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Some Problems of Optionality in the Civil Law of Russia

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Abstract. *In civil theory, the concept of dispositive legal regulation and its relationship with legal, normative, individual, autonomous, decentralized, self-regulating regulation has not been created. Modern civil scientists are faced with the task of creating a holistic teaching about the content, forms, and means of this unique phenomenon.*
Keywords: *dispositive law regulation, individual legal regulation, and civil and regulatory means of regulation.*

Like many legal categories, dispositivity does not have a single theoretical definition for its concept, content, form, or legal means in civil science. The situation is explained by the complexity of the legal phenomenon under discussion, the debatable nature of its content, its many manifestations, and various definitions in other Russian law branches.

The dispositivity concept was introduced by German researchers Wetzel, Endemann, and Heinz [1, p. 411] and became the object of close attention for Russian scientists, such as M.A. Gurvich, S.S. Alekseev, E.V. Vavilin, E.A. Evstigneev, O.A. Krasavchikov, A.P. Sergeev, V.F. Yakovlev, and many others. We can generally agree with their authoritative conclusions.

For example, Yakovlev considered dispositivity as one of the quality features of civil law methodology and the reception of civil law regulation and a manifestation of the freedom of the civil rights principle. It also expresses, in its sole discretion to carry out its legal personality, the ability to acquire, exercise, and defend one's right to determine the content of legal relations involving their participation, and the legal ability to dispose of existing powers. Yakovlev argued that mandatory norms also ensure the dispositivity effect involved in the formation of the legal status for individual or legal entities. Participants in a civil legal relationship have the right to, inter alia, choose a counterparty, set the conditions for their own and joint behavior, and determine the place and time of action. The restrictive framework of dispositivity differs among categories of civil law subjects. There are such restrictions as the granting of certain legal capacities to various law subjects, the establishment of specific legal regimes over their property, and the publication of power acts of individual regulation, etc. [2, p. 114–118].

V.P. Gribanov called dispositivity the disposition of one's subjective rights by civil capacity [3, p. 158]. E.V. Vavilin quite convincingly revealed the significant role of optionality in the mechanism of subjective civil rights implementation and its impact on the dynamics of previous activity, the balance of rights and responsibilities, and the choice of the method (option) tasks, including the protection of rights and legitimate interests [4, p. 310–315].

In his dissertation research, R.B. Bryukhov came to a reasonable conclusion that being an element and an indicator of the civil law subject's behavioral freedom, dispositivity is at the same time a principle of civil law. This principle organizes its structure and ensures its fundamentality, stability, universality, intersectoral character, and multiplicity of manifestation forms. At the same time, we believe that the statement of R.B. Bryukhov concerning the normative basis of dispositivity being all the norms of civil law [5, p. 6-7], looks somewhat inaccurate. In our opinion, the main source of dispositive behavior for an individual or legal entity is the dispositive norms prescribed in the law. According to Article 421 of the Civil Code of the Russian Federation,[1] the contract terms are determined at the discretion of the parties, except for legal situations, when the content of contractual conditions are predetermined by the law or other legal acts.

Of course, a contract concluded on the basis of dispositive norms must comply with the statutory rules provided for by law and other legal acts (mandatory norms) during the contractual period (paragraph 1 of Article 422 of the Civil Code of the Russian Federation) [6, p. 10-22].

[1] Civil Code of the Russian Federation (part one) of 21.10.1994 No. 51-FZ (ed. of 08.12.2020) // Sobranie zakonodatelstva RF. 1994. No. 32. Art. 3301.

In our opinion, dispositivity is one of the main civil law principles, which actively influences the method of autonomous regulation with the help of dispositive norms and branch principles of civil law (i.e., legal equality of the parties, inviolability of property, contractual freedom, inadmissibility of arbitrary interference in private affairs, ensuring the unhindered exercise of subjective civil rights, and restoration and protection of violated rights) (paragraph 1, Article 1 of the Civil Code of the Russian Federation). This is the opportunity provided by the law to act independently, at its own discretion and will and in its own interest, albeit in compliance with legal restrictions. This is an opportunity to enter into contractual legal relations, acquire the necessary subjective rights, determine their content, exercise them, dispose of them, and protect them.

Contract freedom is the freedom of the party(ies) to enter into contractual relationships, the freedom to choose the counterparty (the contract parties), expression, establishing the material terms of the contract, and the freedom to reconcile the contract terms on the basis of not only mandatory but discretionary rules.[2] Needless to say, there is no absolute freedom in the world, and a conscious person with will, needs, and interests, being a participant in society, is dependent on that society in connection with private and public, i.e., state, interests. Thus, according to Part 3 of Article 55 of the Constitution of the Russian Federation and paragraph 2 of Article 1 of the Civil Code of the Russian Federation,[3] human rights may be restricted in order to protect the constitutional system of the country, strengthen its sovereignty and defense capability, ensure morals, protect the health of citizens, and their rights and legitimate interests.

Legitimate interest means heightened attention to the solution of existing problems by legal means in order to satisfy material and/or non-material interests, to obtain expected property or personal non-property effects. The interest initiates positive actions of the parties aimed at the emergence and execution of contractual terms, and contributes to the further development and implementation of the contractual relationship.

In cases where a condition of the contract is provided for by a rule not otherwise stipulated (a dispositive rule), the parties may exclude its application by their agreement or establish a condition other than that provided for therein. In the absence of such an agreement, the contract condition is determined by the dispositive norm.

Dispositivity is closely related to autonomous, decentralized, individual, and normative legal self-regulation. In our opinion, autonomous regulation in the civil law is the phenomenon whereby participants in civil legal relations attempt to regulate their own behavior (according to their will, at their sole discretion) to establish the rules of their behavior, contract terms and conditions, and changes and enforcement of the contracts in their and the company's interests.

S.S. Alekseev noted that regulations are manifested with the help of legal norms, according to people's needs, certain relations, and the entire set of legal means necessary to implement the programming of these relations. Individual regulation has a sub-normative, concretizing nature, carried out on the basis of objective law norms, within the limits, forms, and directions provided by the participants of individual legal regulation. Participants tend to specify their relations with the help of transactions (contracts), and agreements, due to the fact that the norms of positive law cannot settle all the issues of interest to the subjects of legal relations. A special place in the implementation of legal norms is occupied by law enforcement agencies [7, p. 155–165].

V.V. Yershov rightly points out that legal and individual regulation of public relations are paired concepts, without which it is impossible to fully regulate certain social relations due to the abstractness of the principles and norms of objective law. The term "normative regulation" of social relations is a controversial, insufficiently clarified concept that has no future. There are not only legal, but other social regulations. Regulatory governance is conducted with the help of normative legal acts. The scientist suggests replacing "regulatory regulation" with "legal regulation" [8, p.10-21].

In my opinion, regulatory regulation is quite reasonably included in the system of legal lexicon. As previously noted, a significant part of legal regulation is based on the norms of objective law. The terms "autonomous," "decentralized," "individual," "regulation," and "self-regulation" have their own characteristics, according to the scope, content, methods (means), nature, form, subject, and composition of regulation, etc. Various definitions of regulatory forms and methods emphasize the complexity of social regulation, the diversity of its legal and regulatory means, and their contributions to theoretical research and practical law enforcement. Norms can also be contained in the moral and ethical rules of behavior.

The characterization of civil law means that dispositive settlement continues to be the object of scientific discussion. The means

[2] Civil law. Textbook: in 3 vols., vol. 1 / Ed. by A.P. Sergeev. 2nd ed., reprint. and add. M.: Prospect, 2018. p. 211.

[3] The Constitution of the Russian Federation (adopted by popular vote on 12.12.1993, with amendments approved by popular vote on 01.07.2020) // Rossiyskaya Gazeta. 2020. № 144.

of the legal regulation type described here include transactions (contracts), agreements (all contracts are agreements, but not all agreements are contracts), and legal means (acts of legal realization). V.N. Kudryavtsev stressed that the most important task of law is to maintain law and order and proper behavior of legal entities through legal means [9, p. 22-42].

The authors of the textbook, edited by L.T. Bakulina, correctly note that contractual law regulation is aimed at decentralizing, self-regulating relations, and softening subordination. The parties to such regulation are private individuals who carry a certain legal status, their own interest, will, and independence. By coordinating their actions and interests at their own discretion, they form a model of behavior [10, p. 177-187].

Thus, the controversial issues of dispositive regulation in civil law need to be further discussed and resolved as soon as possible for the benefit of the Fatherland, its citizens, and civil science.

References

1. Wetzell G.H. System der ordentlichen Civilprocesses. Aufl. Leipzig, 1878. 396 p.
2. Yakovlev V.F. Civil law method of regulating public relations. 2nd ed., additional Moscow: Statute, 2006. 212 p. (In Russ).
3. Gribanov V.P. Theoretical research on civil law. *The Soviet State and Law.* 1970;(9):158-169. (In Russ).
4. Vavilin E.V. Implementation and protection of civil rights. 2nd ed., reprint. Moscow: Statute, 2016. 41 p. (In Russ).
5. Bryukhov R.B. Dispositivity in the civil law of Russia: Dis. ... cand. the faculty of law. sciences'. Ekaterinburg, 2006. 21 p. (In Russ).
6. Andreev Yu.N. A contract in civil law of Russia: comparative legal research. Moscow: Norma, 2019. 270 p. (In Russ).
7. Alekseev S.S. Collected works. In 10 vols. 3: Problems of the theory of law. Course of lectures. Moscow: Statute, 2010. 520 p. (In Russ).
8. Ershov V.V. Legal and individual regulation of public relations. Moscow: RSUP, 2018. 628 p. (In Russ).
9. Kudryavtsev V.N. Law. An act. Responsibility. Moscow: Nauka, 1986. 448 p. (In Russ).

О некоторых проблемах диспозитивности в гражданском праве России

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Аннотация. *В цивилистической теории не создана окончательная концепция понятия диспозитивного праворегулирования и его соотношения с правовым, нормативным, индивидуальным, автономным, децентрализованным, саморегулируемым регулированием. Перед современными исследователями-цивилистами стоит задача создать целостное учение о содержании, формах и средствах этого уникального явления.*

Ключевые слова: *диспозитивное праворегулирование, индивидуальное правовое регулирование, гражданско-правовые и нормативные средства регулирования.*

Список литературы

1. Wetzell G.H. System der ordentlichen CiIvilprocesses. Aufl. Leipzig, 1878. 396 p.
2. Яковлев В.Ф. Гражданско-правовой метод регулирования общественных отношений. 2-е изд., доп. М.: Статут, 2006. 212 с.
3. Грибанов В.П. Теоретическое исследование по гражданскому праву // Советское государство и право. 1970. № 9. С. 158–169.
4. Вавилин Е.В. Осуществление и защита гражданских прав. 2-е изд., перераб. и доп. М.: Статут, 2016. 415 с.
5. Брюхов Р.Б. Диспозитивность в гражданском праве России: Дис. … канд. юрид. наук. Екатеринбург, 2006. 21 с.
6. Андреев Ю.Н. Договор в гражданском праве Росси: сравнительно-правовое исследование. М.: Норма, 2019. 270 с.
7. Алексеев С.С. Собрание сочинений. В 10 т. Т. 3: Проблемы теории права. Курс лекций. М.: Статут, 2010. 520 с.
8. Ершов В.В. Правовое и индивидуальное регулирование общественных отношений. М.: РГУП., 2018. 628 с.
9. Кудрявцев В.Н. Закон. Поступок. Ответственность. М.: Наука, 1986. 448 с.