On the Regulatory Regime of Private Individuals

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ABSTRACT
The article assesses the quality of legislation regulating the participation of individuals, both from a formal legal point of view (form) and in terms of its social purpose (content). One of the criteria for assessing the quality of legislation is the regulatory regime of the subjects. The difference between the regulatory regime of private individuals and the regulatory regime of public authorities is shown. A list of tasks that can be understood and resolved to a large extent in the legal nature of legislation is provided. One such task is considered — the task of determining the purpose and subject of legislative regulation. The Russian Civil Code is assessed as a system-forming piece of legislation of all Russian legislation. On the basis of the assessment of the state of Russian legislation, it is concluded that the federal law on regulations, which will regulate all the main aspects of legislative and other normative activities: the concept of legislation; Regulatory boundaries Principles of regulatory activity (based on the objectives and subjects of regulation, taking into account the differences in the nature of human activities and the activities of political institutions); types of regulations and their relationship with each other (legislative and by-laws; federal, regional and local acts; centralized and local acts; general and special acts, etc.), including case law, customs, universally accepted principles and norms of international law, international treaties; other aspects corresponding to the content of such a law (in particular, the drafting of the bill, including its public discussion, adoption, publication, modification and repeal, etc.). The determining principle in all cases should be the recognition, observance and protection by the state of the rights and freedoms of a person and a citizen as the highest value (Article 2 of the Russian Constitution).
Keywords: regulatory regime, activities of individuals, activities of public authorities, self-regulation, goals and subject of legislation, law on regulations

The characterization of the regulatory treatment of private individuals' activities involves an assessment of the quality of legislation which regulates relations with private individuals, both from a legalistic perspective (letter) and from the perspective of its social purpose (spirit). It is usually considered that a law is a normative act adopted by the highest representative body of state power in compliance with the procedure established by the constitution or through a referendum[1]. This definition of the law is incomplete, since it defines it only with formal features.

The law, being a normative means of regulating public relations, must meet certain regulatory objectives and reflect the relevant public interests. This shows the spirit side of the law. Therefore, the law should be evaluated not only from the perspective of formal features in the system of normative acts, but also from the perspective of what it actually represents in its social purpose, whose interests it reflects[2]. The system of legislation should reflect the system of law and, therefore, if possible, be brought into line with it. Many authors have paid attention to this[3].

1. *From a legalistic point of view, legislative acts* as external forms of expression of law are characterized by such features as subjectivity and complexity.

The subjective nature of legislative acts is determined by the fact that they are constructed in accordance with the subjective views of the legislator (a group of persons authorized to adopt such acts), who proceeds from practical interests. Since the state of legislation (its system, structure) largely depends on the will of the legislator, contradictions between the law, law system (an objective phenomenon) and legislation and its system (subject to political influence) are not excluded. The choice of systematization of legislation depends on the will and interests of the legislator, who forms this system taking into account the economic and political situation in the country and its traditions, seeking to ensure the most effective regulation of relations in this area.

The subjective nature of legislative acts and their system is confirmed by their comparison in different countries, which sometimes shows significant differences in the set of such acts. For example, the business legislation of Russia and of a number of other countries with a monistic system of private law (in particular, Italy, the Netherlands) is represented by unified civil codes, which are accompanied by other legislative acts adopted in the development of the civil code and dedicated to individual institutions

[1] Legal Encyclopedia [Yuridicheskaya ehntsiklopediya] / edited by B. N. Topornina. Moscow., 2001. p. 317. (in rus)
[2] *Tikhomirov, Y. A.* Theory of Law [Teoriya zakona] / edited by V. P. Kazimirchuk. Moscow, 1982. p. 27–37. (in rus)
[3] See: *Genkin, D. M.* To the Question of the System of Soviet Socialist Law [K voprosu o sisteme sovetskogo sotsialisticheskogo prava] // Soviet State and Law [Sovetskoe gosudarstvo i pravo]. 1956. № 9. p. 91 (in rus); Theoretical Issues of Systematization of Soviet Legislation [Teoreticheskie voprosy sistematizatsii sovetskogo zakonodatel'stva] / edited by S. N. Bratush, I. S. Samoshchenko. Moscow, 1962. (in rus) p. 241.

of business law (laws on companies, bankruptcy, etc.). In countries with a dualistic system of private law (for example, Germany, France), business legislation is separated from civil legislation in the form of special trade codes adopted as the development of the Civil Code, which did not exclude the need to adopt other legislative acts as the development of trade codes (for example, the German Joint Stock Companies Act of 1965, the French Insurance Act of 1967, etc.).

There are also examples of the adoption of business codes nowadays, but in fact such codes are not legislative acts that would not allow the subsidiary application of the norms of civil codes to relations regulated by such business codes. Thus, in Ukraine, the Commercial Code has been adopted, but it cannot claim to be a truly codified act, since it does not contain primarily homogeneous norms that would be divided into norms that make up the General and Special parts of the Code. The CC of Ukraine is, in essence, a special legislative act regulating a complex of heterogeneous relations and allowing the application of the norms of the Civil Code of Ukraine and other general laws to these relations. For example, according to paragraph 6 of Article 265 of the Commercial Code of Ukraine ("Supply contract"),"the relevant provisions of the Civil Code of Ukraine on the contract of sale shall apply to supply relations not regulated by this Code".

Kazakhstan has adopted the Entrepreneurial Code of Kazakhstan, which, in essence, is a systematization of legislative acts on state regulation and control of entrepreneurial activity. This approach has nothing to do with the dualistic system of private law expressed in the European trade codes.

In the general law system, where the main source of law is a judicial precedent (Case Law), business relations are also regulated by the system of legislative acts (Statute Law). For example, in the UK there are laws on the sale of goods, on bills of exchange, on property, on companies, on currency control, on fair trade, on insolvency, etc. In the United States, the basis of business legislation is the Uniform Commercial Code of 1968. Some areas of trade are regulated by separate laws: the Tariff Act of 1930, the Trade Act of 1974, the Bankruptcy Act of 1978, and some others. At the state level, there are also laws regulating trade.

The complex nature of legislative acts is determined by their subjective nature and is expressed in the fact that legislative and other normative acts, as a rule, contain heterogeneous norms (norms of civil, administrative, criminal, procedural legislation) in one or another proportion. For example, the laws on the securities market, on banks, on bankruptcy, and many others present both rules governing relations based on equality (between professional participants in the securities market and clients, banks and clients, etc.) and rules governing relations based on power and subordination (between professional participants in the securities market and the Bank of Russia, credit institutions and the Bank of Russia, etc.).

The so-called branch codes, which contain mainly norms of one kind, are also complex, since in each of them norms of a different kind can also be found. Thus, the Civil Code of the Russian Federation, along with the norms regulating relations based on equality, contains norms that prescribe individuals to act in accordance with public interests, for example, the norms on state registration in the field of entrepreneurship (Articles 51, 164), on licensing of certain types of entrepreneurial activity (Article 49), and a number of others.

Since Soviet times, such phenomena as civil law, administrative law, criminal law, etc., are traditionally named as branches of law, although they are in fact are not branches of law, but bodies (branches) of legislation, represented, as a rule, by several legislative and other normative acts containing heterogeneous norms (standards of behavior) aimed at mutual regulation of heterogeneous social relations of the corresponding sphere of society: economic, social, managerial, etc.[4]

Taking into account the identified formal and legal features of legislative (regulatory) acts, they should be defined as *coming from different state authorities and containing heterogeneous norms* regulating human activity both in terms of its implementation and in terms of its public organization.

2. *From a substantive point of view, legislative acts* as external forms of expression of law, despite their subjectivity, should be legal, i. e., reflect the needs of public life as accurately as possible. An illegal official act is an explicit or hidden arbitrariness of the authorities.

The legal nature of legislative acts can be largely ensured by understanding and solving problems, in particular, such as: a) determining the purpose and subject of legislative regulation, its relationship with subordinate statutory regulation; b) the ratio of federal, regional and local regulation; c) the ratio of centralized and local regulation; c) the ratio of unified and specialized regulation. The solution of these tasks will allow us to understand the existing trends in the legislative regulation of public relations and determine its optimal limits, to ensure the necessary regulatory treatment of human activity.

[4] *Antonov M.* On the System and Branches of Legislation [O sisteme i otraslyakh zakonodatel'stva] // Law and Economics [Law and Economics]. 2011. No. 3. p. 53. (in rus)

Before describing the above tasks, let us briefly consider the concept of "*ensuring the necessary regulatory treatment of human activity*", which equally applies to all tasks to be solved and allows us to show which ratio of regulatory means of regulating public relations the necessary regulatory treatment foremost provides. This concept means that the legislation corresponds to the nature of the activity regulated by it and the relations that mediate this activity. Thus, the Constitution of the Russian Federation states that everyone has the right to freely use their abilities and property for entrepreneurial and other non-prohibited economic activities (Part 1 of Article 34). I believe that this constitutional guarantee applies equally to any human activity that is not prohibited by law, which by definition is based on the freedom of a person and a citizen. The legislation should define only the necessary restrictions for human activity, leaving a wide scope for the individual's own discretion.

It is necessary to distinguish between the concepts of the regulatory treatment of the activities of individuals and the regulatory treatment of the activities of institutions of society, especially public authorities.

Statutory regulation of the activities of private individuals should be based mainly on dispositive principles, where detailed regulation of relations is unacceptable. In contrast, *the statutory regulation of relations with the authorities* should be characterized by detailed regulation of the behavior of their participants (for example, the tax authority and the taxpayer), where legal procedures (administrative, procedural) become important. Accordingly, to the extent that legislation creates normative opportunities for human freedom and to the extent that it strictly defines the powers of public bodies, it contributes to the task of forming a civil society (including an effective economy) and building a State governed by the rule of law.

The practical importance of theoretical provisions on the regulatory treatment of human activity is that they can be used in the process of improving the legislation and practice of its application, in formation of modern legal thinking of those who make laws, in organization of execution of laws and in the resolution of social conflicts. The correct definition of the necessary regulatory treatment allows us to establish the general direction of the development of legislation and to reflect the objectively existing system of law most adequately, to develop the concept of a particular regulatory act being designed, to use the appropriate legal tools (legal means, structures, mechanisms).

Determining which regulatory treatment should be the basis for the regulatory act being developed is the first step in translating socio-economic requirements into legal language. This is what determines the strategy of statutory regulation in the society.

3. Let us briefly consider only one of the above-mentioned tasks to be solved in order to ensure the legal nature of legislative acts — the task of determining the purpose and subject of legislative regulation. The question of the limits of the activity of the legislator is considered in legal science from the position of *sufficient minimization of the legislative regulation of public relations*. It is known that the domain of law exists as an objective reality, regardless of whether we are aware of it or not. Along with the domain of law, there is also the domain of statutory regulation, i. e. legal by nature social relations that can be affected by an external regulator (law, custom, precedent). In particular, the legislator gives legal relations statutory force, brings them under the protection of the state, and confirms in the public consciousness the fact that the relations have a "normal", i. e., correct character. Thus, the initial limiter of the activity of the legislator (as well as other external regulator) is the domain of the law, of legal relations[5].

Legal relations are relations of individuals based on equality, autonomy of will and property independence of their participants. They arise from the division of labor and the exchange of its results on an equivalent basis. The external regulator cannot ignore this pattern, since it is an objective constraint on the will of the external regulator, primarily the legislator.

The redistribution of material and spiritual values with the help of the state (legislative, executive and judicial bodies) by means of restrictions and incentives can be permissible only if it is aimed at establishing or restoring the violated equivalent or is carried out in the interests of persons who, due to their psychophysical properties or due to extraordinary circumstances beyond their control, cannot act as an equal party in the exchange of equivalents. State intervention, including through legislative regulation, in the processes of free exchange and redistribution with other, even the best of intentions leads to a violation of the equivalent relations of exchange and cannot be justified, it is public arbitrariness[6].

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[5] *Silchenko N. V.* Boundaries of the Activities of the Legislator [Boundaries of the Activities of the Legislator] // Soviet State and law [Sovetskoe gosudarstvo i pravo] 1991. No. 8. p. 15. (in rus)

[6] Ibid. p. 18.

Thus, since legislative regulation is a subsidiary means of regulating public relations (complementing legal self-regulation), it is necessary, first of all, to determine the *objectives of legislative regulation*. From the Constitution it follows that rights and freedoms are the supreme value and the state (including the legislative branch) has the duty to recognize, respect and protect human and citizen rights and freedoms (article 2); human and citizen rights and freedoms shall have direct effect; they determine the meaning, content and application of laws, activity of legislative and executive authorities, local self-government and are provided with justice (article 18). The article 55 of the Constitution of the Russian Federation also states the purpose of legal regulation. According to the article the enumeration in the Constitution of the Russian Federation of fundamental rights and freedoms shall not be construed to deny or disparage other universally recognized human and citizen rights and freedoms; laws that abrogate or derogate the human and citizen rights and freedoms must not be issued; human and citizen rights and freedoms may be restricted by federal law only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of other persons, and to ensure the defense and security of the State. It seems that these provisions of the Constitution of the Russian Federation determine the *limits of legislative regulation*.

The issues that are the *subject of law regulation,* are solved in the Constitution fragmentarily, for example, in clause 4, article 81, paragraph 2, article 96, paragraph 2, article 114 of the Constitution it is stipulated that the election procedure of the President of the Russian Federation, the procedure of formation of the Federation Council and elections of deputies of the State Duma, the procedure of the Government activity are defined by Federal laws. Obviously, there is a need for a fundamental definition of the subject of legislative regulation, which can be done both in the Constitution of the Russian Federation and in a special law on normative acts. More important, however, is how the list of these issues should be defined: in an exclusive way, by reflecting the basic list or by establishing the principles by which the issue of attributing public relations to the subject of the exclusive regulatory impact of laws should be resolved[7].

It seems that it would be reasonable to resolve the issues that constitute the subject of regulation of laws based on the objectives of legislative regulation, in a special law on normative acts by defining a basic list of such issues and establishing the principles (criteria) for their determination, just as it is done in Article 34 of the French Constitution, which specifies *not only the institutions and relations* that are regulated by legislative acts, but also *the principles* on the basis of which the subject of legislative regulation is determined.

The subjective nature of the legislation allows us to agree with the established legal theory of its differentiation into constitutional, civil, administrative, criminal legislation, as well as legislation regulating the relevant procedural relations: constitutional-procedural, civil-procedural, administrative-procedural, criminal-procedural and constitutional-procedural legislation.

In the system of legislation, the Constitution of the Russian Federation (Article 15) has the highest legal force. It contains the basic norms of society: on the basic rights and freedoms of the individual, on the relationship between the individual and the state; on the types and competence of state authorities.

The core legislative act is the Civil Code of the Russian Federation, which combines the norms governing private relations and guarantees individuals the most stable conditions of activity. Around the Civil Code of the Russian Federation are grouped special laws and bylaws that regulate both relations based on equality, autonomy of will and property independence, and relations based on power and subordination. Special normative acts take into account the dynamics of public life by defining public requirements (restrictions, prohibitions, etc.) that ensure public order for a given period of society's development.

In accordance with paragraph 2 of article 3 of the Russian Civil code the norms of civil law contained in other laws, should correspond to the Civil code of the Russian Federation. This statute is evaluated differently in the legal literature, mainly critical, since we are talking about the ratio of legal acts of equal legal force, a distinction which appears only in the fact that one is a codified legislative act, and the others are ordinary legislative acts[8].

I believe, however, that to solve the issue of the ratio of the norms of civil law contained in the civil code and other legislative acts, we should use not the traditional formal criteria (the form, validity, etc.), but objective criteria, determining the relationship strength of these external forms of law expression with the law as such, of how directly (or indirectly) law is reflected in the legislation standards. When

[7] *Marchenko, M. N.* Sources of Law [Sources of Law] Moscow, 2005. p. 128–129. (in rus)
[8] Ibid. p. 133–167.

determining the priorities of legislative acts, it is necessary to proceed from such a factor as the degree of compliance of the legislative norm with the fundamental rights and human and citizen rights and freedoms.

From this point of view, there should be no doubt that the codified norms of civil legislation have priority over the norms of the same legislation contained in other legislative acts. Moreover, I would venture to suggest that the norms of civil legislation (first of all, codified) should play a system-forming role in the system of all legislation. The Civil Code of the Russian Federation is often called the economic constitution. However, given that the norms of the Civil Code of the Russian Federation regulate not only property relations based on equality, autonomy of will and property independence of their participants, but also personal relations based on the same principles, its significance is much broader. On the basis of the value of the Civil Code of Russian Federation in the system of legislative acts, which directly provides along with the Constitution the freedom of the human activities, other legislative acts (not only the special norms of the civil law, but also norms of administrative, criminal, procedural law) should define only the *necessary restrictions* for human activity, leaving wide scope for private discretion of the individual. The only question that remains is how to legally consolidate the leading role of codified norms of civil legislation? It would be logical to do this in the law on regulations, which should be adopted.

4. So far, the system of current Russian legislation leaves much to be desired. To represent its state, it would be necessary to consider each of the structural parts of this system, but I will limit myself to civil legislation.

Civil legislation is represented not only by the norms of the Civil Code of the Russian Federation, but also by many norms of civil legislation contained in other legislative acts, including those called codes: family, labor, land, housing, etc. It is quite legitimate to ask the question: how many codes do we need?[9] It is not about the form of a regulation, although it is also important, as there is no need to call the code what actually is not a codified normative act, which by definition must contain mostly homogeneous legislation with allocation of the General and Special parts in it. Thus, the civil, criminal, and procedural codes, of course, are codified normative acts and contain a certain set of legislative norms of the corresponding kind. Family, labor, housing, forest, land, and many other codes are not actually codified regulations, as they contain heterogeneous legislative norms, so they should not be called codes, but ordinary laws, respectively: on the regulation of family relations, on the regulation of labor relations, on the regulation of land relations, etc.

In the legal literature, it is correctly noted that, for example, a tort has its own characteristics in contrast to a contract, law of property differs from the law of obligations, but this is not the basis for their regulation in separate codes (although this is possible — in the UK there are no codes, but there are laws). Why, then, should family law, housing law, or commercial law be separated into separate divisions of legislation, expressed externally in the form of codes? Such excessive differentiation of civil legislation destroys its unity, hinders its visibility and simplicity in interpretation and application, reduces the importance of general rules governing private relations, and affects the legal culture. This problematics is considered not only from academic interest. It is of great practical importance, in particular for the codification of certain matters within and outside the Civil Code, including the creation of special types of jurisdiction.[10].

Thus, the codification of Russian civil legislation is characterized by a mixed approach, and in essence – inconsistency, chaos. On the one hand, the legislator refused to adopt the Commercial Code, including the norms regulating business relations directly in the Civil Code of the Russian Federation, but, on the other hand, along with the Civil Code of the Russian Federation, the above-mentioned comprehensive legislative acts, unreasonably called codes, have been adopted and are in force. It would be logical to place the norms governing private relationships considered by these comprehensive codes (laws) directly to the civil code of Russian Federation as sections (e. g. section, "Family law") or chapters (e. g. the Chapter "of Property rights to land"), etc. Mainly the rules governing public relations in the relevant sphere of society should be contained in the laws on the regulation of family relations, on the regulation of labor relations, on the regulation of land relations, etc., establishing the guarantees of the rights of individuals, on the one hand, and the necessary restrictions on their freedom, on the other. Examples of this approach exist. For example, the rules governing insurance (private) relations are con-

[9] *Shelokaeva, T. A.* How Many Codes Does Russia Need? [Skol'ko kodeksov nuzhno Rossii?] // Law [Pravovedenie] 2009. No. 4. p. 102–108. (in rus)

[10] *Kniper R.* Problems of Internal Differentiation of Private Law [Problems of Internal Differentiation of Private Law] // Civil Law in the System of Law [Grazhdanskoe pravo v sisteme prava] / edited by M. K. Suleimenov. Almaty. 2007. p. 30. (in rus)

centrated in the Civil Code of the Russian Federation (Chapter 48), and the rules on the public organization of insurance business — in the Federal Law of December 31, 1997. "On the organization of Insurance business in the Russian Federation»[11].

Differentiation of the civil law should manifest itself primarily in the framework of a unified civil code and when required to develop in the ordinary law governing a particular sphere of private life, subject to the assumption of subsidiary application of norms of the civil code to relations regulated by these laws. The division of the norms governing relations based on equality between several codes (civil, commercial, labor, family, etc.) is an archaic approach typical of countries with a dualistic (pluralistic) system of private law, in particular Germany and France, and is criticized not only in the Russian legal science. For example, a German professor R. Kniper encourages the rejection of the dualism of private law. In particular, he writes that the legitimate legal structure of genuine commercial law is very small, there are great doubts about the need for its independent codification, but the costs of legislative activities related to the abolition of the German Commercial Code are too high. In order to present a proportionate, voluminous Commercial Code, there should be sections attached to it (currency law, banking law, stock exchange law, competition law, rules governing the circulation of securities, bankruptcy relations), which clearly do not represent only commercial law[12].

5. The Law "On Normative Acts". The above assessment of the Russian legislation testifies to the usefulness, if not to say urgent needs in the development of the law "On normative acts", which would resolve all the main aspects of legislative and other regulatory activities: the concept of a normative act; the boundaries of normative regulation; principles of regulatory activities (based on the goals and objects of regulation, distinguishing the nature of human activities and political institutions); types of normative acts and their relationship to each other (legislative and subordinate acts; federal, regional and local acts; centralized and local acts; general and special acts, etc.), including case law, customs, generally recognized principles and norms of international law, international treaties; other aspects corresponding to the content of such a law (in particular, the procedure for drafting a bill, including its public discussion, adoption, publication, amendment and repeal, etc.). The defining principle in all cases should be the recognition, observance and protection by the state of the human and citizen rights and freedoms as the highest value (Article 2 of the Constitution of the Russian Federation).

The question of the need to adopt such a law has long been discussed in the legal science[13]. Many states, including all CIS member states except Russia, have adopted such laws. A model law "On Normative legal Acts" for the CIS member states has also been developed and adopted. Theoretical developments concerning the concept, structure and content of the law on normative acts, including the recommendations contained in this work, the practice of issuing and applying such a law in the countries where it is adopted and in force, allow us to propose to the Russian legislator to develop and adopt a federal law "On Normative Acts".

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[11] Corpus of Legislation of the Russian Federation. 1998. No. 1. Article. 4.

[12] *Kniper, R.* op.cit. p. 31–32.

[13] See, for example: *Kazmin I. F., Polenina S. V.* "Law on Laws": Problems of Publication and Content ["Zakon o zakonah": problemy izdaniya i soderzhaniya] // Soviet State and Law [Soviet State and Law], 1989. No. 12. p. 3–9; *Lukyanova E. G.* Some Problems of Law-making in Modern Russia [Nekotorye problemy pravotvorchestva v sovremennoi Rossii] // Law [Pravovedenie]. 2007. No. 6. p. 159–165; *Panova I. V.* On the Normative Legal Act [O normativnom pravovom akte]/ Vestnik SAC of the Russian Federation [Vestnik VAS RF]. 2009 No. 6. p. 57–73.

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