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INSTRUMENTAL APPROACH TO DEFINING LEGAL OPPORTUNITIES IN LABOUR LAW

The article considers the mechanism of legal regulation and investigates fundamental ideas of S. S. Alexeyev about the instrumental theory in law. It analyses the proposed division of legal means (instruments), determines the practical value of the instrumental approach in labour law. Separately, it is emphasized that such combined legal means as encouragement and incentives are charged with social and economic results of labour activity both for the participants of labour relations and for the state. The analysis of law regulation on the basis of «idea of legal means» enriches methodologically a new approach to solving the urgent problems in the world of work. It is described the practical value of legal means, we indicate the need for further development of instrumental theory in labor law. This theory fulfills a functional purpose reflecting the peculiarities of legal instruments, revealing the legal possibilities in the legal matter, which eventually should ensure the implementation of labour law.

Keywords: legal means, legal instruments, legal structures, mechanisms of legal regulation, sectoral legal means.

The evolution of social life, the development of market economy, the emergence of new types of relations inevitably affected their legal regulation. The priorities of legal regulation and a circle of social relations that require legal influence have changed. This requires the search for a modern legal science and the justification of new ways of ensuring the effectiveness of law and means of legal influence on the participants in the legal relationship. In this direction, in our opinion, the instrumental theory of S.S. Alexeyev, whose work was initiated in 1987, deserves attention¹. Determining the methodological foundations for the formation and the use of legal means has a great practical importance for the effectiveness of legislation, which reflects the level of protection of the rights and freedoms of citizens in the state.

With the purpose to ensure the completeness of the analysis of instrumental theory in the law, it should be noted that the problem of legal means has long been studied in the science of law. The following researchers such as D.A. Andreev², M.V. Volkova³, V.T. Komziuk⁴, O.A. Kutsiy⁵, O. V. Malko⁶, M.I. Matuzov⁷, E.B. Olkhovskiy⁸, O.V. Onufrienko⁹, V.A. Sapun¹⁰, K.V. Shundikov¹¹ and

¹ Алексеев, С.С. (1987). Правовые средства: постановка проблемы, понятие, классификация. *Сов. государство и право*, 12-19.

² Андреев, Д.О. (2008). *Адміністративно-правові засоби захисту прав власників цінних паперів*: дис... канд. юрид. наук. Київ.

³ Волкова, М.В. (2010). *Правовые средства обеспечения прав и свобод человека: теоретико-правовой анализ*. дис... канд. юрид. наук. Краснодар.

⁴ Комзюк, В.Т. (2003). *Адміністративно-правові засоби здійснення митної справи*: дис... канд. юрид. наук. Харків.

⁵ Куций, О.А. (2004). *Адміністративно-правові засоби забезпечення прав фізичних осіб у податкових правовідносинах*: дис... канд. юрид. наук. Одеса.

⁶ Малько, А.В., Игнатенкова, К.Е., Комкова, Г.Н. (2009). *Большой юридический словарь*. Москва: Проспект.

⁷ Малько, А.В., Матузов, Н.И. (2001). *Теория государства и права: курс лекций* Москва: Юристъ.

⁸ Ольховський, Є.Б., (2003). *Адміністративно-правові засоби забезпечення громадської безпеки*: дис... канд. юрид. наук. Харків.

⁹ Онуфрієнко, О.В. (2004). *Правові засоби у контексті інструментальної теорії права*: дис... канд. юрид. наук. Харків.

¹⁰ Сапун, В.А. (2002). *Теория правовых средств и механизм реализации права*. дис... д-ра юрид. наук. Н. Новгород.

¹¹ Шунди́ков, К.В. (1999). *Цели и средства в праве (общетеоретический аспект)*. дис... канд. юрид. наук. Саратов.

others. We also join in the scientific debate on legal means in law. However, in this article we aim to analyse the methodological approaches of S.S. Alekseev to the definition, modification and use of legal means (instruments). The source of the research is based on the various works of Russian scientist S.S. Alexeyev.

The investigation of legal means is inextricably linked to the mechanism of legal regulation; this statement is based on the proven belief that the generalized concept of a mechanism of legal regulation is defined as a united system of legal means. Through them it is ensured a productive legal influence on social relations¹. The purpose of this approach to the research of legal means is a definition of such means and their characteristics.

The rule of law. Speaking about the rule of law, it is necessary to clearly distinguish the legal norm as a common rule of behaviour, which is built on the typical structure in the unity of its elements – a hypothesis, a disposition, a sanction, which S.S. Alexeyev called “a logical norm”² and the norms that are in the articles of legal acts. Investigating the normative basis as an element of the mechanism of legal regulation, S.S. Alexeyev wrote that the initial source of the mechanism of legal regulation created the legal norms... They have a number of features that allows them to be used as a “regulator” of social relations... with the help of legal norms it is achieved the unity of state regulation... The regulatory regulation of social relations is the determining link in the mechanism of legal regulation. All other links (excepted the legal consciousness and legal culture...) are not only conditioned by the system of legal norms, creating the law, but are its concrete expression. The author emphasizes that the law is a regulator of social relations in the unity, in the system of their norms³. It gives a reason to believe that the norm of law is a legal mean (instrument) for regulation of social relations, which regulates the socially meaningful relations.

Having investigated the legal acts as a link of mechanism of legal regulation that serves its normative basis, S. S. Alexeyev notes that such “service’s” role is inherent to legal acts, to which, in addition to normative one the individual acts also belong⁴. The author writes that the condition of effective influence of legal acts on social relations is the perfection of their expression, which is achieved through the legal technique⁵. Cannot be ignored the emphasis of S. S. Alexeyev on legal technique, as a way of development, processing and systematization of legal acts⁶. But in the articles of legal acts the norm of law is reflected as a norm-statement that is formulated in the form of an external form of law. Misunderstanding of the meaning of the logical norm of law and its incomplete reflection in legal acts, as a result of human activity, sometimes reduces the goal of legal regulation. Such problem arises when at least one element of the rule of law is absent, which unfortunately often happens in domestic legislation. The problem of the presentation of normative material in the legislation of Ukraine, despite the progressiveness of legislation, which regulates the labor relations and relations, is closely related to the labor ones. The ways and methods of presentation of normative material do not prove to be effective regulation. The problem of the effectiveness of legal regulation and the use of legal techniques in a certain part begins with the work on bills. We are aware of the fact that the bills are not the norms of law, but we think it is necessary to focus on them, because broadly considering the essence of “legal means”, we can refer the bills to legal instruments. Undoubtedly, the number of bills exceeds the number of passed laws, but exactly in these documents there is fixed the prospects of the occurrence or development, changes and termination of certain legal relationships. The role of bills in determining the directions of legal regulation with the possibilities of public discussion of their content makes it possible to orientate not only in issues that require the attention of scientists, but also in the variability of the solution of certain problems in the regulation of social relations. At the same time, at the stage of registering the bill, the executive authorities start to implement the statutory competence. These are the powers of the Ministry of Justice of Ukraine, which for each draft

¹ Алексеев, С.С. (2008). *Общая теория права*. Москва: ТК Велби, Издательство Проспект, 267.

² Алексеев, С.С. (2008). *Общая теория права*. Москва: ТК Велби, Издательство Проспект, 305.

³ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 106, 108, 110, 113, 115.

⁴ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 119.

⁵ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 125.

⁶ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 125.

law makes a conclusion on its compliance with the current legislation; existing conflicts with acting normative acts; incorrect, false or contradictory interpretation of legal phenomena; coherence of articles of the document etc. Such work of the Ministry of Justice is inextricably linked with the development of legal opinion. And therefore, from the standpoint of scientific expediency, we define the draft laws as a legal means of ensuring the implementation of social relations. The draft laws are not only the results of the subjects' activities with the right of legislative initiative, but they also are scientifically substantiated results of scientific research that are aimed at solving practical problems concerning the implementation and protection of the rights and freedoms of citizens in Ukraine. Thus, summing up the above, we note that the draft of law as a normative act is a legal means fulfilling its "official" role providing the perfection of its form and content.

The relationship, according to S.S. Alexeyev, is the main means by which the legal norms are enforced. Relationship is a means of "transition" of general rules of the legal norm into the plane of subjective legal rights and obligations¹. Investigating the legal relationship, the scientist substantiated three types of legal relationships: 1) general regulatory ones, which are aimed at consolidating the circle of subjects of law and their general legal status; 2) specifically regulatory ones, they are aimed at consolidating the concrete behaviour of subjects; 3) guard relationships, they are aimed at implementing measures of state-compulsory influence². Agreeing with the author, we note that classification of legal relationships into groups gives the opportunity to direct the scientific search for tools into directions. Namely: 1) instruments that establish the legal status of the subjects of law; 2) legal means of regulating the behaviour of participants in legal relationships; 3) legal instruments of protection and protection of rights.

Individual acts, according to S.S. Alexeyev, are essential in the mechanism of legal regulation. They perform various functions: (a) individual acts-regulators, along with normative acts, ensure the completeness and comprehensive regulation of social relations³; (b) law enforcement acts are acts of competent authorities issued primarily on the basis of procedural law. Their main function is the implementation of regulatory legal acts⁴; (c) acts of compliance and use (performance). Use is the process of legal regulation, which ends with the actual realization by the participant of legal relationship of subjective rights and legal obligations. According to the author, the action of the mechanism of legal regulation ends with their implementation. Compliance acts have an independent value, mainly in the implementation of legal relationships active type⁵. Methodologically important is to separate the individual acts. Such delimitation makes it possible not only to comprehensively cover the regulation of social relations, but also to track the implementation of legal relationships from their occurrence to termination. From the standpoint of the instrumental approach, each stage of the implementation of legal relationships (emergence, change and termination) should have the specific legal means for the implementation of compliance, execution (use) of the legislative requirements.

Legal awareness and legal culture are important elements of the legal regulation mechanism. Legal awareness, above all, is essential for the basis of legal regulation – legal norms⁶. Legal culture, as well as legal consciousness, acts as a means of ensuring the right to act on the stage of realization of subjective rights and obligations⁷. In general, it can be argued that legal culture, as well as legal awareness, is the basic parameter (indicator) of activities of people in public life regarding the observance, use (implementation) of mandatory rules of conduct. These elements of mechanism of legal regulation are close connected with

¹ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 130-131.

² Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 140.

³ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 155-156.

⁴ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 165, 167.

⁵ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 171-172.

⁶ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 174.

⁷ Алексеев, С.С. (1966). *Механизм правового регулирования в социалистическом государстве*. Москва: Юридическая литература, 177.

the law and provide voluntary actions of participants of public relations. From the point of view of providing the proper realization of the rights and obligations of participants of legal relations, legal consciousness and legal culture encourage the subjects to the conscious use of the norms of law in their activities. However, in our opinion, these elements can not be provided with legal instruments. The process of formation of legal consciousness and legal culture does not stand as an object of legal regulation.

Developing own scientific achievements in the research of the mechanism of legal regulation and taking into account the stages of legal regulation, S.S. Alexeyev sorted out four main elements of the mechanism of legal regulation: legal norms, individual requirements for the use of law (optional element), legal relationships, acts of realization of rights and obligations¹. However, the research of the scientist is not limited to the definition of mechanism's elements of legal regulation and its characteristics. He had consistently scientifically substantiated the various approaches to it, in particular, instrumental and special legal, psychological aspects². Taking as a basis position of S.S. Alexeyev about the mechanism of legal regulation and its various aspects, we consider the instrumental approach as very important, that can cover all means and legal instruments in the process of proper legal regulation of legal relations. It should be noted that such approach is useful, taking into account that a significant part of the relations, in particular, in the labor regulation, is transformed or arisen in Ukraine (for example, social partnership relations are being renewed, outstaffing agreements are being developed, and atypical forms of employment are arising). In order to ensure an adequate regulation of such relationships, it is necessary to determine which legal means can be used to achieve the main practical purpose of regulation – the realization and protection of the rights and freedoms of citizens, business entities and the state.

S. S. Alexeyev's instrumental approach to the mechanism of legal regulation is based on the fact that: (a) legal means is the most general, universal category³; (b) in general, the legal means in the field of legal regulation can be presented as a kind of "triple" with primary importance: prohibition, positive commitment, permission. All other legal means, as the author emphasized, are a modification or combination of means of legal regulation⁴; (c) the development of society is complicated by the composition and content of legal means... The most significant of these processes are two. Firstly, it is a typification of legal means, with its help the legal constructions and system structural units began to emerge. Secondly, the legal means (both at the primary, and at the level of legal structures, structural units) acquire a normative nature⁵.

S.S. Alexeyev pointed out that the issue of legal means is not the issue of assigning to a special unit of certain fragments of legal reality, but the issue of their particular vision in a strictly defined perspective – their functional purpose, their role as instruments of optimal solution of social problems. The author stressed that in all cases, there are fragments of legal reality before us, which can be considered due to their functions and the role as tools of legal influence⁶. In our opinion, this indicates that the legal means ensure the functioning of the mechanism of legal regulation, where the regulation of social relations is a manifestation of the State's will. The decision of the state of social tasks should be reflected not only in the norms of prescriptions, but also to be ensured by the specific legal constructions of the implementation of state will. The objectification of such realization "lives" in the process of emergence, change and termination of legal relations.

¹ Алексеев, С.С. (2008). *Общая теория права*. Москва: ТК Велби, Издательство Проспект, 282. Алексеев, С.С. (1982). *Общая теория права*. В двух томах. Т. II. Москва: Юридическая литература, 27.

² Алексеев, С.С. (2008). *Общая теория права*. Москва: ТК Велби, Издательство Проспект, 267-279.

Алексеев, С.С. (1982). *Общая теория права*. В двух томах. Т. II. Москва: Юридическая литература, 9-24.

³ Алексеев, С.С. (2000). *Право на пороге нового тысячелетия: Некоторые тенденции мирового правового развития – надежда и драма современной эпохи*. Москва: Статут, 31. Алексеев, С.С. (2010). *Собрание сочинений*. В 10 т. + Справочный том. Том 5. *Линия права. Отдельные проблемы концепции*. Москва: Статут, 323.

⁴ Алексеев, С.С. (2000). *Право на пороге нового тысячелетия: Некоторые тенденции мирового правового развития – надежда и драма современной эпохи*. Москва: Статут, 32. Алексеев, С.С. (2010). *Собрание сочинений*. В 10 т. + Справочный том. Том 5. *Линия права. Отдельные проблемы концепции*. Москва: Статут, 324.

⁵ Алексеев, С.С. (2000). *Право на пороге нового тысячелетия: Некоторые тенденции мирового правового развития – надежда и драма современной эпохи*. Москва: Статут, 33, 35. Алексеев, С.С. (2010). *Собрание сочинений*. В 10 т. + Справочный том. Том 5. *Линия права. Отдельные проблемы концепции*. Москва: Статут, 326-327.

⁶ Алексеев, С.С. (1995). *Теория права*. Москва: Издательство БЭК, 218, 223.

Investigating the “whole” matter of law, S.S. Alexeyev came to the conclusion that the “triple” (i.e. prohibition, positive commitment and permission) show themselves as the delimitation of branches of law... The legal specificity of branches which is characterized with their mode and regulatory methods caused by that whether they have an obligatory, prohibitive or permissive direction¹. It is important, in our opinion, that the author of the instrumental theory will emphasize in his works the starting points from which the formation of legal instruments begins. Besides the legal means of primary importance, the scientist directs our efforts to search for legal instruments and for “the main thing, “the structure” (construction, organization) of legal regulation”². Recognizing the sectoral peculiarity of legal means, S.S. Alexeyev focuses our attention not on the formalized statement of the list of legal means, but motivates us to a new point of view of the right, that means its matter. Determining the mechanism of legal regulation, as the unity of the system of legal means, the author examined this system by enriching it with specific legal means without restricting scientific searches to only universal means or an exhaustive list of legal instruments.

The practical value of S.S. Alexeyev’s theory consist in the fact that in the research of legal means, the theory of law serves as the basis for further practical and applied researches. At the same time, from the standpoint of the sectoral use of legal means that are developed in the theory of law, their peculiarity consists in the universality of tools that ensure the implementation of certain legal relations. This relates (according to the classification of S.S. Alexeyev) both as to legal means of primary importance, as well as modified or combined legal regulation. However, the modification and combination of legal means for regulation of specific legal relationships should be based on the theory of law and reflect the sectoral peculiarity of legal influence on the participants of legal relations, where the sectoral originality is a key criterion that determinately influences the set and content of legal means. They are inherent in one or another branch of law.

For the research of our opinion, we give the conclusion of S. S. Alexeyev about the content of the sciences, which affect the economic and social spheres of life. The author wrote that the point of focusing of worked constructive tools for solving economic and social problems is not economic disciplines (as it commonly believed), but legal ones – i.e. jurisprudence³. We assume that this problem statement about the concentration of tools contradicts the realities of today. The practice proves that the solution of economic and social problems cannot be based on the priority of one particular science. The interdisciplinary approach, in our opinion, is more acceptable. For example, combination of economic and legal instruments of providing the workers’ labor rights should create a positive synergistic effect for achievement the general socially important goal, that means for providing and maintaining the rule of law in the labour sphere.

As S. S. Alexeyev rightly pointed out, the formation of legal structures in one or another national legal system occurs in many cases spontaneously, during complicated practical relations and it represents rather a long process, which... has... formalized, by the way, quite often, complicated formalized character, which largely reveals the technology of formation of legal constructions⁴. This proves the necessity of working out a number of legal constructions as legal models of regulation of different legal relations. But such work requires time, scientific approach and approbation of these models in practice with the further implementation into law enforcement activities.

As the author of the instrumental theory S. S. Alexeyev noted the development of legal constructions is mainly the merit of legal dogma, analytical jurisprudence, and mainly in the branch of legal disciplines... An analysis of group of legal norms, principles and legal relationships that belong to this category of legal cases, as a rule, represents identification and processing of peculiar legal structure... This is, in essence, the statement, insulation and the formal and logical characteristic of peculiar legal construction – i.e. the type relations of rights, obligations, responsibilities, legal facts⁵. Methodologically important is the emphasis on analytical jurisprudence. This testifies that legal tools cannot be formed only on the background

¹ Алексеев, С.С. (2010). Собрание сочинений. В 10 т. + Справочный том. *Том 4: Линия права. Концепция: Сочинения 1990-х – 2009 годов*. Москва: Статут, 215. Алексеев, С.С. (2009). *Тайна и сила права. Наука права: подходы и идеи. Право в жизни и судьбе людей*. Москва: Норма, 36.

² Алексеев, С.С. (2010). Собрание сочинений. В 10 т. + Справочный том. *Том 4: Линия права. Концепция: Сочинения 1990-х – 2009 годов*. Москва: Статут, 216. Алексеев, С.С. (2009). *Тайна и сила права. Наука права: подходы и идеи. Право в жизни и судьбе людей*. Москва: Норма, 38.

³ Алексеев, С.С. (2006). *Линия права*. Москва: Статут, 220-221.

⁴ Алексеев, С.С. (2006). *Линия права*. Москва: Статут, 212.

⁵ Алексеев, С.С. (2006). *Линия права*. Москва: Статут, 216.

of the practice of using the current legislation. It is a scientific analysis of current problems that requires legal regulation and research of the practice of applying legal acts and it is this material from which it is necessary to isolate and combine the legal structure that will provide the functioning of legal norms and implementation of legal relationships.

Regarding the labor law, it should be emphasized that the legal possibilities of labour law are manifested, for example, through such legal means as encouragement and promotion. Their goal is to develop labor relations, to encourage workers and employers to work actively, to stimulate a competitive environment in the labor market, which should result in a high level of protection of interests of the participants in labour relations, and as a consequence, a socio-economic development in the state. The legal influence on the participants in labour relations, which is implemented through promotion and stimulation, should generate the activity in the world of work, and the legal conditions for the realization the rights to work should stimulate in general socio-economic development. Incentives should be considered as the potential of labour law for the sustainable development of labour relations. Government bodies, by issuing the regulations, should clearly track the legal possibilities that are laid down in the regulatory acts for stimulating the labor activity of population, rather than the incentive to expand the shadow labour market in Ukraine.

Thus, as a result, it should be noted that the instrumental theory, which is used to solve the problem of consolidating, implementing, guaranteeing, securing and protecting labor rights, freedoms and legitimate interests of citizens and their groups, makes it possible to approve the scientific results of theoretical and industry research with a goal to distinguish the legal means in the labor law of Ukraine. This approach to solving legal problems in labor law is a new legal knowledge that hastens the right to practical application in the issue of controlled management of processes in the labor sphere, in particular, regarding the providing of adequate and safe conditions of work, stability of labor relations, stimulation of conscientious and productive labor, etc. It is important that the use of such combined means as an encouragement and incentives for influencing all relations in the area of work is charged with the social and economic results of working life, both for the participants in the labor relations and for the state.

The investigated theory of S. S. Alexeyev is the basis for the science of labor law in the search for new ones and a combination of existing legal means. Also, the allocation of updated legal means of influence on the participants in labor relations should provide the protection of employees' rights as an economically weak side of work agreement. The analysis of law regulation on the basis of «idea of legal means» enriches methodologically a new approach to solving the current problems in the world of work. It is characterized the practical value of legal means that specifies the necessity for further development of instrumental theory in labor law. This theory fulfills a functional purpose reflecting the peculiarities of legal instruments, revealing the legal possibilities in the legal matter, which eventually should ensure the implementation of social function of labour law.

References:

1. Alekseev, S.S. (1966). *Mehanizm pravovogo regulirovaniya v socialisticheskom gosudarstve* [The Mechanism of legal regulation in a socialist state]. Moscow, Juridicheskaja literatura, 187 [in Russian].
2. Alekseev, S.S. (1982). *Obshhaja teorija prava. V dvuh tomah. T. II.* [The general theory of law. Two volumes]. Moscow, Juridicheskaja literatura, 360 [in Russian].
3. Alekseev, S.S. (1995). *Teorija prava* [The theory of law]. Moscow, Izdatel'stvo BJeK, 420 [in Russian].
4. Alekseev, S.S. (2000). *Pravo na poroge novogo tysjacheletija: Nekotorye tendencii mirovogo pravovogo razvitiya – nadezhda i drama sovremennoj jepohi* [The law on the threshold of the new millennium: Some trends in developments in the world of law – the hope and drama of the modern era]. Moscow, Statut, 256 [in Russian].
5. Alekseev, S.S. (2006). *Linija prava.* [The Line of Law]. Moscow, Statut, 461 [in Russian].
6. Alekseev, S.S. (2008). *Obshhaja teorija prava* [The general theory of law]. Moscow, TK Velbi, Izdatel'stvo Prospekt, 576 [in Russian].
7. Alekseev, S.S. (2009). *Tajna i sila prava. Nauka prava: podhody i idei. Pravo v zhizni i sud'be ljudej* [The mystery and power of law. The science of law: approaches and ideas. The right in life and destiny of people]. Moscow, Norma, 176 [in Russian].
8. Alekseev, S.S. (2010). *Sobranie sochinenij. V 10 t. + Spravochnyj tom. Tom 4: Linija prava. Konceptija: Sochinenija 1990-h – 2009 godov* [Complete works. 10 Volumes. + References. Volume 4: The Line of Law. The concept: Books of the 1990s and 2009]. Moscow, Statut, 544 [in Russian].
9. Alekseev, S.S. (2010). *Sobranie sochinenij. V 10 t. + Spravochnyj tom. Tom 5. Linija prava. Otdel'nye problemy koncepcii* [Complete works. 10 Volumes. + References. Volume 5: The Line of Law. Separate problems of the concept]. Moscow, Statut. [in Russian].