let us emphasize that we are talking about powers and not competence. As rightly noted by V. F. Yakovlev, "...competence is a category only inherent to those branches of law that regulate relations of power-organizational content" [27, p. 149].

If there were some persons who participated in organizational relations but there are other persons in legal relations being organized, then the persons who were not involved in organizational legal relations cannot be forced without their will to fulfil obligations under the legal relationship being organized. For example, an agreement on the organization of cargo transportation is concluded by the cargo owner, but the contract of carriage is concluded by the consignor. If these are two different persons, then the consignor can be forced to fulfil obligations only in the event of his consent expressed in the agreement, attorney letter, etc. The situation is different if the participant of the corporation was not present at the general meeting during the voting. Regardless of his agreement or disagreement with the decision, he is forced to do the will of the majority. The participant must also agree with the decisions of the executive body of the corporation. This is a worldwide practice of legal regulation of corporate relations. It is noteworthy that according to American law, fiduciary duties are not intended to protect stockholders from wrong decisions [51]. Relations of governance are linear and different from the self-organization processes.

In connection with the above, we can conclude that organizational relations aimed at organization of relations of governance can exist

Results

Specific features of governance relations, in particular corporate ones, indicate their civil nature and that the civil method is applicable to their regulation.

First, such relations are formed solely on the grounds stipulated by civil law [3, pp. 79–80]. Dependence, subordination of one party to another is based on the act of concordance of the wills of the subjects forming corporate relationships[1] [6, pp. 80–81]. For example, N. V. Pakhomova does not see inequality in submission of subsidiaries and dependent companies, believing that the act of concordance of the wills of the subjects is the basis of subordination [20]. It is noted that relations of subordination arising under the agreement of the participants are of the coordinative-volitional origin, and therefore do not undermine the common features of a strong-willed organization in corporate relations coupled with the agreement of the wills of the participants [20]. It is worth mentioning that in German science of civil law corporate law is traditionally considered to be the "right of private cooperation" (privatrechtliches Kooperationsrecht) [32, pp. 1–2; 33; 37; 49].

Second, legal capacity of participants of civil relations of governance is identical. For example S. S. Alekseev regards equality of subjects of civil law as "equality of legal attributes of legal capacity" [2, p. 264]. In contrast to administrative law, where legal capacity of participants of governance relations is different, in civil law it is identical [45]. In administrative law, legal capacity of the subject of governance is initially wider in scope than that of the subordinate person. This is explained by the fact that not all participants of administrative legal relations have competence as the ability to gain and exercise powers of authority [26; 27, p. 93]. In civil law, the situation is different. For the subject of governance to be vested with powers, expression of the consent by the subordinate is necessary. Thus, becoming a participant of the corporation, the person voluntarily agrees with the necessity to obey decisions of the majority of the participants, the constituent documents and requirements of the law [44]. According to O. Gierke, legal capacity of a legal entity is wider as a legal entity has rights that can only belong to the public whole over its parts (e. g. corporate power) [33, pp. 265, 469, etc.]. Thus, powers of authority are always derived from the will of the subordinate entity of corporate relationship. Before joining the relations

[1] By means of the contract, each party has an opportunity to organize activity of the other party but only because the other party undertakes obligations to behave in a certain way. M. I. Braginsky noted that the right to behavior of the obligor has nothing in common with the similar in content rights of bodies of authority in regard to persons subordinate to them.

of governance, participants have equal opportunities. Imperative establishment of the rights and duties of other persons is not allowed.

Third, the private interest is satisfied through corporate relations of governance. S. V. Mikhailov believes that society, being an independent subject of law, has its own interest, which may not coincide with the interests of its members. A similar thesis is supported in German legal literature. In particular, it is alleged that private interests of a company and its board of directors aimed at making a profit may not coincide with the interests of individual participants. It is generally accepted nowadays that the classical model of corporate governance is the model of shareholders (shareholder-oriented model), proceeding from the priority of the interests of shareholders over those of all other members of corporate governance [29; 35; 36].

Fourth, with regard to specific legal relations of governance, legal equality is found primarily in terms of legal facts. It manifests itself in the main role that belongs to the civil contract in the establishment, modification and termination of legal relations [14, p. 31; 28, p. 161; 46, pp. 260, 280, 550; 54, pp. 121–123]. The legal facts which determine the use of the civil law method include not only the corporate contract [41, p. 72], memorandum of Association [38; 50, p. 81][1] and other contracts [47, p. 90][2], but also decisions of assemblies, unilateral civil transactions.

Fifth, the subjective right of the subject of governance in civil relation serves as a means for satisfying the interests of the subject of governance and at the same time of the interests of his contractor. The power of a public authority is a means of performing its duties assigned to it by the State.

Sixth, governance relations are governed by civil law rules, the dominant characteristic of which is optionality of legal regulation, which, however, does not exclude the presence of peremptory norms in corporate law [38, pp. 29, 92, 94; 55].

Seventh, governance on a voluntary basis can be terminated according to the rules of civil law or challenged in the prescribed manner, which is not the case for public law relations [25, p. 40]. The unilateral breach of public law relations, especially at the initiative of the subordinate participant, is, of course, inconceivable [3, p. 80].

[1] In German law, statutes of legal persons are treated as a special kind of the organizational agreement.

[2] See, for example, about the role of contract in the implementation of control to prevent losses from poor management.

Conclusions

Civil corporate relations are local private relations of power and subordination and are regulated by the method of legal equality of the parties. At the same time, corporate governance relations differ from civil organizational ones because they are not oriented towards organization of other civil law relations and personable and non-personable entities.

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