

Theoretical Issues of the Constitutional Regulation Mechanism

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ABSTRACT

The purpose of this research is to define the concept of “constitutional regulation mechanism”. The definition of the concept of “constitutional regulation mechanism” will give jurists and legislators a theoretical framework for developing legal sciences, such as the constitutional law and the theory of state and law. The research investigated the main attributes of the constitutional regulation mechanism. The methodological framework of the research included the systems, historical-legal, and axiological approaches, classification, and systems-structural analysis. The concept of “constitutional regulation mechanism” is defined as a set (system) of constitutional means of influencing objects of constitutional regulation for the purpose of ordering, normal functioning, development and protection of fundamental social relations in accordance with the constitutionally set goals of the society and the state. The conclusions of this research may be used for the theoretical development of constitutional law.

KEYWORDS

Legal influence, legal regulation, legislative initiative, constitutional process, interests of subjects

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Introduction

Law as a social, civilizational, and cultural phenomenon functions, exists, and acts in a state-organized society (Samuel, 2014; Cotterrell, 2013). However, V.I. Goyman (1996) argues that the action of law is not spontaneous. It requires a special “aggregate” that would launch the mechanism every time respective needs and interests arise, which may and objectively should be satisfied by legal means. In the force of law, legal regulation is such an “aggregate”.

Legal regulation introduces a certain order in social relations. Legal regulation orders social connections between people, groups, organization, etc. R.K. Rusinov (2001) argues that within the system of social regulation, a crucial role is played by legal regulation, which in its narrow sense means the influence of statutes (system of legal statutes) and other special legal means on human behavior and social relations for the purpose of their ordering and progressive development.

According to V.N. Khropanyuk (1995), legal science differentiates between the concepts of legal influence and legal regulation. He argues that this is

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reasonable, since the very existence of law has a significant effect on human behavior. As a cultural and informational value, law determines the direction of human activity and keeps it within the boundaries of civilized social relations.

Literature review

According to V. N. Khropanyuk (1995), legal influence is more extensive than legal regulation of social relations. Jurists share the same opinion regarding the differentiation of these terms (Lazarev, 1996). For instance, V.L. Kulapov (2010) argues that legal regulation is defined as a special legal influence by legal means on the participants of social relations, with a view to ordering them and subjecting them to universal order. However, legal influence is a comprehensive effect of law on social life, human behavior and consciousness, which includes, besides its special legal action (legal regulation), such areas as informational, psychological, cultural, and educational.

According to A. V. Malko (2002), the difference between legal regulation and legal influence is as follows.

Firstly, the object of legal regulation is somewhat narrower than that of legal influence. That latter includes economic, political, and social relations that are not regulated by law, but influenced by it (Hart, 2012).

Secondly, while legal regulation is a special legal influence is related to the establishment of specific rights and obligations of subjects and the rules of what is due and what is allowed, legal influence is not always related to the above (Abramova, 2006). If the former implies the existence of statutes through legal relationships, the second does not. Therefore, legal regulation always implies legal influence, but legal influence does not always imply conscientious regulation of social relations (Greenberg, 2013). In this sense, regulation is only a form of legal influence on social relations that does not cover its other forms, including the informational, psychological, educational, and social (Malko, 2002). While acknowledging the difference between legal regulation and legal influence, it is worth noting that this difference is predetermined, to an extent, by the factors of political (state) regime, essence of law and the state, development of the civil society and democratic values in the society and the state, etc. Here, the issue of the object of legal regulation is related to the field of legal regulation. At that, this research shares the opinion of V.V. Kozhevnikov & A.I. Krasman (2013), who argued that identifying such concepts “legal regulation object” and “legal regulation field” is impossible.

Legal regulation is effective given a set of legal means, the combination of which forms the legal regulation mechanism. D.A. Kovachev (1977) notes that the term “mechanism” in humanities, including legal science, has two meanings. The first one implies an idea of some way of functioning of something; the second one implies an idea of a system of agencies, institutions, and organizations (subjects) engaged in this or that activity. The purpose of the legal regulation mechanism is to ensure the normal functioning of the society and the state and to satisfy this or that interest of subjects of law.

It is worth noting the any regulation, and especially legal regulation, implies a set of means and techniques of such regulation that are used to achieve this or that legal result.

There are various definitions of the “legal regulation mechanism” concept. According to A.V. Malko (2002), the legal regulation mechanism is a system of

legal means that is organized in a consistent fashion with a view to ordering social relations and helping to satisfy the interests of the subjects of law. V. N. Khropanyuk (1995) defined the legal regulation mechanism as a system of legal means used to order social relations in accordance with the goals and objectives of a legal state. R.K. Rusinov (2001) defined the legal regulation mechanism as a system of legal means used to perform legal regulation.

A more extensive definition of the legal regulation mechanism was given by E.R. Chernova (2007) – the legal regulation mechanism is a unified system of various types of legal regulation activity (juridical and law-enforcement activity of respective social subjects), through which and during which the standard legal regulation of social relations, realization of statutes, and legal self-regulation of the direct addressees of statutes takes place.

A.A. Abramova (2006) argues that the concept of mechanism should be considered from the perspective of its dynamic, rather than statics. According to A.A. Abramova (2006), the legal regulation mechanism is a regulatory-organizational successive comprehensive process aimed at effective implementation of legal standards through adequate legal means.

The definition of the concept of “constitutional regulation mechanism” will give jurists and legislators a theoretical framework for developing legal sciences, such as the constitutional law and the theory of state and law.

Aim of the Study

The aim of the study is to define the concept of “constitutional regulation mechanism”.

Research question

What are the attributes of legal regulation?

Method

It is possible to study various aspects of constitutional regulation based on a combination of methodological with the greatest potential for explanation.

The methodological framework of the research included the systems, historical-legal, and axiological approaches, classification, and systems-structural analysis.

Data, Analysis, and Results

Law regulates the relations that can objectively be legally regulated, which are the most important ones from the perspective of social and state interests, such as property relations, issues of state administration, labor relations, etc. This means that the concept of “legal regulation object” includes the substantial aspect of the phenomenon under consideration. In its narrow sense, the legal regulation object is not only a material criterion of the branch division of the system of law, but also as a material criterion of social relations regulation in the broad sense.

In terms of the legal regulation field, it is worth noting the boundary, limit, degree of expansion, and scope of social relations that are regulated by the rules made by the state. In other words, the legal regulation field indicates the quantitative characteristic of the scope of social relations subject to such regulation. In this case, law (state regulatory legal acts) does not have to

regulate only the relations that actually should be regulated by law. Here, state regulatory legal acts can regulate relations that are beyond the scope of the legal regulation object. However, this is usually caused by excessive centralization of state power, establishment of police order in the state, total control of social life and even private life, when the laws are such that even law-abiding citizens can “trip over” them and become criminals for committing even the most insignificant offense.

Furthermore, excessive expansion of the legal regulation field at the subjective discretion of the legislator causes meticulous state and legal regulation of virtually all aspects of public and social life, the establishment of new types of relations, and enhancement of existing types of responsibility. Hence, the number of laws and other regulatory legal acts increases; their enforcement requires state support and protection, including through the state obligation mechanism. V.V. Lazarev (1996) argues that such practice can cause scrupulous state control of the life of citizens, who are forced to compare their life and actions to new laws, and the emergence of many bureaucratized institutional instructions, explanations, and provisions that regulate each step of a person.

In this case, laws that were passed in the established order by an authorized agency, regardless of their content, are law only in the external and formal sense, but not in the conceptual sense. Therefore, the legal regulation field is more of a subjective factor of a legal phenomenon.

In the 1980s, L.A. Morozova (1985) argued that based on the approach to the content of the “legal regulation” concept accepted in the general theory of state and law, the concept of constitutional regulation should reflect, firstly, the features of the object of constitutional influence, secondly, the social purpose and purposefulness of constitutional regulation, thirdly, its methods, and fourthly, effectiveness. O.O. Mironov (1986) argued that the term “constitutional regulation” characterized the legal mechanism of action of constitutional provisions and their effect on social processes. Constitutional provisions prevails in this regulation. Constitutional regulation implies the realization of constitutional provisions, the dominating role in which is played by the constitution. O.O. Mironov (1986) proceeds to note that when studying constitutional regulation, it is important to gain insight into its object – a certain field of social relations that is specific to this type of regulation.

The adoption of the Constitution of the Republic of Kazakhstan on August 30, 1995 as a result of the national referendum heralded a new stage of constitutional development of Kazakhstan. This Constitution establishes the main models of society with strong and unified state power (Paragraph 4, Article 3) and that Kazakhstan identifies as a democratic, secular, legal, and social state, the highest values whereof is the individual, his life, rights, and freedoms (Paragraph 1, Article 1).

The 1995 Constitution of the Republic of Kazakhstan reflects such constitutional regulation objects as the fundamentals of the constitutional order, human and citizen rights and freedoms, unitary state, presidential power, local self-government, etc.

Going back the correlation between the object and field of constitutional regulation, it is worth noting that the constitutional regulation object itself coincides with the constitutional regulation field. In other words, the object and

field of constitutional regulation are limited by the provisions of the Constitution of the Republic of Kazakhstan and do not concern the fields that are regulated by constitutional laws, ordinary laws, other regulatory legal acts, and international treaties signed by the Republic of Kazakhstan. Thus, the constitutional regulation objects, besides the relations that are regulated by the Constitution, does not cover the relations that are regulated by other regulatory legal acts, even if they are sources of the constitutional right.

From this perspective, O.O. Mironov's (1986) take on the constitutional regulation object is not entirely accurate. Mironov argued that regulation was not limited to the effect of constitutional provisions, that constitutional provisions could not be identified with the regulations of the Constitution, that they were contained in other regulatory acts.

At that, it is worth noting that the principles of the Constitution of the Republic of Kazakhstan should permeate all laws and other regulatory legal acts, regardless of the object of their regulation, effect in space and time or the scope of persons and branch profile, since the Constitution of the Republic of Kazakhstan has supreme legal power and a direct effect in the entire territory of Kazakhstan (Paragraph 2, Article 4).

Legal Regulation Mechanism

As seen from the above definitions of the legal regulation mechanism, all the definition come down to a system (set) of legal means, the purpose whereof is to achieve a certain legal result.

The mechanism of constitutional regulation of social relations is part of the mechanism of legal regulation of social relations. According to K.B. Aytkhozin (2008), both the constitutional regulation concept and the "constitutional regulation mechanism" concept are an important theoretical term that expresses the activity foundation of the transformation of constitutional law standardization into an order of social relations. K.B. Aytkhozin (2008) argues that the significance of this category is that it allows uniting all phenomena of the constitutional and legal reality related to the effect of the Constitution and constitutional law, to describe the specific functions of its constituents, and to show their interrelation and interaction.

At least two attributes of the legal regulation mechanism can be distinguished: content and formal.

The content attribute consists in the fact that the goal of the legal regulation mechanism is to ensure unimpeded movement of the interests of subjects of law to values, i.e. to guarantee their fair satisfaction.

In terms of the formal attribute, the legal regulation mechanism is a system of legal means of different nature and with different functions, which allow reaching set goals.

In terms of the mechanism of constitutional regulation of social relations, in its content aspect, it also implies the achievement of this or that result and goal, in particular, the support of the supremacy of the Constitution and constitutional law, functioning of governmental agencies in compliance with the provisions of the Constitution, protection of constitutional human and citizen rights and freedoms, etc.

The constitutional regulation mechanism is characterized by traits and features that are typical for the legal regulation mechanism in general. However, the constitutional regulation mechanism is specific and distinguishing features.

Firstly, the legal framework of the constitutional regulation mechanism is the legal provisions of the Constitution of the Republic of Kazakhstan as regulations with supreme legal power and direct effect in the entire territory of the Republic (Paragraph 2, Article 4). Unlike other laws or regulatory legal acts, the Constitution of the Republic of Kazakhstan was adopted at a national referendum, which means that its regulations reflect the will of the multinational people of Kazakhstan.

Secondly, the means of the constitutional regulation mechanism are specifically of constitutional nature. These are legal means provided for by the Constitution of the Republic of Kazakhstan.

Thirdly, the object of influence of the constitutional regulation mechanism is the foundation of the constitutional order, the foundation of the people's and citizens' legal status, central and local governmental agencies, local self-government bodies, etc.

Fourthly, the constitutional regulation mechanism is aimed at solving important and fundamental problems of the society and the state that are established in the principles and provisions of the Constitution of the Republic of Kazakhstan.

Discussion and Conclusion

All the above allows defining the concept of "constitutional regulation mechanism" as follows: the constitutional regulation mechanism is a set (system) of constitutional means of influencing objects of constitutional regulation for the purpose of ordering, normal functioning, development and protection of fundamental social relations in accordance with the constitutionally set goals of the society and the state.

This definition of the constitutional regulation mechanism through the influence of a set (system) of constitutional on constitutional regulation objects does not explain the mechanism of this mechanism. It is unclear how specifically should this mechanism be executed, who should initiate legal progress, that should serve as the source of updated constitutional laws, and, consequently, all other laws in the country. The source of the need to update and improve laws in effect should definitely be new events, in both Kazakhstan and the entire world. However, such events can be triggered by people's reaction to the flaws in the system of existing legal relations, which they are already used to and take for granted. In general, any changes in the laws occur upon the initiative of the supreme authorities.

The imperfection of laws primarily affects the people. Therefore, common citizens should be the main source of progressive laws. According to B.G. Golovkin (2013), the acceleration of legal progress requires each citizen to have the right to direct legislative initiative. This right is an imperative of a legal state; therefore, it should be enshrined in the Constitution.

Implications and Recommendations

The main differences between the concepts of legal influence and legal regulation were studied. The term “constitutional regulation mechanism” was defined.

The features of the legal regulation mechanism were determined: the content attribute, which consists in the fact that the goal of the legal regulation mechanism is to ensure unimpeded movement of the interests of subjects of law to values, i.e. to guarantee their fair satisfaction; the formal attribute, which consists in the fact that the legal regulation mechanism is a system of legal means of different nature and with different functions, which allow reaching set goals.

The main component of the executive aspect of the legal regulation mechanism was investigated: the right of each citizen to direct legislative initiative.

This research can be used as theoretical material in such disciplines as the theory of state and law and constitutional law.

Disclosure statement

No potential conflict of interest was reported by the authors.

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References

- Abramova, A. A. (2006). *The Effectiveness of the Legal Regulation Mechanism*: PhD Thesis. Krasnoyarsk, 216 p.
- Aytkhozin, K. K. (2008). *Theoretical Issues of the Constitution of the Republic of Kazakhstan*: PhD Thesis. Almaty, 220 p.
- Chernova, E. R. (2007). *Juridical Activity in the Legal Regulation Mechanism*: PhD Thesis, Ufa, 193 p.
- Cotterrell, R. (2013). *Law, culture and society: Legal ideas in the mirror of social theory*. Ashgate Publishing, Ltd, 252 p.
- Golovkin, B. G. (2013). Citizen Right to Direct Legislative Initiative – an Obligatory Attribute of a Legal State. *Proceedings of the Interregional Scientific and Practical Conferenced dedicated to the 20th Anniversary of the Adoption of the Constitution of the Russian Federation: “I am a Citizen of Russia. 20th Anniversary of the Constitution of the Russian Federation. Anthropological Readings”*. Yekaterinburg, 81-82.
- Goyman, V. I. (1996). *Law in the System of Statutory Regulation*. Moscow: Right and Law, 363 p.
- Greenberg, M. (2013). Moral Impact Theory of Law. *Yale LJ*, 123., 128-138.
- Hart, H. L. (2012). *The concept of law*. Oxford: Oxford University Press, 326 p.
- Khropanyuk, V. N. (1995). *The Theory of State and Law*. Moscow: Science, 384 p.
- Kovachev, D. A. (1977). *The Legislation Mechanism in a Socialist State: Theoretical Issues*. Moscow: Right and Law, 264 p.



- Kozhevnikov, V. V., & Krasman, A. I. (2013). The Limitations of Legal Regulation and Natural Right. *Modern Law International Scientific and Practical Journal*, 10, 35-47.
- Kulapov, V. L., & Khokhlova, I. S. (2010). *Means of Legal Regulation*. Saratov: Saratov State Academy of Law Publishing House, 252 p.
- Lazarev, V. V. (1996). *The Mechanism of State Legal Regulation*. Moscow: Right and Law, 352 p.
- Malko, A. V. (2002). Legal Regulation. *The Theory of State and Law*, 480-483.
- Mironov, O. O. (1986). *Constitutional Regulation of Social Relations in the USSR*: PhD Abstract. Moscow, 42 p.
- Morozova, L. A. (1985). *Constitutional Regulation in the USSR*. Moscow: Legal Literature, 253 p.
- Rusinov, R. K. (2001). Legal Regulation and its Mechanism. Moscow: NORMA Publishing House, 384 p.
- Samuel, G. (2014). *An introduction to comparative law theory and method*. London: Bloomsbury Publishing.