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Method of civil procedure

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ABSTRACT

Investigating the civil procedure regulation as a set of interrelated tools and techniques (imperative, dispositive and determinative) providing legal impact on the behaviour of civil procedure participants, this article is to substantiate that the method of civil procedure is a set of techniques (imperative, dispositive and determinative), methods (permissions, regulations, prohibitions, sanctions) and means (the consequences of failure to comply with civil procedural rules) of regulation implemented in the administration of justice in civil cases. However, determinative method of civil procedure regulations is a kind of methodological system of weights and balances, where the dispositive will of the parties and the imperative discretion of the court dialectically transform themselves in a new quality representing a symbiosis of the ways and techniques of civil procedure regulations. Moreover, summarizing the comparative aspect of the conducted research, it is proved that there are more than enough reasonable grounds to state that despite some discrepancy in the scientific approaches of theoretical legal proceedings, the litigation in practice requires the usage of simultaneous methodological techniques for procedural regulation in different countries.

1. Introduction

The relevance of the research topic is due to the fact that the method of civil procedure regulations together with subject of this branch of law is a system-creating factor that determines the form and the content of civil procedural law. That is why all the issues related to research into the essence of the methods utilised in civil procedure regulations traditionally create and increased amount of scientific interest. It also follows from the particular importance of the legal category studied for the system of civil procedure law and the necessity of detailed knowledge of the nature, manner of procedural conduct, and the legal impact on civil procedural relations in various stages of civil proceedings. However, a comprehensive study of the important category “method of civil procedure regulations” in the theory of civil proceedings has been absent until now. Meanwhile, the necessity of the scientific development of this problem is not only dictated by the methodological content of this subject, but also by the changes that took place in civil procedural law, as well as in consideration of the resolution of civil disputes. So, the relevance of this study is determined by the necessity of the development of theoretical questions about the concept and system of the method of civil procedure regulation, including their varieties and the factors that determine their application in specific circumstances. It is particularly important that the researched topic acquires a special significance in the elaboration and development of an international doctrine of civil procedure methodology, which

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increasingly attracts worldwide scientific attention in view of the pervasive integrative cooperation of convergence and harmonisation in legislative theory and lawsuit procedure.

1.1. The degree of the scientific development of this problem

The fundamental basis for the studies generated relied on the results and conclusions of such researchers as B. van Klink, S. Taekema (Germany), H. L. A. Hart, A. Langlinais, B. Leiter, J. Folkard (USA), I. Lakatos (Great Britain), T. Hervey, R. Cryer (EU) and many others. In post-Soviet countries, with regard to the theory of civil procedure, there are no scientific papers on the methods employed in civil procedure regulation. However, the magnitude of the problem in the method of legal regulation caused great interest to it in the general theory of law. It is studied in the issues of such scientists as S. S. Alexeyev, V. M. Gorshenyov, O. S. Ioffe, V. V. Lazareva, O. G. Lukianova, O. V. Mal`ko, V. D. Sorokin, M. D. Shargorodskyy, L. S. Yavich and O. I. Vitchenko,. Moreover, this problem is mostly raised by Russian representatives in other branches of law in their studies of related issues: by V. F.Yakovlev in civil law, by V. V. Vasiliyev, T. Y. Pavlisova and S. D. Shestakova in criminal procedure, by N. Y. Polyanska, O. V. Nikolaychenko and others in civil procedure law.

The aim of this paper is to identify techniques and ways of influencing the standards of this branch of law as to their appropriate relationship, based on comparing the methods of legal regulations to the methods of civil procedure regulations, and thereby reveal the essence and content of the method of civil procedure regulations.

This general objective required the necessity to set and solve the following theoretical and practical tasks: 1) clarification of the interrelation between concepts concerning the 'method of the mechanism of civil procedure regulations', and the 'method of civil procedure regulation', 2) comparison of the definitions of the 'method of legal regulation' and 'method of civil procedure regulation', 3) to distinguish between the 'method of civil procedural law' and 'method of civil procedure regulation', 4) to analyse the method of civil procedure regulations, and 5) to formulate a working definition of the concept 'method of civil procedure regulation'.

2. Presentation of the basic material

One prerequisite in the science of civil procedural law is to study the essence and genesis of the method of civil procedure regulation, which has been refined recently, and can be explained, to our mind, by the following factors. First, this analysis provides a comprehensive study of the development of the method of civil procedural law covering the need to examine the current state of this branch of law, evaluating the efficiency of civil procedure regulations, and identifying the causes that lead to difficulties in the implementation of civil procedural rules in practice when considering and resolving civil cases. Secondly, an evaluation of the legal and technical performance of a particular method actually embodied in the prescriptions of civil procedural law is required. Nowadays, within the science of civil procedural law, the method of legal regulation along with the subject are only perceived as criteria for distinguishing one branch of law from another. But in legal literature, the general theory of law points out fairly that the method of legal regulation should be understood more widely, as it is a link between the social and legal aspects of law (Marchenko & Lejst, 2005, p. 503).

The most productive period, by the number of scientific and theoretical studies on the method of legal regulation (for the majority of Eastern European countries) was the Soviet period, when separate monographs and articles in periodicals were dedicated to the consideration of this issue. Common to these works is the lack of a critical approach to the characteristics analysed in their evaluation of the method of legal regulations, when the question of its shortcomings and possible alternatives was avoided by scientists for obvious reasons. It should be noted that the theses on the concept and characteristics of the method of regulation, which are considered as axiomatic ones now, were established during that period. The priceless conclusions contained in these studies should be a starting point in today's civil justice for all further developments in this area.

However, nowadays the method of legal regulation is mainly under attention by representatives of the general theory of law (Malko, 1998, p. 66–78; Rukavishnikova, 2003, p. 217–223; Sorokin, 2003; Teryaevskij, 2005, p. 17–21; Anisimov & Lazarev, 2005; Dedov, 2008). This issue has also been studied by the representatives of other sciences (Protsevskij, 1972; Vedyakhin & Revina, 2002; Pavlisova, 2005; Vasilev, 2012, p. 61–65; SHestakova, 2004). The defining feature of these papers is that the method of the corresponding branch of law can only be estimated according to its specifics in relation to the methods of other branches of material and procedural law, but not in comparison with the legal methods that are used in different countries.

When speaking about different countries, it is necessary to admit that modern theoretical research obligatorily consists of a chapter on the methodology of law, i.e. a fundamental analysis of law not only concerns the methodology of legal relationships, but of economics and social studies as well. So we believe that a review of the methodology employed in jurisprudence must therefore concentrate on ideas which are shared by the vast majority of legal scientists. Thus, in different unrelated issues, it is stated that most legal branches of law follow the pragmatic, eclectic approach (Klink & Taekema, 2011, p. 85–107). In this case, we should agree with J. Folkard, who remarks that in common law, in cases where a substantive claim is governed by foreign law, questions of procedure are nonetheless governed by the *lex fori*. In the context of damages, although the existence of damage is a question for the *lex causae*, its quantification and assessment is determined according to the law of the forum (Folkard, 2015, p. 37–40).