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## LEGAL RESTRICTIONS AS THE BASIS OF INSTRUMENTAL THEORY OF LAW

**Abstract.** *Purpose.* The purpose of the article is to study legal restrictions as an element of the mechanism of legal regulation, their essence, and approaches to their determination and classification; to elucidate the essence of legal restrictions as a key element of the instrumental theory of law. *Research methods.* General scientific and special methods of scientific cognition were used for carrying out the present research. *Results.* The main approaches to determining legal remedies are considered as a part of instrumental theory of law. The article analyses the place of legal restrictions in the mechanism of legal regulation, examines the main scientific approaches to identifying legal restrictions as an element of the system of legal remedies, and provides an author's definition of legal restrictions. The importance of legal restrictions for legal influence and the main approaches to their classification, in particular, depending on the structural element of a legal norm, were researched, while legal restrictions were considered amidst the disposition of the legal norm. The peculiarities of the implementation of legal restrictions were analysed in order to ensure their effective impact. The peculiarity of legal obligations as a special type of legal restrictions is regarded. *Conclusions.* It should be noted that legal regulation is carried out through a combination of legal incentives in the process of legal regulation and legal restrictions. It is through the use of various legal means that the positive effect of legal regulation on public relations is achieved. In general, the issue of legal restrictions is a question of the limits of human legal freedom in society, because it is limited by the freedom of others. Thus, legal restrictions (along with legal incentives) are fundamental means of legal regulation. The effect of only legal incentives in the process of legal regulation cannot exist without legal restrictions that balance the mechanism of legal regulation. The relevant relationship contributes to the impact of law on society. Similarly, the violation of the balance in applying various legal means has the consequence of not obtaining the desired result of legal regulation. Therefore, legal incentives, backed by appropriate legal restrictions, have the most effective impact on legal regulation.

**Key words:** mechanism of legal regulation, legal means, legal restrictions.

### 1. Introduction

Modern theoretical science substantiates different approaches to understanding law. The main ones are legal, sociological, normative, communicative, integrative and instrumental scientific approaches. Each of them focuses on important aspects of law, revealing its value and social purpose. The analysis of the problem determines the essence of the instrumental approach.

Instrumental theory of law focuses on the practical (praxiological) purpose of law, and special attention is paid to clarifying the nature of legal remedies and various types of legal activities. Given that the modern legal paradigm is becoming more practice-oriented, instrumental theory of law is becoming one of the integrative theories of law, and the concept of legal means is called 'instrumental theory of law', 'instrumental approach', which is

supported by A. Malko, K. Shundikov, V. Sapun (Malko, Shundikov, 2003; Sapun, 1992) and which can be considered one of the most promising and progressive scientific areas of modern theoretical and legal science.

Substantiation of the instrumental theory of law (instrumental approach) was a natural stage in the formation of legal understanding. Its main provisions are due to the value of law, its ability to be an instrument of ordering the diverse life of society. Instrumental theory of law can be considered as a potential future replacement for normativism, as instrumentalism is a fundamental scientific trend, philosophically and methodologically sound and productive, which should be further researched and expanded. Thus, instrumental theory shifts the vector of ideas about the right to a higher level of knowledge.

The purpose of the article is to study legal restrictions as an element of the mechanism

of legal regulation, their essence, and approaches to their determination and classification; to elucidate the essence of legal restrictions as a key element of the instrumental theory of law. General scientific and special methods of scientific cognition were used for carrying out this research.

## 2. Legal restrictions as the basis of instrumental theory of law

The basis of instrumental theory of law is the analysis of legal means. In general, legal means are legal phenomena that are reflected in the tools (resolutions) and actions (technologies), which satisfy the interests of legal entities, ensure the achievement of personal and public goals.

One of the approaches to the formation of ideas about legal means is their understanding as the institutional phenomena of legal reality, which render the regulatory force of law, its energy, and play the role of its active centers. Another approach is to understand legal means as a tool that accumulates in the mechanism of legal regulation, which contributes to achieving the goal of legal regulation (Denisova, 2013, p. 86). To achieve the goal of regulatory influence, law uses unique tools – means of legal influence, which are divided into two groups (legal incentives and legal restrictions).

It should be noted that the theory of remedies is more important primarily as a general theoretical concept that allows for using various remedies regardless of the nature of the legal relationship between the subjects of law in different law branches. At the same time, according to K. Petrov, it is possible to see the shortcomings of law enforcement, which are caused by the wrong choice of legal means (Petrov, 2019, p. 47).

Legal restrictions are means of exercising legal responsibility and tools to ensure the legal status of the person. A. Malko has thoroughly studied legal restrictions as a process of legal coercion at the informational and psychological level in potential or actual terms, in the performance of actions in the public interest or in the interests of the authorized entity. According to the scientist, legal restrictions (as well as legal incentives) constitute a more extensive layer of the legal sphere – information and psychological means of law, while reflecting the duality of legal information. They are broader in scope than traditional methods of legal regulation and do not replace other diverse legal remedies, to some extent integrating and unifying them (Malko, 2004, p. 92).

S. Bobrovnik has an important position which defines legal restriction as those enshrined in the right to refrain from an illegal act, the purpose of which is to create

the necessary conditions to meet the interests of the authorized entity and the public interest as a whole (Bobrovnyk, 2004, p. 92). Following N. Onishchenko, a legal restriction is an obstacle to illegal behaviour enshrined in legal norms, which creates conditions for satisfying the interests of the subject of law for the normal functioning of social institutions (Onishchenko, 2010, p. 97). The existence of legal restrictions is intended to protect society from the arbitrariness of law enforcement. Ultimately, legal restrictions must have one goal in all cases: to ensure a reasonable compromise between the public need and the interests of such a society (Goiman, 1998, p. 33).

Based on various approaches to the definition of legal restrictions (which are primarily due to the multifaceted nature of this category), it is most optimal to define legal restrictions as certain legal remedies aimed at deterring and restricting the subject of legal relations from certain acts through negative motivation. Thus, legal restrictions are a certain limit to the lawful conduct of legal entities, which must not violate the legal rights and interests of other entities. In this case, the legal restriction is a safeguard against illegal behaviour. In general, legal restrictions are designed to reduce social activity that is contrary to legal norms. In fact, legal restrictions operate in a system with legal incentives and protect public relations from the negative impact of illegal factors. That is why legal restrictions perform the functions of protection and defence and are not designed to develop public relations.

The functional purpose of legal restrictions is to create such conditions under which the need to protect and safeguard the interests of individual entities and society will be met. Thus, legal restrictions prevent illegal activity and stabilize social processes.

According to A. Denisova, the importance of legal restrictions for legal influence is as follows:

- 1) they determine the limits of permissible behaviour in the process of legal influence;
- 2) are a means of ensuring the legal status of a person as an important aspect of the manifestation of legal influence;
- 3) have a regulatory basis for consolidation and provide preventive action to prevent violations of legal requirements;
- 4) ensure the formation of motivation for the need for legal influence (Denisova, 2013, p. 101).

The category of 'legal restrictions' is most fully disclosed in the scientific legal literature through the classification of its types. A. Malko notes that the main types of legal restrictions, depending on the element of the rule of law

in which the restrictions are fixed, are legal fact-restrictions (hypothesis of the rule of law), duty, prohibition, suspension, etc. (disposition of the rule of law) and punishment sanction (Malko, 2004, p. 94). According to N. Onishchenko, the classification of restrictions depends on the content of values that the subject is deprived of when applying them: substantive and moral and legal restrictions (Onishchenko, 2010, p. 229).

In order to substantiate the criterion of classification of legal restrictions depending on the structural element of the legal norm in which they are enshrined, legal entities take into account that the conditions of their rights and obligations, benefits and prohibitions, legal consequences due to specific legal facts. That is why in some cases the subjects want to occur, and in others – prevent their occurrence.

Legal regulation is carried out by various means, which are applied in a certain sequence, replacing and complementing each other. It is these tools that ultimately shape the legal state of society (Vengerov, 1998, p. 264). Legal obligations are the primary means of regulation. Following A. Malko and V. Subochev, duty is a certain way of realizing interests by influencing the behaviour of other subjects of legal relations. It is the duty that motivates the legitimate interests, while establishing the framework of permissible behaviour for the participants of such legal relations by virtue of their own behaviour (Malko, Subochev, 2004, p. 2).

Based on the analysis of the modern legal literature, it is worth mentioning that responsibilities include both incentives and legal restrictions. In this regard, A. Malko states that the relevant view is not based on information and psychological action of law but on the social mechanism, sociological approach to legal incentives, in which the main problem is not to meet the specific interests of specific subjects of law (material side) and the problem of their lawful activities (formal side) (Malko, 2005, p. 97).

### 3. Legal remedies in the structure of the rule of law

An important aspect of the study of legal remedies is their placement in the structure of the rule of law. Thus, V. Kozhevnikova argues that from the standpoint of the structure of the rule of law, restrictions in the hypothesis are indicated as legal grounds in the form of legal facts, the presence of which results in a restriction of a particular right (Kozhevnikova, 2018, pp. 18–21). The disposition reveals the content of a certain legal restriction and sets out prohibitions, suspensions, and obligations. The limits of rights are established for all subjects of the respective legal relations and are specified

in the acts of the current legislation. Restrictions, in turn, are characteristic of the establishment of certain rights, subjects of family relations in accordance with the features, conditions and procedure for exercising the relevant rights.

At the level of the disposition of the legal norm, legal restrictions are legal obligations, prohibitions, suspensions, while sanctions contain certain penalties, which are the most significant means of restriction. Another criterion for distinguishing legal restrictions as a means of legal regulation is belonging to a particular area of law in which they are enshrined, namely:

1) civil law restrictions that are enshrined in the rules of civil law, such as Art. 36 of the Civil Code of Ukraine, which provides for the restriction of civil capacity of an individual under certain conditions (Civil Code);

2) restrictions in labor legislation. For example, the following restrictions according to the Labour Code of Ukraine: restrictions on overtime work (Article 62), restrictions on payroll deductions (Article 127), restrictions on women's work at night (Article 175), etc. The main array of legal restrictions in labor law is contained in the form of prohibitions (Labour Code);

3) restrictions in family law. For example, restrictions are enshrined in the Family Code of Ukraine, namely: restrictions on persons who cannot be married to each other (Article 26), deprivation of parental rights (Article 164), restrictions on persons on adoption (Article 212), etc. (Family Code);

4) restrictions in land legislation, which are highlighted in a separate chapter 18 of the Land Code of Ukraine on restrictions on land rights, which, for example, are: a) the condition to begin and complete construction or development of land within the prescribed time; b) a ban on certain activities; c) a ban on changing the purpose of the land, landscape; d) the condition to carry out the construction, repair or maintenance of the road, road section; e) the condition of compliance with environmental requirements or the performance of certain works; e) conditions to grant the right to hunt, catch fish, collect wild plants on their land at the prescribed time and in the prescribed manner (Land Code);

5) economic and legal restrictions, which often exist in the form of suspension of the business entity. For example, in accordance with Art. 246 of the Commercial Code of Ukraine established restrictions and suspensions in the following cases: 1) the implementation of any economic activity that threatens human life and health or poses an increased danger to the environment is prohibited; 2) in the case of economic activity in violation of environmental requirements, the activities of the busi-

ness entity are prohibited (Commercial Code);

6) environmental and legal restrictions, which are in the form of specific legal restrictions on the limits of emissions of pollutants into the environment. For example, according to Art. 44 of the Law of Ukraine 'On Environmental Protection' set limits on emissions of pollutants into the environment and other types of harmful effects in general in the Autonomous Republic of Crimea, regions, cities of national importance or individual regions are set if it leads to pollution of natural resources importance, territories of other oblasts, – the central body of executive power, which implements the state policy in the field of environmental protection (Law of Ukraine 'On Environmental Protection');

7) administrative and legal restrictions, which exist mainly in the form of warnings and prohibitions. For example, in Art. 30 of the Code of Administrative Offenses of Ukraine provides for deprivation of the right to drive a citizen is applied for up to three years for gross or repeated violation of the exercise of this right or for up to ten years for systematic violation of the use of this right (Code of Administrative Offenses);

8) the widest list of restrictions is established in criminal law in the form of prohibitions, punishments and restrictions of rights. For example, Art. 172 of the Criminal Code of Ukraine establishes that for illegal dismissal of an employee for personal reasons or in connection with his notification of violation of the Law of Ukraine 'On Principles of Prevention and Combating Corruption' to another person, as well as other gross violations of labour legislation from two thousand to three thousand non-taxable minimum incomes or deprivation of the right to hold certain positions or engage in certain activities for up to three years, or correctional labour for up to two years (Criminal Code).

Within the framework of legal regulation, legal facts act as circumstances that limit, restrain and determine the limits of permissible behaviour, as well as provide an opportunity to implement permitted behaviour. Therefore, at the present stage, legal obligations in terms of legal restrictions should be studied as a motivational and motivating effect on people's behaviour.

It should also be noted that it is not enough to have the necessary arsenal of legal restrictions to ensure their effective impact. An important aspect is their implementation. In conducting her dissertation research, O. Levada appropriately noted that the signs of realization of legal restrictions are: 1) focus on restraining the subject's own interests and at the same time satisfying the interests of the other party

in legal relations and public interests in protection and defence; 2) the actual reflection of the reduction of opportunities, freedom, and hence the rights of the individual, which is carried out through duties, prohibitions, punishments, suspensions, limitations and types of behaviour of subjects; 3) expression of negative legal motivation; 4) performance of a protective function in the public and state interest; 5) aim to reduce negative activity (Levada, 2019, pp. 13).

It is noteworthy that legal obligations play an important role not only as legal restrictions, but also positive obligations that indicate the subject of the need for lawful action. Positive commitments are more related to coercion than to stimulating people's behaviour. In general, in the legal literature, legal restrictions are rightly associated with the narrowing of permits, the imposition of prohibitions and additional positive obligations, as the obligation is a necessity, due to which in case of non-compliance there are penalties.

Developing the idea of legal obligations, it can be argued that prohibitions are also to some extent passive obligations. By imposing prohibitions, the regulator thus imposes certain negative obligations – that is, the obligation to refrain from illegal acts. Thus, the legislator expresses his negative attitude to certain actions that he considers undesirable for public relations. In this regard, A. Denysova believes that the prohibition by creating obstacles to the interests of the individual in relation to whom it acts, is aimed at realizing the interests of the opposite party (Denysova, 2013, p. 108).

#### 4. Conclusions

Summarizing the above, it should be noted that legal regulation is carried out through a combination of legal incentives in the process of legal regulation and legal restrictions. It is through the use of various legal means that the positive effect of legal regulation on public relations is achieved. In general, the issue of legal restrictions is a question of the limits of human legal freedom in society, because it is limited by the freedom of others.

Thus, legal restrictions (along with legal incentives) are fundamental means of legal regulation. The effect of only legal incentives in the process of legal regulation cannot exist without legal restrictions that balance the mechanism of legal regulation. It is relationship that contribute to the impact of law on society. Similarly, the violation of the balance in the application of various legal means has the consequence of not obtaining the desired result of legal regulation. Consequently, legal incentives, backed by appropriate legal restrictions, have the most effective impact on legal regulation.

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## ПРАВОВІ ОБМЕЖЕННЯ ЯК ОСНОВА ІНСТРУМЕНТАЛЬНОЇ ТЕОРІЇ ПРАВА

**Анотація. Мета.** Дослідження правових обмежень як елементу механізму правового регулювання, їх значення та підходів до їх класифікації. Розкриття сутності правових обмежень як ключового елементу інструментальної теорії права. **Методи дослідження.** При здійсненні дослідження були використані загальнонаукові та спеціальні методи наукового пізнання. **Наукова новизна.** Розглянуто основні підходи до визначення правових засобів. У статті проаналізовано місце правових обмежень у механізмі правового регулювання та розглянуто основні наукові підходи до визначення

правових обмежень як елементу системи правових засобів, надано авторське визначення правових обмежень. Досліджено значення правових обмежень для правового впливу та основні підходи до визначення класифікації правових обмежень, зокрема залежно від структурного елементу правової норми, розглянуто правові обмеження на рівні диспозиції правової норми. Проаналізовано особливості реалізації правових обмежень задля забезпечення їх ефективного впливу. Розглянуто особливість правових обов'язків як особливого виду правових обмежень. **Висновки.** Слід зазначити, що правове регулювання здійснюється через комбінацію дії правових стимулів у процесі правового регулювання та правових обмежень. Саме через застосування різноманітних правових засобів досягається позитивний ефект правового регулювання на суспільні відносини. В загальному питання правових обмежень є питанням меж правової свободи людини в суспільстві, адже вона обмежена свободою інших людей. Отже, правові обмеження (поряд із правовими стимулами) є основоположними засобами правового регулювання. Дія лише правових стимулів у процесі правового регулювання не може існувати без правових обмежень, які збалансують механізм правового регулювання. Саме на цьому взаємозв'язку побудований вплив права на суспільство. Так само і порушення цього балансу у застосуванні різноманітних правових засобів має наслідком неотримання бажаного результату правового регулювання. Саме тому правові стимули, підкріплені належними правовими обмеженнями, мають найефективніший вплив на правове регулювання.

**Ключові слова:** механізм правового регулювання, правові засоби, правові обмеження.

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