THE RULE OF CIVIL LAW IN THE CIVIL LAW SYSTEM

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Summary

The article is devoted to defining the place of the rule of civil law in the civil law system. It investigates the rule of civil law as a primary element of the civil law system and outlines the range of entities authorised to form the civil law prescriptions.

Key words: legal system, system of law, legal regulation, rule of civil law, legal model of conduct, self-regulation, optionality.

Аннотация

Статья посвящена определению места гражданско-правовой нормы в системе гражданского права. Исследуются гражданско-правовые нормы как первичный элемент системы гражданского права, и определяется круг субъектов, уполномоченных формировать гражданско-правовые предписания

Ключевые слова: правовая система, система права, правовое регулирование, гражданско-правовая норма, правовая модель поведения, саморегуляция, диспозитивность.

The legal rules constitute a system element of law and its operation mechanism. They serve as the grounds for any entities having their proper rights and imposing obligations on them (in this context, they can be considered to be a source of subjective rights and duties).

To some extent, a legal rule is a foundation of the content of any specific legal relations, since these are the legal rules that the subjective rights and subjective obligations of the parties in civil law relations are based on.

Thus, forming the basis of the positive civil law while acting as a normative foundation of any subjective civil law, the rule of civil law plays an important role in the mechanism of regulation of social relations, and in spite of such an importance for the arrangement of social relations and the formation of civil law system at large, the rule of civil law has not been the subject of thorough investigations yet.

Therefore, the purpose of this article is to analyze the place and role of the rule of civil law in the civil law system in the context of forming an integral scientific vision of its concept and legal nature.

At different stages of the development of social relations, the elaboration of the legal rule doctrine as such was always under attention of the eminent jurists of the late 19th and early 20th centuries (A. Tonn, G.V.F. Hegel, H. Kelzen, N.M. Korkunov, F.V. Tarnavskyi, G.F. Shershenevych, etc.). These studies were further logically developed in the works of the Soviet legal science representatives (P.O. Nedbaylo, N.G. Aleksandrov, S.S. Alekseyev, V.K. Babayev, I.N. Senyakin, A.S. Piholkin, A.F. Shebanov, etc.) and subsequently in those of the leading Ukrainian and foreign legal scholars (P.M. Rabinovych, A.M. Kolodiy, O.F. Skakun, M.S. Kelman, O.G. Murashyn, N.S. Kuznyetsova, M.I. Baytin, V.M. Baranov, V.S. Nersesyants, etc.).

Analyzing the development process of the social relations that form the surrounding world and are characterised by the set of ordered items, one can say that being relatively autonomous each of them in its turn interacts with others and tends towards the integrity. The social form of the motion of matter inspirits the social systems, the main feature of which is their connection with the human activity and their various associations. The evolution of the social systems leads to their complication, and completeness of their forms; their movement consists in approaching the integrity, conquering all the elements of the society or creating the authorities which it requires. Thus, in such a way in the course of historical development the system becomes an integral whole [23, p. 546].

In general, this situation is typical of the system of law. The social and humanitarian subsystem is a vital element of every social system; in its turn, the system of law is its component responsible for the development, rather than degradation of any state, public social entity, class, other social formation, etc.

Provision of such a development is carried out by the integrity of the legal system, with the assistance of which there starts the normative motion and the development of the social and humanitarian subsystem and the social system as a whole. In civil society such a dynamics and development take place on the basis of the democratic values inherent in a particular stage of the development of the society based on the genetic code of this society, its customs, traditions and stable rules of behaviour of the social relations participants based on them that have taken the meaning and the form of the legal matter.

Thus, the legal system should mean the unity of its relevant components (parts) that are conditionally united with each other (following the substantive and formal criteria) and constitute a relatively stable organization depending on their nature and the character of their connection (objective, natural, subjective or arbitrary) [23, p. 547].

Herewith, along with other elements that make up the legal system (legal policy, legal ideology, legal culture, legal education, etc.) the central element "launching" the legal system is a system of law as a regulatory entity that includes a stable correlation of the rules of law, legal institutions and branches of law. The consistency is an attributive feature of law and its branches. Due to the consistency, the legally diverse rules of law are able to regulate the social relations in a systemic way, that is comprehensively, by the interrelated methods and providing the differentiation and yet united, coordinated impact on social relations [3, p. 72].

In the legal literature, there has been rooted the idea that the legal system is the structure of law determined by the economic and social arrangement that reflects the internal coherence and unity of the legal norms, as well as their subdivision into the relevant areas and institutions. When describing the system

of law, it must be emphasized that it is the objective phenomenon, which is not arbitrary formed, but due to the system of existing social relations. In particular, the classical definition of the system of law in this context was stated by S.S. Alekseyev: "The system of law is an internal structure of law that reflects the disposition of legal institutions in the interconnected subdivisions (areas)" [2, p. 7].

After all, the social system of the society and the state determines a particular system of law and its internal structure. The system of law shows the constituent parts of the law and their correlation. Each historical type of law has its own system reflecting the features of a certain type of state. The legislature can not arbitrarily issue the legal rules or change the historical type of law. It just legally fixes the social development needs by establishing legal prescriptions.

Thus, the basis of the system of law is made of the legal prescriptions grouped within this system as the integral compositions. Within the legal system, they reflect such qualities as objectivity, consistency of the rules of law, their uniformity, difference, ability for insulation, etc. Besides, the rules of law ensure the dynamism of the system of law, make its elements movable and provide for the sustainability of the system of law at large. With the introduction of changes to the social relations there arises the need for the new legal rules reflecting them; that is, there takes place the qualitative filling of the structural elements of the system of law [10, p. 57].

Considering the system of law as such, one should single out its two macroelements (subsystems), which are the autonomous systems themselves: the system of public law and that of the private law.

Without going into a detailed retrospective analysis of the dichotomous subdivision of the law into the private and public elements, we should note that all the modern researchers formally recognize the existence of two areas (supersystems) of law, namely, the private law and the public law [1, pp. 15-58; 5; 7, pp. 46-80; 14, pp. 57-72; 16, pp. 58-61; 20, pp. 195-200; 21, pp. 5-13; 34, pp. 83-89; 35, 36, 41, pp. 118-119].

Herewith, there even exists the opinion that the regulatory basis of the subdivision of the law into the private and public ones is contained in Article 3 of the Constitution of Ukraine. It enshrines the rule that a person, his/her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value, and the main duty of the state, which is responsible for its activities to the individual, is to establish and maintain his/her rights and freedoms [28, p. 155].

In general, the sphere of private law is characterized by a decentralized regulation based on the principles of optionality using its inherent legal means of all the non-property and property relations based on the juridical equality, free will and the entities' property autonomy [37, p. 82].

Thus, the Constitution of Ukraine has created a framework for the legislative stimulation of the development of local self-government bodies. Such methods of the decentralized regulation, as contracts, subsidiary application, the analogy of the law and rights, are being significantly developed. Under the current conditions in Ukraine, there takes place the expansion of the scope and raising the level of optionality of the private law regulation by way of recognizing the civil law contract as a special source of civil law (individual rules of conduct), which can complement or sometimes even change the content of the legal rule defined by the legislature. The trend of the development of the modern private law system determined by this relates to the extension of the scope of applying the contractual mechanisms for regulating the obligations, methods of their securing and termination.

The concept and structure of the private law system in Ukraine reflects the established lawmaking traditions, which are complicated by the conflicts of law caused by the emergence of the new social relations that determine the need for the qualitative changes in the system of law [24, pp. 163-165].

The need for the internal differentiation both of the system of law as a whole and within an array of the private law is predetermined by the academic and applied interest.

The practical value of the private law system consists, first of all, in addressing the issue of codification by the Civil Code of all the private law relations or their vast majority, the establishment of the subsidiarity rules or the priority of the Civil Code of Ukraine over the special areas (labour, commercial or family) of private law.

The internal subdivision of the private law into the separate subareas influences the creation of separate jurisdictions: the civil and commercial legal proceedings.

The current system of law is characterized by the formation of the new branches (areas) of law and the complexes of the Ukrainian legislation. This process is continuous. Basically, these are the complex branches on banks and banking operations, privatization, mortgage, bankruptcy of enterprises, taxes, local self-government, etc. [24, p. 162].

In legal literature, the attention is focused on the fact that "the legal regime of the area of private law is an integral system of the regulatory impact that creates the generally permissive type of regulating the property and personal non-property relations based on the legal equality, free will, property independence of their participants and provides the opportunities for self-determination and the active subjective rights and duties within the limits set by the contract or by law to achieve certain private objectives and interests" [24, p. 34].

The current system of private law consists of a certain set of coordinated legal formations with the private law character, which are commonly called the branches of law under the doctrine [24, p. 165]. The basis of private law is formed by the civil law as the element, which is the most valuable one within the whole system of private law formations, self-contained and at the same time system-forming and completely and consistently embodies the features of private law [9, p. 3]. Herewith, the civil law is a system-forming constituent of private law. It is not only the independent sphere (branch) of a domestic law, but also a systemic body of legal rules that not only present the basic content of the private law, but also consolidate the rules of other subareas of the private law governing the personal non-property and property relations based on the legal equality, free will and property independence of their participants to meet their material and spiritual needs and interests (family, commercial, labour, etc.).

The efficient regulation of civil relations appears to be an integrative feature of civil law system that is an

element that starts up the whole civil law as a legal matter.

In general, the legal regulation of the legal social relations lies in their ordering implemented through the determination of the legal status of the entities of such relationships by the establishment, alteration or abolishment of their rights and obligations. Herewith, the referred to entities' rights and obligations are defined by the rules of private law and embodied (implemented, executed) through the law enforcement acts of public authorities [18, p. 146].

In the research of the whole legal regulation process, the primary role belongs to the legal rules. In particular, under the theory of law by S.M. Bratus and I.V. Samoshchenko, there was formed an opinion, which was subsequently recognized as the classic one and stated that the regulation lies first of all in the establishment of the legal rights and obligations of the participants in public relations by means of legal rules and that this is the specificity of the impact of law on the social life [19, p.11].

Thus, throughout the duration of the legal science, the legal rule always attracted the attention of scholars and was in the focus of the drafters. In this period, there were formed various approaches, concepts and even schools of understanding the phenomenon of law and its rules (sociological, historical, ethical, normative, etc.) from the point of view of which the different aspects and manifestations of the concept of the legal rule were examined. After all, in the 20th century within the Soviet and later the newest Ukrainian and Russian jurisprudential doctrine the legal rules were studied in the context of the concepts of normative school that was the most widely spread in the Soviet context. However, as noted by O.V. Naden, these were the ideas of this school that had led the domestic lawyers to understand the essence of the legal rule as a certain kind of social regulator. Since the 60s of the last century, in the Soviet and post-Soviet legal literature the legal rules have been studied mainly through the prism of the mechanism of legal regulation and the system of law as one of its elements" [18, p. 146; 6, p. 150; 39, p. 142; 15, p. 60].

Thus, the retrospective analysis of legal doctrine leads to the conclusion that it is the rule of civil law that is the primary cell, a kind of "atom" in the structure of civil law as a branch and as a standalone system: the rule of civil law is an ultimate boundary systemic part (element) of the system, because it does not absorb other subsystems and includes only the structural parts, namely, elements (hypothesis, disposition, sanction, etc.) and concurrently acts as a central element of the mechanism of civil regulation in its application.

Thus, being the last and at the same time primary indivisible element of the civil law system, the legal rule is endowed with all the properties of the entire system of law; it is the rule of law, including the civil one, that the legal institution, for which the rule of law is a subsystem, is built on.

Since the legal rules govern the most important public relations, the very possibility of execution of tasks for the implementation of which the relevant rules have been created depends on the manner and form of such regulation. The rule of civil law is a sort of a legal rule, and, thus, it possesses peculiar tribal characteristics inherent in it given the certain specific features that are characteristic only of the rules of private law.

This encourages one to explore its concept and the legal nature based on the general provisions of the theory of law. Clarification of the essence of the rule of civil law is seen appropriate in view of the logical correlation between the general concept of the "legal rule" and the special concept of the "rule of civil law".

Noting the multiformity of the term "rule", S.S. Alekseyev pointed out that such terms as "legal rule", "provision of law" and "legal norm" are used only in the legal science; these terms are identical by their substance, but their determination often leads to scientific disputes of a scholastic character. According to S.S. Alekseyev, the legal rule is a volitional, obligatory, formally defined rule of conduct that regulates social relations by granting rights and imposing duties, the compliance with which is secured by the possibility of state coercion [4, p. 208].

However, in subsequent studies the author explained the concept of legal rule by expanding the range of rule-making entities without limiting it to the state itself. He proposed to understand the legal rule as an obligatory, formally defined rule of conduct established and ensured by the society and the state, enshrined and published in the official acts and aimed at regulating the social relations by defining the rights and obligations of their participants [32, p. 360].

Considering the legal rule as a kind of social norms, O.S. Ioffe and M.D. Shargorodskyi originally defined it as an "objectively caused social and volitional rule of conduct of people established for ensuring specific purposefulness of practice" [12, p. 127], but eventually they summarized that "the legal rule is an established and sanctioned by the state and protected by it rule of the mandatory conduct of people as the participants of the controlled and repetitive social relations" [12, p. 132].

O.E. Leyst further provided the definition with the close meaning and considered the legal rule to be "the general rule of conduct designed to regulate a certain type of public relations, which is established or authorized by the state and protected from violations through the measures of state coercion" [31, p. 369]. A similar position on this issue was also expressed by V.K. Babayev [33, p. 559], O.F. Cherdantsev [38, p. 208] and A.B. Venherov [8, pp. 360-361].

The importance of the legal rule as a primary element constituting the meaning of law as a whole and expressing first of all the basic features of law in general was stressed by V.S. Nersesyants, who understood the legal rule as a mandatory rule of social conduct established or authorized by the state, publicly expressed in the formally defined prescriptions, usually in writing, and secured by the state through the supervision of its observance and application of coercive measures for offenses provided for by the law [25, p. 250]. M.N. Marchenko adhered to the same position on the legal rule concept [17, pp. 213-217].

The famous modern Ukrainian lawyer A.M. Kolodiy understands the legal rule as a "mandatory formally defined rule of conduct of legal entities that includes the public authority commands of a normative character, is established, authorized and provided for by the state to regulate social relations" [13, p. 31; 14, pp. 57-72]. According to other Ukrainian scholars, that is V.D. Tkachenko and I.V. Yakovyuk, "the legal rule is a rule of conduct, which is socially conditioned, aimed at regulating the social relations,

binding, approved or established by the state in its implementation and ensured by the level of consciousness of executors, organizational and educational work and the opportunity to apply state coercion in case of violation of its requirements" [11, p. 279].

O.F. Skakun and N.K. Podberezkyi determine the legal rule as "a formally mandatory rule of conduct (pattern, scope, standard) of a general character enshrining the degree of freedom and justice, expressing the general and individual interests (the will) of the population of the state, serving as a regulator of social relations and ensured by all the measures of state influence, all the way up to the coercion" [30, p. 78].

The legal rule was also described in detail by the well-known domestic law theorist P.M. Rabinovych. He defined the legal rule as a formal mandatory rule of physical conduct that has a general character, is established or authorized by the state to regulate social relations and is ensured by the relevant state guarantees of its implementation. The author provided a number of general features of the legal rule, such as: a) the regulation of a group of quantitatively undetermined social relations; b) the targeted range of non-personified entities; c) the continuous action; d) the obligatoriness, which is not limited to a certain number of applications; e) the termination or abolition through a special procedure [26, p. 189].

When analyzing the Ukrainian and foreign scholars' scientific approaches to the determination of the legal rule, it should be noted that the vast majority of them recognize the law-making function as inherent solely in the state without extending it to such members of law-making as the Ukrainian people, local self-government entities and, what is crucial for the civil law system, the physical and legal entities in part of their self-regulation of civil relations.

Besides that, the theoreticians have proposed the definition of the legal rule with regard to the intersectoral concept of the legal rule with the mandatory emphasis on the fact that the public authority commands should be given only by the state. However, this clause is not absolute.

Let us try to provide our own arguments.

Generalizing the position of the general legal theory on the concept of the legal rule at large, one can single out its fundamental features: 1) the legal rule is a primary and basic element of the system of law; 2) it acts as a benchmark, rule, model, standard of conduct in the society; 3) the legal rule is a mandatory and permanent rule of conduct, which is not limited to a one-time act or a separate deed of the entities of legal relations; 4) the legal rule is a formally expressed rule of conduct, which usually has a written form; 5) the legal rule is the basic regulator of social relations established or authorized by the state; 6) the legal rule is a system element of law, which establishes the subjective rights and legal responsibilities for the participants of legal relations that constitute the substance of these relations; 7) the implementation of the legal rule is provided for by the state, including through the coercion.

As it has been already clarified above, the rule of civil law is a primary element (element particle) of the civil law system, which in its content refers to the conditions of the acts in the form of the generally accepted rule of conduct, defines the limits of the rules of conduct and forms the description of negative consequences in case of violations.

The scope of civil and legal regulation can be abstractly conceived as a comprehensive (and simultaneously separated) social and legal environment, within which there is provided the regulatory impact on civil relations of the mutually coordinated system of legal devices on different levels that operate on the basis of the regulatory organization and self-organization. In particular, the self-organizing principles lay in the basis of the formation of acts of local regulations, conclusion of contracts, unilateral transactions, drawing up and placement of securities, etc.

Self-regulation of civil relations significantly affects the processes of regulatory consolidation of legal structures, the use of which is determined by the optionality of the method of civil regulation. When guided by the optionality, the rule of civil law, depending on its type and legal and technical fixation, can be a self-organizing system that is capable of maintaining its own integrity, changing its structure with the active interaction with the environment acting within the allowed regularities peculiar of the environment by choosing one of the possible variants of conduct [40, pp. 360-361].

Optionality consists in the possibility for a person to act proactively and in his/her own discretion, which is stipulated by the prescriptions of the rules of civil law. This means the possibility for each participant of civil legal relations to choose for themselves the most preferred option of a lawful conduct, independent determination of trends and legal forms of implementation of the complex of legal preferences provided to this person. However, the optionality as a sign of the method of civil law regulation provides not only for the opportunity to choose the possible variants of lawful conduct defined at the level of provisions of relevant rules of civil law, but it is also a necessary precondition for the widespread use of self-organizing principles in the legal regulation of the most of civil relations [42, pp. 118-119].

The peculiarity of this method and the element composition of the rule of civil law (in particular, the availability of legal means as its manifestation formed by the participants of legal relations themselves) of the civil mechanism of legal regulation determine in totality the directions and limits of using the self-organizing principles of regulation of social relations limited to the private sphere.

Herewith, not only contractual, but also other types of property relations are regulated on the basis of self-organizing initiatives. The ability to adopt appropriate acts of self-regulation, the provisions of which are binding, ensures the maximum consideration of individual needs and interests of entities taking part in the establishment of the preferred models of the desirable lawful conduct, because its areas are formed independently. This also provides for the universality of complexes of legal means defining the element composition of the mechanism of legal regulation of property relations.

This becomes especially apparent with the assistance of rules-principles of civil law, which have a general civil law character, that is they apply to all the subareas and institutions of civil law, which regulate the uniform or similar legal relations. The remarkable structure of the rules forms their respective specialization and cooperation into the legal institutions. The abovementioned underscores the essential role of the civil law system and its impact on the mechanism of civil legal regulation.

Thus, the rule of civil law is a primary element of the civil law system, which in combination with other uniform rules constitutes the relevant legal institutions and by its content ensures the sustainability of this system and the efficient civil and legal regulation of social relations. The rule of civil law is primarily formed by the state in the prescribed manner, but based on the content of the principle of optionality the civil relations can regulate the practices, including the practices of business intercourse, the prescriptions of local acts and the provisions of civil law contracts.

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ПРОБЛЕМЫ РЕГУЛИРОВАНИЯ И ПЕРСПЕКТИВЫ ТЕОРЕТИЧЕСКИХ ПОЛОЖЕНИЙ УГОЛОВНОГО ПРОЦЕССА УКРАИНЫ

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Summary

This article analyzes the norms of current legislation of Ukraine. Attention is paid to inaccurate construction stages of the criminal process. Considered the procedural status of the investigator. The theoretical questions of procedural participation of defense counsel before the preliminary questioning, the definition of the protection position when considering the criminal proceedings in court, when assessing the evidence supporting the guilt of the suspect (the accused). Proposals to further improve the procedural legislation of Ukraine.

Key words: investigator, prosecutor, judge, proof, evaluation, participant, status, defender, shape.

Аннотация

Статья посвящена анализу норм действующего законодательства Украины. Обращено внимание на неточную конструкцию стадий уголовного процесса. Рассмотрен процессуальный статус следователя. Проанализированы теоретические вопросы процессуального участия защитника до первого допроса подозреваемого, определена позиция защиты при рассмотрении уголовного производства в суде, при оценке доказательств, подтверждающих вину подозреваемого (обвиняемого). Внесены предложения по дальнейшему совершенствованию процессуального законодательства Украины.

Ключевые слова: следователь, прокурор, судья, доказательства, оценка, участник, статус, защитник, форма.

Постановка проблемы. В 1864 году был принят Устав уголовного судопроизводства России. Данным законом было определена структура, принципы, статус участников уголовного процесса. На протяжении длительного периода времени лучшие умы уголовно правовой науки изучали действие Устава на всем протяжении России от губернии до волости. Основная задача заключалась в разработке новых положений, которые должны обеспечить процессуальную деятельность стороны обвинения и защиты, процессуальную самостоятельность следователя, независимость суда и т.д. Результатом данных научных исследований стал пятитомный свод изучения Устава, который в 1901 году был представлен в Сенат. К 1914 году был разработан новый Устав, который так и не был принят.

Уголовно-процессуальный кодекс Украины был принят в 4 часа утра 13 апреля 2012 года. На протяжении обсуждения нового УПК Украины было подано более тысячи замечаний и предложений, связанных с улучшением механизма его реализации, однако депутаты в «полуобморочном состоянии» проголосовали за принятие закона, надеясь на внесение изменений в дальнейшем. Коллизии, которые остались в уголовном процессе Украины, не соответствуют теоретическим и практическим положениям. Проведенная аналитическая работа, связанная с практикой выполнения процедурных и процессуальных норм, на практике требует корректировки отдельных процессуальных норм.

Цель статьи включает в себя проведение анализа отдельных положений УПК Украины и внесение предложений по совершенствованию механизма реализации практической деятельности стороны обвинения и защиты, участия специалистов, участников процесса.

В статье рассматривается реформирование структуры уголовного производства, определяются действия принципов, процессуальный статус следователя, классификация участников уголовно-процессуальных правоотношений.