

including by applying coercive means to entities that do not perform their duties or violate the rights of other entities. Finally, legal compromise is a prerequisite for any legal relationship in the field of human rights. It is the achievement of a legal compromise in the field of human rights that provides an opportunity to resolve emerging conflicts and determines the level of effectiveness of the state's activities in the specified field.

Keywords: law, legal compromise, human rights, society, state.

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COMPONENTS OF THE NORMATIVE ELEMENT IN THE MECHANISM OF LEGAL REGULATION OF CIVIL RELATIONS

Problem statement. Currently, phenomenon of the law as a regulator of social relations is revealed by many sciences beyond the scope of jurisprudence, studying social, political, ethical, aesthetic and other aspects of social life. Being an ideal social phenomenon, but essentially a systematic scope of generally accepted rules of conduct, the law makes it possible to regulate relationships in society and create conditions to meet the needs of all its members. At the same time, in order for the rules of law to be effective the legal system shall have effective means (instruments). Such legal instruments maintain working of a corresponding mechanism for the legal regulation of public relations. Its effectiveness and legal efficiency are achieved by the constituent elements of the mechanism of legal regulation, and the legal norm has been considered as its main element for a long time. However, the synergistic context of development of the modern world's legal system, its organization factor shows a change in the paradigm of perception of the legal norm as a basic element in the regulation of social relations.

Recent research and publications analysis. Many works are dedicated to the study of the mechanism of legal regulation of civil relations, including works of outstanding scientists, in particular O. I. Abramov, O. I. Bobyliev, Yu. Grevtsov, V. V. Dudchenko, V. B. Isakov, N. M. Onishchenko, S. O. Pohribnyi, S. O. Suniehin and others. However, the problem of legal alternative in the regulation of social relations is out of sight of the scientists, since they place greater focus on the legal norm.

Purpose of the article is to theoretically explore the problem of public relations regulators alternative to the legal norm. Change of the focus from the legal norm to the benefit of other regulators of public relations results in rethinking of the components of the legal regulation mechanism. Challenging issues of the legal regulation of social relations, efficiency of its functioning are the object of interest of scientists in various fields of legal science. However, the transparency of this legal category, its interdisciplinary nature, makes it possible to explore its nature integrally, taking into account the potential of other fields of legal science. The introduction of the complementarity principle suggested by N. Bohr in 1927 enabled the author to adequately learn the phenomenon of the mechanism of legal regulation of social relations, its constituent parts by analysis in the mutually exclusive systems. The study of the structure of the legal regulation mechanism requires specification of its elements and causes their structured examination to determine the conditions of occurrence of legal consequences of the reality circumstances and achievement of the corresponding goal of legal regulation. Thus, the study of this theoretical model at empirical heights of the civil law science allowed extending horizon of the concept of this fundamental category in law.

Key results of the study. Analysis of the studies focused on the mechanism of legal regulation of social relations confirms that the mentioned issue is a subject of theoretical studies and was considered within

the framework of the general theory of law. At the same time, versatility of the problems of the legal regulation mechanism, its general and interdisciplinary nature makes it impossible to consider it only within the framework of studies of the general theory of law.

The mechanism of legal regulation in various areas of society, for example private or public relations, may have different manifestations. Accordingly, the use of various methods of influence on public relations completely defines the nature of such influence and possibility of achieving its goals. Theoretical study of the mechanism problems by which the ideal legal norms are transformed into real social life is traditional for the Soviet and post-Soviet legal science of the second half of the XX – beginning of the XXI centuries.

Thus, according to S. S. Alekseev, the category «mechanism of legal regulation» exists in the theory of law to demonstrate the moment of action and functioning of the legal form. The category «mechanism of legal regulation» originates from the category «legal regulation» [1, p. 30].

The mechanism of legal regulation is broadly considered as a set of direct social and legal means of objectification and realization of provisions of natural law, intended to ensure the stability of social relations through the best balance of social and individual interests of the society members in order to create conditions for the progressive development of each person, as well as exercise of his/her rights and freedoms. Under this approach, the legal norm is one (but not the only one) of the ways to objectify provisions of natural law.

Thus, the mechanism of legal regulation of civil relations is represented by the system of legal means which regulate social relations, satisfy interests of the legal subjects, establish and maintain the legal order in society.

Such an element of the mechanism of legal regulation as legal norm creates a model of possible behaviour, existence of which does not result in occurrence of the expected legal effects by itself. This requires factual circumstances of reality within the relevant legal model.

Thus, holism of the mechanism of legal regulation is determined by the procedure for forming its elements. Such accumulation is fully consistent by nature.

First, a legal model of behaviour of the participant in civil-law relations is developed, which establishes itself, for example in a disposition of legal norms.

Later, as a result of objective occurrence of factual circumstances of the reality a subjective identification of its consequence with the corresponding model enshrined in the law takes place. Juridical fact is created as a legal effect of the combination of the behaviour model with actual conditions personalized for the subject. Occurrence of a juridical fact, in its turn, leads to the origin of a legal relation between participants of social behaviour as a means of personification of mutual legal rights and legal obligations caused by the manner of the corresponding juridical fact.

Exercise of rights and legal obligations in the structure of a specific legal relation is accompanied by such legal means of achieving the goal of legal regulation as an act of enforcement of the right and an act of law enforcement as a special form of exercise of rights.

Through their mediation objective exercise of subjective rights takes place and legal obligations established in a legal relation which arose based on a juridical fact, the legal model of which is provided in the legal norm, are fulfilled, which leads to achievement of the goal of legal regulation, as a result, termination of the corresponding mechanism.

Another order of accumulation of elements of the mechanism of legal regulation does not have a legal algorithm to achieve the goal of legal regulation. However, the model of building elements of the mechanism of legal regulation can be complicated by the formation of a new goal of legal regulation at any stage of accumulation of such elements. For example, act of enforcement of the right may result in occurrence of another juridical fact, which in its turn will lead to the occurrence of different legal relations. Or else, the legal relation itself, as legal means of regulation, may create a separate juridical fact which will give another impulse to the functioning of the mechanism of legal regulation.

However, such a mechanism will function according to the established formula for the formation of its elements: norm, juridical fact, legal relations, acts of enforcement of the right (law enforcement).

The above structure of the mechanism of legal regulation (legal norm, juridical fact, legal relations, acts of enforcement of the right (law enforcement) must be generally recognized in the theory of law. Therefore, social regulation is achieved by introducing common standards of conducts in the society that correspond to the culture of such a society. Repetition of social processes, typical nature of social binds lead to their determination as an imperative of behaviour. As a result, they are regulated through the mediation

of a normative regulator of such relations, which allows to influence the will of the society members and to support the behaviour of individual members in the footsteps of the allowable and necessary. Excess of the limits results in the legal effects of influence on a person's deviant behaviour.

From the perspective of architectonics of the mechanism of legal regulation of civil property relations, the legal norm is an initial element of the mechanism of legal regulation that determines its basis, direction of the legal behaviour in real social relations being formed [3, p. 108].

The legal norm is the basis for the legal regulation of social relations. Its influence on social relations is to determine a range of subjects to which it applies; formulate the circumstances in which participants of social relations follow their rules; define the rule of conduct itself; establish a legal liability for the violation of the stated rules.

The legal norm creates a legal opportunity for creation, change and termination of legal relations. It indicates conditions, circumstances (facts) in the presence of which the legal relations begin to move. The legal norm directs each legal relation, recognizing certain facts as the basis of its movement, including creation, change or termination of civil legal relations. It is a basic and obligatory condition for the movement of legal relations of this kind. The basis for the movement of a particular legal relation is not the norm, but judicial facts recognized by such norm.

At the same time, a normative regulator is not the only way of influence on the subject's assessment of own ability to act in the social environment. The abovementioned is manifested in the field of relations free of the state imperative pressure – relations, which formation is conditioned by the sphere of a person's private life. That is, civil law regulation of social relations is achieved through the mediation of other regulators which have a common nature with the legal norm but a subjective limitation of their obligation.

It should be added that social relations are a multidimensional social phenomenon. Variability of the parameters making their content and essence may not always be fit into previously established normative regulators. Therefore, the legal norm may not regulate certain types of social relations. Moreover, the disposition of legal norms may not even meet the real needs of the subjects of a particular relationship. Or vice versa, a legal norm may contain only declarative principles or definitions, complicating the appropriate level of legal regulation of relations.

It is of importance to note that discretionary nature of the civil law regulation of public relations enables their participant to independently determine the subject matter and method of legal regulation of the relations the parties are going to enter into. The above enables us to claim that along with the legal norm the legal means for ensuring the mechanism of legal regulation of public relations include alter-normative regulators (agreement, practice), which represent a mutually agreed formation and further application of a corresponding normative structure to the specific model of behaviour of the participants of legal relations. This legal structure becomes an alternative to the legal norm by accepting the elements of its obligation with respect to those individual rules formed by the parties, equality of its status in the field of self-regulation of public relations in the sphere of private law.

Thus, according to Article 6 of the Civil Code of Ukraine, the parties shall be entitled to enter into an agreement not provided by the civil legislation acts, but complying with the general principles of the civil legislation. In addition, the parties shall be entitled to regulate their relations not regulated by the civil legislation acts in the agreement provided thereby. Similarly, the parties to the contract may deviate from the provisions of civil legislation acts and regulate their relations at their own discretion, unless such impossibility is expressly specified in Ukrainian legislation acts, as well as in the event that mandatory nature of the provisions of the civil legislation acts results from their subject matter or the substance of relations between the parties [4].

Civil relations may be regulated by the practice, in particular, normal business practice (practice is a rule of conduct not established by civil legislation acts but applied to a certain sphere of civil relations) [4].

However, their legal regulation is not limited to the above forms of regulatory influence on public relations. Over-normative (legal principles) and quasi-normative (judicial acts) must be distinguished along with normative and alter-normative regulators.

Regarding over-normative regulators, it should be noted that they are beyond the normative regulation, or more exactly above it. These are legal means that are not within the scope of the legal norm. Their nature is interpretation of the phenomenon of law by formula «*jus est ar boni et aequi*».

Law in a particular society is external reality at any given moment, strict objective reality that exists and acts. That is, such a reality that exists and acts as actual fact of our existence, somewhat separated

and «external» to each person for all other social institutions, if desired, in a sense – for the society in general (in terms of philosophy – phenomenon of alienation) [5, p. 114].

The idea is that the legal norm, because of the human nature creating it, cannot be objective epitome of benevolence, reasonableness, and justice by itself. Therefore, as a deterrent to the unlawful in the legal norm the over-normative becomes the guiding principle for creation of regulatory acts.

Such over-normative includes principles of the law (fundamental, general, specialised, etc.), as intrinsic initial basics, undeniable demands (positive obligations) applied to the participants of public relations in order to harmonize the individual, group and social interests. In other words, it is a kind of coordinate system, within which the law develops, and at the same time it is a vector that determines the direction of its development. Objectivity of the law is institutionalized through its principles.

Principles are the basis of law, are contained in its content, act as guidelines in the formation of law, reflect the nature of law and basic ties that actually exist in the legal system. The principles focus on the world experience of the development of law, experience of civilization. They focus on and express the essence, content of the law, therefore, are important guidelines in the implementation of law making, law enforcement activities by the state.

It should be noted that over-normative principles go beyond their fundamentality in the process of building a system of normative regulators. Over-normativity of the principles of law as an independent regulator of social relations is also manifested in their direct application to corresponding legal relations. This is most clearly shown in the case of imperfection, contradiction or, in general, lack of legal norm in solving social conflict.

The essence of a quasi-normative regulator is to replace the normative one, providing it with the quality of a legal norm. At the same time, as opposed to the alter-normative regulators, the nature of quasi-normative regulator is characterized by the lack of counter-will of the parties regarding its content and scope. The use of the quasi-normative regulator as a legal instrument for the regulation of legal relations is a result of a defect in the regulation of social relations. As a result, due to the loss of synchronization of the actual model of behaviour with the normative one, existing social relations do not change into legal relations. Juridical fact lacks its regulatory framework, which prevents legal relations between the participants. That is, a defect in the legal regulation of social relations is objectively identified.

Consolidation of the defect of the normative regulator model is implemented by forming a legal illusion of the required norm. Its illusiveness is manifested in the specifics of its creation, nature of its obligation. In the absence of a real one, so-called illusive norm is formed not by the law-making body, but by a court in a judicial act applied to a certain group of persons. Thus, through the quasi-normative regulator the completion of the law, judicial creation of the legal norm and its application to the legal relations in dispute is performed.

It should be noted that expediency of the given classification of forms of legal regulation of civil relations is conditioned by the different nature of their formation, way of legal application.

At the same time, their variety (normative regulators, over-normative regulators, alter-normative and quasi-normative regulators) does not exclude their joining another systemic legal phenomenon, which can be characterized as construction of a normative element of the mechanism of legal regulation of public relations.

Conclusions. The mechanism of legal regulation of relations is considered as a system of legal means, methods and forms which regulate social relations. At the same time, under current conditions of the society development such regulation is achieved with minimal normative of the state. The above mentioned allows to claim the variability of the normative element of the mechanism of legal regulation of social relations.

The legal norm is not a fundamental element of the mechanism of legal regulation of social relations, through which relations between the society members from the essential field to the real field and formation of corresponding legal relations between them are regulated. Such regulatory influence is provided by other regulators of various legal nature, but of identical axiological significance.

Since regulatory influence on public relations goes beyond the legal norm, the corresponding element of the mechanism of legal regulation requires its structural adjustment. Thus, in the context of terminology, not the legal norm, but a certain set of legal concepts identical to the legal norm – a normative construct (normative regulator, over-normative regulator, alter-normative regulator, quasi-normative regulator) act as an element of the mechanism of legal regulation of social relations.

References

1. *Alekseev S. S. Mekhanizm pravovogo regulirovaniya v socialisticheskom gosudarstve* / S. S. Alekseev. – M.: Yurid. l-ra, 1966. – 188 s.
2. *Isakov V. B. Pravovoe regulirovanie i yuridicheskie fakty* / V. B. Isakov // *Izvestiya VUZov, seriya Pravovedenie*. – 1980. – № 5. – S. 34–37.
3. *Bobylev A. I. Mekhanizm pravovogo vozdejstviya na obshchestvennye otnosheniya* / A. I. Bobylev // *Gosudarstvo i pravo*. – 1999. – № 5. – S. 104–109.
4. *Tsyvilnyi kodeks Ukrainy: stanom na 01 bereznia 2020 roku* // *Vidomosti Verkhovnoi Rady Ukrainy*. – 2003. – №№ 40–44. – St. 356 (iz zminamy).
5. *Alekseev S. S. Voskhozhdenie k pravu. Poiski i resheniya*. – M.: Izdatel'stvo NORMA, 2001. – 752 s.

Kostruba A. V. Components of the normative element in the mechanism of legal regulation of civil relations

The article is devoted to the study of the structure of the normative element of the mechanism of legal regulation of social relations.

The mechanism of legal regulation of relations is considered as a system of legal means, methods and forms which regulate social relations. At the same time, under current conditions of the society development such regulation is achieved with minimal normative of the state. Scientists claim the variability of the normative element of the mechanism of legal regulation of social relations. The normative regulator is not the only way of influence on the subject's assessment of abilities in the social environment. The abovementioned is manifested in the field of relations free of the state imperative pressure – relations, which formation is conditioned by the sphere of a person's private life. Legal regulation of social relations in this field is achieved through the mediation of other regulators which have a common nature with the legal norm but a subjective limitation of their obligation.

Variability of the parameters making their content and essence may not always be fit into previously established normative regulators. Therefore, the legal norm may not regulate certain types of social relations. Moreover, the disposition of legal norms may not even meet the real needs of the subjects of a particular relationship. Or vice versa, a legal norm may contain only declarative principles or definitions, complicating the appropriate level of legal regulation of relations.

It is proved that legal norm is not a fundamental element of the mechanism of legal regulation of social relations, through which relations between the society members from the essential field to the real field and formation of corresponding legal relations between them are regulated. Corresponding regulatory influence is provided by other regulators of various legal nature, but of identical axiological significance.

The author argues that along with the legal norm the legal means for ensuring the mechanism of legal regulation of public relations include alter-normative regulators (agreement, practice), which represent a mutually agreed formation and further application of a corresponding normative structure to the specific model of behaviour of the participants of legal relations. Besides, over-normative (legal principles) and quasi-normative (judicial acts) regulators are distinguished along with normative and alter-normative regulators.

Since regulatory influence on public relations goes beyond the legal norm, the corresponding element of the mechanism of legal regulation requires its structural adjustment. The scientist coins a term a normative construct as set of legal concepts identical to the legal norm for description of an element of the mechanism of legal regulation of social relations

Keywords: mechanism of legal regulation of social relations, normative construct, agreement, practice, principles of law, legal norm, court decision.

Коструба А. В. Складові нормативного елементу в механізмі правового регулювання цивільних відносин

Стаття присвячена дослідженню структури нормативного елементу механізму правового регулювання суспільних відносин.

Механізм правового регулювання відносин розглядається як система правових засобів, способів та форм, за допомогою яких впорядковуються суспільні відносини. При цьому таке впорядкування в сучасних умовах розвитку громадянського суспільства досягається мінімальним нормативним примусом держави. Вченим стверджується про варіативність нормативного елементу механізму правового регулювання суспільних відносин. Нормативний регулятор стає не єдиним засобом впливу на оцінку суб'єктом можливостей в соціальному середовищі. Яскраво зазначене проявляється в сфері відносин, які позбавлені державного імперативного примусу – відносини, формування яких обумовлено сферою приватного життя людини. Правове регулювання суспільних відносин в цій сфері досягається за посередництвом інших регуляторів, які мають спільну нормою права природу, але суб'єктну обмеженість своєї обов'язковості.

Варіативність параметрів, які формують їх зміст та сутність, не завжди можливо вписати у вже сформовані нормативні регулятори. Тому норма права може і не регулювати деякі види суспільних відносин. Більше того, диспозиція правової норми може навіть не відповідати дійсним потребам суб'єктів певних відносин. Чи навпаки, правова норма може містити в собі виключно декларативні засади, принципи або дефініції, що ускладнює належний рівень правової регламентації відносин.

Доведено, що норма права не є основним елементом механізму правового регулювання суспільних відносин, за посередництвом якого відбувається упорядкування відносин між членами соціуму від сфери сутнісного до сфері дійсного та формування відповідних юридичних зв'язків між ними. Відповідний регламентаційний вплив забезпечується за допомогою інших регуляторів, які мають різну правову природу, але тотожне аксіологічне значення.

Автором доводиться, що нарівні з правовою нормою правовим засобом забезпечення дії механізму правового регулювання суспільних відносин виступають alter-нормативні регулятори (договір, звичай), які представляють собою взаємоузгоджене формування та подальше застосування відповідної нормативної конструкції до індивідуально-визначеної моделі поведінки учасників правових відносин. Крім того, поряд з нормативними та alter-нормативними регуляторами виокремлені наднормативні (принципи права) та quasi-нормативні (судові акти).

Через те, що правовою нормою не вичерпується регламентаційний вплив на суспільні відносини, відповідний елемент механізму правового регулювання вимагає свого структурного корегування. Вченим вводиться термін «нормативний конструкт» як сукупність тотожних правовій нормі юридичних конструкцій для характеристики елементу механізму правового регулювання суспільних відносин

Ключові слова: механізм правового регулювання суспільних відносин, нормативний конструкт, договір, звичай, принципи права, норма права, судові рішення.

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ДОКТРИНАЛЬНІ ОЗНАКИ ПОЗИТИВНОГО ПРАВА

Постановка проблеми. Загальна теорія позитивного права, яка підсумовує дані аналітичної юриспруденції, – це самодостатня юридична наука, предметом якої є догма права [6, с. 95]. Саме вона із своїми «відгалуженнями» (історією права, порівняльним правознавством) і поєднанні з соціологією права, займає гідне місце в системі юридичних наук, виконує у всьому комплексі юридичних знань свої особливі та незамінні функції сфери законодавства. А позитивне право являється основою цієї теорії і визначення сутності та особливостей даної категорії, має визначальне значення для усвідомлення позитивного підходу щодо розуміння основ правотворення. Саме ці положення становлять актуальність піднятої проблематики.

Аналіз останніх досліджень. Теоретико-правові аспекти дослідження сутності позитивного права через призму його визначальних ознак вивчалися в юридичній науці такими відомими вченими, як: С. Алексєєв, О. Бандура, В. Бачинин, М. Байтин, Г. Гриценко, І. Ільїн, О. Копиленко, Н. Крашеніннікова, О. Лейст, Д. Ллойд, М. Марченко, І. Малинова, Н. Оніщенко, А. Поляков, В. Сорокін, О. Скакун, Е. Трубецької, Б. Шейндлин та фундатор української юриспруденції Ю. Шемшученко, які сприяють осмисленню поточних процесів в теорії права та мають важливе значення для подальшого їх дослідження.

Виходячи уже з тих фундаментальних основ, які вони заклали, вважаю за доцільне проводити власні дослідження визначеної проблематики.

Мета статті. Метою дослідження є визначення сутності та особливостей позитивного права на основі правильного розуміння ознак, які характеризують це явище, а також є ключовими факторами в процесі праворозуміння. Саме останні окреслюють ті складові, які й характеризують сутність так званого державного (позитивного) права.

Основні результати дослідження. Характеризуючи визначальні ознаки позитивного права, необхідно відштовхуватися від визначення цього поняття. Так, фундатор української юридичної