UDC 340.115

Method of legal regulation as display of intrinsic properties of the law

Sorokina Yuliya Vladimirovna
Full Doctor of Law,
Professor of the Department of Theory and History of State and Law,
Voronezh State University,
P.O. Box 394006, Universitetskaya sq., No. 1,
Voronezh, Russian Federation;
e-mail: yulia_sor@mail.ru

Abstract

The subject of study in this article are the problems of the method of regulation, which is considered the most important legal tool for the impact on public relations and one of the criteria for dividing the right branch. The concept of the method of regulation is important for the development of two problems in the theory of law. First, the method serves as a way of designing, modeling, public relations, and secondly it takes place in the discourse about the structure of law and its division into sectors, where the traditional posed the question of whether it is possible to consider the method of legal regulation of demarcation criteria for the rights to the industry, and whether the industry specific method peculiar to them. The evolution of the concepts of the understanding of this legal phenomenon, analyzed the views of contemporary legal scholars. According to the study the author presents his own conclusions as to the content of the method of legal regulation: the problem of the method of regulation has many aspects that are identified, analyzed and solved in the course of the study. Interest in it is associated with both the fundamental scientific knowledge of the law and its effect, and with access to the empirical field, where the selection of a method directly affects the effectiveness of law. This research can be used for develop-

ing further studies by scientists and practitioners of the method the problem of legal regulation.

Keywords

Method, law, regulation, branches, measure, relations, influence, criterion, evolution, conception.

Introduction

Method of legal regulation for many years has been one of the most important problems of both theoretical legal studies and practical jurisprudence. As an empirical reality, it characterizes the legal way of structuring social relations and behavior of the participants. As a scientific category, the method of legal regulation has many facets and layers that are being actively researched by legal scholars. At a first approximation to this problem can be seen that radically opposing views about the characteristics of the method are not observed. The basis is the Greek word *method*, i.e. process, approach. However, the concept of the method of legal regulation in the legal theory has implications for the development of two problems, although related, but have certain characteristics. First of all, the method acts as an approach for designing, modeling of public relations, but apart from that, it has a place in the discourse on the structure of law and its division into sectors where a traditional question is raised, whether can the method of legal regulation be taken as a differentiation criterion of the law into branches, and do these branches possess their inherent specific method. In this paper, the author makes an emphasis on considering the method as a way of modeling, as a special legal instrument[1]. Regardless of the application, the method can be considered as a set of methods and techniques to achieve a particular purpose.

1 On the method as a criterion for differentiation of the law into branches see: Popondopulo, V.F. (2002), "System of social relations and their legal forms (the question of the legal system)" ["Sistema obshchestvennykh otnoshenii i ikh pravovykh form (k voprosu o sisteme prava)"], *Pravovedenie*, No. 4, pp. 78-101; Baitin, M.I., Petrov, D.E. (2003), "The system of law: to overcome the debate" ["Sistema prava: k preodoleniyu diskussii"], *Gosudarstvo i pravo*, No. 1, pp. 25-34; Baitin, M.I., Petrov, D.E. (2004), "Main branches of the modern Russian law" ["Osnovnye otrasli sovremennogo rossiiskogo prava"], *Pravo i politika*, No. 1, pp. 19-30.

Origin of the term

The term "method of legal regulation" entered the legal literature after a discussion about the legal system in 1938-1940. I.e., the problem of a method precisely appeared from the perspective of differentiation of elements of the law, differentiation of branches of law not only based on subject matter, but also using the method. In the postwar years, the discussion continued, the method of legal regulation has become a separate entity for research and was perceived as a separate legal phenomenon. At that time, two approaches to its definition in the legal literature gained widespread. Supporters of one of them established an understanding of the method based on any particular legal status. They were either "autonomy of the subject" and their equality or "heteronomy of the subject" and, consequently, power-subordinate relationship. On this basis, two methods were emphasized – the method of autonomous relations and the method of heteronomous relations. During the development of legal concepts the method of legal regulation was interpreted much more widely. Thus, L.S. Yavich in 1957 proposed to perceive a method as a complex phenomenon and allocated the following components: 1) the procedure for establishing the rights and obligations of legal entity; 2) the degree of certainty of the provided rights and autonomy of subjects actions; 3) the relationship of legal entities; 4) the presence or absence of a specific legal relationship between the subjects of rights and obligations; 5) ways and means to ensure the established subjective rights and obligations[2].

S.S. Alekseev confined a broad interpretation of the method of legal regulation, he also considered it as a phenomenon consisting of several interconnected elements. Under the method, he understood the set of methods and means of legal impact, aimed at regulating the right of public relations. As elements of the structure of the method S.S. Alekseev proposed the following: 1) the general legal status of subjects, their legal status and capacity; interaction between them; 2) the grounds for the emergence, change and termination of legal relations; 3) the nature of legal defense, i.e. sanctions of

2 Yavich, L.S. (1960), "On the subject of legal regulation methodology", *Questions of the general theory of Soviet law* ["K voprosu o predmete i metode pravovogo regulirovaniya", *Voprosy obshchei teorii sovetskogo prava*], Gosyurizdat, Moscow. p. 60; Yavich L.S. (1961), *Problems of legal regulation of Soviet public relations* [*Problemy pravovogo regulirovaniya sovetskikh obshchestvennykh otnoshenii*], Gosyurizdat, Moscow, p. 89.

legal norms[3]. According to S.S. Alekseev, among all of these elements, the most stable and determining is the general legal status of legal subjects. This is where the features of the method of legal regulation are focused, and it is able to be a criterion of differentiation of law on branches.

The meaning of the concept

One aspect of the debate on methods was the problem of legal and government regulation. O.S. Ioffe and M.D. Shargorodskii identified the concept method as a process of implementation of an impact, including a certain amount of leverage. The state acted as a management entity and a main "arm of law". L.S. Yavich also did not elude a strict reference of the method of legal regulation to the state. He pointed out that "the method – is a set of legal means of influence, applied by the state in legal regulation of social relations"[4]. Almost the same definition gives A.M. Vasil'ev, "the method – is a way of state influencing to certain public relations, applied as techniques to establish the relationship of the parties"[5]. This interpretation of the method, in addition to specifying its connection with the state, is somewhat one-sided itself, since A.M. Vasil'ev gives too narrow definition, revealing only one side of the phenomenon, namely such a feature as means to establish the relationship of the parties.

During the discussion, proposed the basic apprehensions of the method of legal regulation. M.D. Shargorodskii and O.S. Ioffe proposed the following definition: "a method of legal regulation should be understood as a specific way, in which the state on the basis of a set of legal norms provides it with the proper behavior of people as the parties involved"[6]. S.S. Alekseev opposed a strict association of the method of legal regulation to the state. He writes: "The method of legal regulation is legal impact techniques, their combination, characterized by the

3 Alekseev, S.S. (1961), *General theoretical problems of Soviet law* [*Obshchie teoreticheskie problemy sistemy sovetskogo prava*], Gosyurizdat, Moscow, pp. 61-70.

4 Yavich, L.S. (1960), "On the subject of legal regulation methodology", *Questions of the general theory of Soviet law* ["K voprosu o predmete i metode pravovogo regulirovaniya", *Voprosy obshchei teorii sovetskogo prava*], Gosyurizdat, Moscow. p. 62.

5 Vasil'ev, A.M. (1965), *Theory of state and law* [*Teoriya gosudarstva i prava*], Moscow, pp. 411-412.

6 Shargorodskii, M.D., Ioffe, O.S. (1961), *Issues of theory of law* [*Voprosy teorii prava*], Gosyurizdat, Moscow, p. 260.

use of a set of legal means of influence in the field of public relations"[7]. B.V. Sheindlin occupies an intermediate position. From his point of view, the method of legal regulation – not just the way, in which the State exercises the right to impact on society, but also limiting those techniques and instruments, which may be gone in for by the state power. In his opinion, the method of legal regulation is a "predicated on the principles of the legal system, on certain kinds of social relations"[8]. Seems logical assertion that an understanding of the method of legal regulation depends on an assessment of relationship between the state and law. The character of this assessment is largely based on historical and legal traditions. And one more thing. All concepts of legal consciousness do not question the relationship of state and law. State creates legal norms or gives legal nature to the established rules of conduct, as is usually the case in the Anglo-Saxon legal system. It can be argued, and it will be absolutely true, that the authority of the rule of law based on the recognition, but to confirm the recognition and guarantee their implementation can only the state. Therefore, in initial approximation, this question does not seem controversial, and speaking of the method of legal regulation as a tool in the hands of the state would be quite logical. But when analyzing the empirical legal studies, a certain autonomy of the state and the law between each other is observed. Once created or sanctioned by the state norms begin to live their own lives. They regulate the behavior of members of society and are often a barrier to the expansion of the state. Therefore, the state as a subject of control should be left out in the cold. The law serves as a source of control, as a kind of impersonal regulator that using a specific leverage drives the social mechanism.

There is an interesting definition of the method of legal regulation by V.Z. Yanchuk: "method of legal regulation is a way, approach, technique, means of influence, by which powers of the subjects are established and implemented, the character of relations between them is determined"[9]. I.e., V.Z. Yanchuk takes

7 Alekseev, S.S. (1966), *The structure of Soviet law* [*Struktura sovetskogo prava*], Yurid. lit., Moscow, p. 144.

8 Sheindlin, B.V. (1959), *The essence of Soviet law* [*Sushchnost' sovetskogo prava*], Leningr. un-t, Leningrad, p. 93.

9 Yanchuk, V.Z. (1969), *Problems of the theory of the collective farm law*, Moscow, p. 90. Quoted by: Sorokin, V.D. (2002), *Administrative process and administrative procedure law* [*Administrativnyi protsess i administrativno-protsessual'noe pravo*], Yurid. in-t, St. Petersburg, p. 210.

the appointment of the method of legal regulation in clarification of the nature of relationship between the subjects.

Broad understanding of the method of legal regulation proposed by V.M. Gorshenev, who described it as a varied means of influence on public relations for the purpose of their settling. It is expressed in the establishment of the rule of law with the help of a certain, proper and possible condition of the subjects' will in their relationship with each other, as well as with respect to the desired results of conduct[10]. A.I. Protsevskii defined the method of legal regulation as a way to influence the consciousness and will of the people. In this case, the method reveals two properties of law: impact on the life of society as a whole and determination of the behavior of people in relation to a specific type of public relations[11].

Great contribution to the development of the theory of the method of legal regulation made A.M. Vitchenko and V.D. Sorokin. Their views are united by the allocation of a specific aspect of the notion of "method of legal regulation", namely its considering as an integral means for regulating, inherent to the law as a phenomenon. Indeed, the law – the entire, though consisting of interconnected elements, and so it has a special, holistic, albeit a complicated method of regulation.

A.M. Vitchenko singled a common method or method of law in general and branch method of legal regulation inherent in a particular branch of law. Beneath this conception he understands " a set of specific regulatory means to influence on social relations"[12]. Branch method is "a set of legal techniques, tools, methods, reflecting the uniqueness of the impact of branch of law to public relations, aimed directly at the expression on the outside of the possible and proper conduct of subjects regulated by this branch of legal relations"[13]. In this case, A.M. Vitchenko stands on the position of perception of the method of legal regulation as a tool in the hands of the state, where the latter organizes and provides positive activities of the subjects in accordance with the re-

10 Rukavishnikova, I.V. (2003), "Method in the system of legal regulation of public relations" ["Metod v sisteme pravovogo regulirovaniya obshchestvennykh otnoshenii"], *Izvestiya vuzov. Pravovedenie*, No. 1, p. 217.

11 Protsevskii, A.I. (1972), *Method of legal regulation of labor relations* [*Metod pravovogo regulirovaniya trudovykh otnoshenii*], Yurid. lit., Moscow, p. 102.

12 Vitchenko, A.M. (1972), *Method of legal regulation of socialist public relations* [*Metod pravovogo regulirovaniya sotsialisticheskikh obshchestvennykh otnoshenii*], Saratov, p. 52.

13 Ibid.

quirements of the rule of law, establishes a link between rights and responsibilities, gives a certain order to public relations. If there is a violation of the law, then compulsory feature of general method comes into effect, which purpose is to impel offenders lawful conduct, rehabilitate them, restore the violated right, disrupted order. General and branch method differ as general and particular[14].

V.D. Sorokin along with A.M. Vitchenko closely relates the method of legal regulation to state activities. And it appears as the quintessential idea of the method. He writes that its constituent system of influence is used primarily and mostly by social management systems belonging to its framework. Consequently, when determining the method of legal regulation one should be aware that its use comes along with nonlegal means influencing people's behavior[15]. Feature of the method of legal regulation is also evident in its immediate conditionality for one subject of legal regulation. The latter he calls social and legal environment, the system of interacting elements. The role of such an environment is manifested in two aspects, namely the combined static and dynamic elements. With respect to static elements of the social environment, such as the status of all varieties of subjects, the problem of determining the legal status and registration of subjects is solved with the help of legal method.

Such a consolidation of the status, according to V.D. Sorokin, is usually achieved by substantive rules. Procedural rules have the task of maintaining the status through the conscious use by social management systems of those funds, which together form it[16]. V.D. Sorokin, on the basis of this position, criticizes views of S.S. Alekseev on the method of legal regulation. He believes that the formula proposed by S.S. Alekseev covers only two elements of social and legal environment in need of legal regulation, two components of the subject of legal regulation, namely, the legal status of legal entities, as well as connections, taking the form of legal relations. V.D. Sorokin concludes on the existence of a uniform method of regulation. He reflects the impact of legal means for a certain range of public relations compared to other ways of influence. I.e., V.D. Sorokin focuses on distinction of the legal and nonlegal in the system of control means. Still the author does not lose sight of the com-

14 Ibid.

15 Sorokin, V.D. (2002), *Administrative process and administrative procedure law* [*Administrativnyi protsess i administrativno-protsessual'noe pravo*], Yurid. in-t, St. Petersburg, p. 212.

16 Ibid.

plexity of this phenomenon. Method – it is a systemic phenomenon, which includes three ways taken in the organic unity – permission, enforcement and prohibition. This is not just techniques, but interrelated components of the method, when the absence of one component erases all sense of the whole category. This system is based on the interaction and mutual provision of elements, being exactly organic, inseparable unity.

Individually, neither permission nor prohibition nor enforcement cannot exist. V.D. Sorokin recognizes that in some situations we increasingly feel the prevalence of prohibition or permission or enforcement. However, it fully fits into his paradigm because it is not about autonomation, but the shift in emphasis. He writes that "when we say that the method of legal regulation is manifested in the form of legal permissions, enforcements or prohibitions, then we bear in mind their cumulative manifestation with the predominance of a single element, which effective impact is provided in a known manner by the presence of the other two"[17]. In principle, one can agree with V.D. Sorokin, as a method of legal regulation is really a complex systemic phenomenon. Describing the method, V.D. Sorokin seeks as much as possible to adequately reflect the current reality. But in this quest he should remember that the legal matter consists of abstract constructions, which, being the result of analysis of legal empirical studies, still not able to give an adequate description of reality. For the creation of universal means of regulation it is necessary to carry out the procedure of "separation" of constructions from the realities. In addition, for in-depth study of implicit and explicit knowledge of legal mechanisms we have to take any one side or a facet of legal matter. S.S. Alekseev and V.D. Sorokin put different tasks and, accordingly, have come to different results. S.S. Alekseev deconstructed design, referred to as "legal regulation". V.D. Sorokin made an emphasis on the delimitation of method of legal regulation of the regulatory methods of other regulatory systems. Moreover, if we take the logic of V.D. Sorokin, it would be wrong to say that the relationship consists of subjects, objects and content, the offense consists of subjects, objects, objective and subjective side, and the rule consists of hypothesis, disposition and sanction.

Another perspective offers I.V. Rukavishnikova. She represents a meth-

17 Sorokin, V.D. (2003*), Legal regulation: the subject, method, process (macro level)* [*Pravovoe regulirovanie: predmet, metod, protsess (makrouroven')*], Yurid. tsentr Press, St. Petersburg, p. 112.

od of legal regulation as a separate element of the mechanism of legal regulation and believes that unlike other parts of the mechanism (legal norms, legal relation, rights and obligation implementation, application of the law), the method is of particular importance. It is not separated from other elements and is inherent to each of them. In addition, it directs the dynamics of other elements. Rukavishnikova I.V. indicates that the branch method can be called unique because in this case for the purposes of legal regulation are used various ways in their various combinations. She notes that the method of legal regulation permeates the entire material of legal regulation, defines the features of generation, modification or termination of legal relationships, influences the choice of the means of establishing the rights and obligations, as well as the possibility of using those or other methods of protection of rights of the parties involved[18].

Interesting is the idea proposed by A.V. Sapii. He goes from sharp positions and offers to use the category of "method of legal regulation" in two senses. First, to designate a system of techniques and ways to create a general legal, source, primary models of legal regulation of social relations. In this case, according to A.V. Sapii, the meaning of the "method of legal regulation" is used in a broad sense, as a generalizing ideal legal phenomenon. Second, its presence of the method of legal regulation is revealed in legal relations, within any areas of law[19]. Indeed, if the law shall be considered and perceived in two ways – as a logical-semantic form and as a set of tools, instruments, guiding people's behavior, then the method must also be understood in two senses. On the one hand, it is a legal means, and this is its empirical role. And then we must admit that it is impossible to highlight permissions, prohibitions, enforcements in reality. However, the method of legal regulation – is a legal construct that initially appears as a result of analysis and generalization of empirical studies, but then begins to live their own lives and influence the legal empiricism. No doubt, it is an important link in the process of constructing the system of law and knowledge of its essence.

18 Rukavishnikova, I.V. (2003), "Method in the system of legal regulation of public relations" ["Metod v sisteme pravovogo regulirovaniya obshchestvennykh otnoshenii"], *Izvestiya vuzov. Pravovedenie*, No. 1, p. 221.

19 Sapii, A.V. (2008), "The development of the concept of "method of regulation" in the general theory of law" ["Razvitie ponyatiya "metod pravovogo regulirovaniya" v obshchei teorii prava"], *Zakon i pravo*, No. 1, pp. 48-49.

The development of the concept of the method of legal regulation

Having defined the content of the method, we turn again to A.V. Sapii's article who highlights several stages in the development of the concept of the method of legal regulation. He connects the first stage (1938-1940) to the first discussion of the legal system. This was the moment when the concept of "method of legal regulation" has become firmly established in the legal discourse. The second stage (1950-1961) is characterized by partial expansion of the contents of the "method of legal regulation". It was treated as a combination of several elements: 1) the procedure for establishing the rights and obligations; 2) the degree of definability of rights provided and "autonomy" of actions of the subjects; 3) the nature of the relations arising between carriers of subjective rights and legal responsibilities; 4) the presence or absence of a specific legal relationship between subjective rights and duties; 5) ways and means to ensure the established legal rights and responsibilities. In the third stage (1970-1980) the method's problem remains in the center of scientists attention. Introduced the notions of "common method of legal regulation" and "branch method of legal regulation". The first proper for the law as a whole, so it can be called a harmonized method, which was originally implemented in the three original versions of legal regulation – permission, prohibition and enforcement and secured, respectively, in entitling, binding and prohibiting rules of law. Branch method is a feature of a particular branch. At the same time the object of study was the ratio of the structure of general and branch method of legal regulation in their relationships and forms of expression. The fourth stage (1990 – present) is characterized by further study of the structure of the method of legal regulation, mechanism, types of regulation. Methods of such branches of law as criminal, administrative, financial and municipal, were investigated.

Thus, A.V. Sapii rightly concludes that "the general theory of law" came to the determination of the method of legal regulation, but essentially did not completely solved this problem. To a certain extent it is solved in a civil, labor and other branches. With regard to criminal law, the method of legal regulation should be investigated further in this area of study[20].

The role of the method of legal regulation in positive law

By taking a little attempt to address the problem of understanding of the

20 Ibid. P. 49.

method, we will pay attention to its role in the positive law. Branch method can be defined as various techniques, methods, means of influencing law on society as a whole, conditioned by the subject of legal regulation. A thesis on branch method implies that every branch has its own subject and method of legal regulation. At the same time, as noted by S.P. Mavrin, the subject of legal regulation has an objective rationale and content, as predetermined by the very nature of social relations. Essentially, it exists objectively and does not depend on the will of the legislator[21]. Of course, the will of the legislator cannot be denied. By subjective decision it is able to expand, narrow or change the scope of the subject of legal regulation. For instance, for the long time there has been no distinction between what is now called tort and the fact that we now call a crime. Therefore, speaking about an objective character of the subject of legal regulation, the nature of social relations, as well as established secular traditions should be contemplated. S.P. Mavrin calls the subject of legal regulation as "material criterion of differentiation of branches of law". Considering the "work" of methods in positive law, one can classify them. The most common of them is a classification, where the nature of the impact of law to public relations is taken in the capacity of criterion. On this basis, there are two methods: mandatory and permissive. Their denotation is quite traditional for the theory of law. The first takes place where the relationship between the subjects is based on relations of power and subordination, therefore its use is observed in public-law field and relevant public law branches. Dispositive method assumes equality of the parties and is used in the field of private law. Sometimes in the literature they are referred to methods of subordination and coordination. This formulation is increasingly characterizes the relationship between the legal entities: horizontal and vertical. Name – mandatory and permissive – increasingly transmits information about the choice of legal regulation means: the presence or lack of choice.

There is also a third option of terminological designation of methods of legal regulation. They are called methods of autonomy and methods of authoritarianism. In the author's opinion, the meaning of these terms is a designation of choice and indicates the particular le-

21 Mavrin, S.P. (2003), "On the role of the method of regulation in the structuring and development of positive law" ["O roli metoda pravovogo regulirovaniya v strukturirovanii i razvitii pozitivnogo prava"], *Pravovedenie*, No. 1, p. 206.

gal status of the subjects, the first follows from the second. Autonomous subjects enjoy independence, able by their own actions to acquire rights and assume responsibilities. Individual state gives them the opportunity to select a particular line of conduct. Authoritarian method indicates power-subordinate relation of entities and the opportunity to prescribe a commitment of certain actions or abstaining from the prohibited conduct. Authoritarian method "is based on using powerful legal regulations that establish the grounds and procedures of the specific rights and obligations for legal entities"[22]. S.P. Mavrin makes an interesting observation about these two methods. They are, in his opinion, are designated as primary source methods. They are highlighted in a logical way as the simplest methods of regulation and determine the main specifics of subjects' position in respective relations[23]. In these circumstances, the mandatory method, alias the method of subordination and authoritarianism, relates to the field of centralized, state regulatory control. Dispositive method, alias the method of coordination and autonomy – to the field of decentralized, usually contractual regulation[24]. Identifying elements of the structure of the method of legal regulation, once again we draw attention to the fact that such identification is the result of dealing with legal frameworks. This work is on the "depth" of law, and in this case, the performance on the empirical level is not always clear. Therefore, the reproach is in that the allocation of methods of legal regulation is abstract, unreasonable, or more precisely, meaningless. The theory of law does not formulate problems directly related to the empirical legal studies. Of course, in practice it is not always possible to draw a clear line in distinguishing methods. But to come at least to such conclusion, one have to clearly envisage the criteria of differentiation.

The fact that problems of such differentiation exist, says S.P. Mavrin[25]. He writes that the peculiarities of legal regulation in any area do not provide a basis for recognition as a universal, and, therefore, immaculate, of the concept that distinguishes two methods of legal regulation. By virtue thereof, according to S.P. Mavrin, a two-kind classification loses its theoretical significance. Especially it concerns those branches of the law, which are typical of the complex nature of relations that constitute their subject. Therefore, that position cannot be

22 Ibid.

23 Ibid. P. 207.

24 Ibid.

25 Ibid.

considered true, according to which the method of legal regulation is determined by its subject. In addition, this statement, for the most part, both theoretically and practically is useless, because it cannot serve even as any clear, reliable and effective criterion for separating one branch of law from the related, having a similar subject of legal regulation. S.P. Mavrin concludes that "considering the operational assignment of a method of legal regulation from the perspective of performance or function of an additional criterion for dividing the system of positive law on the independent branches, we have to recognize that it is unable to perform this function with respect to many branches of law, which objects are characterized by complexity and heterogeneity within these relations. Hence, all variants of the concept are theoretically and practically useless, at least for the scope of the norms of these branches of law"[26].

I.V. Rukavishnikova recognizes the selection of such methods as mandatory and permissive and draws attention on their synonyms in the course of characterization. But she points out that the division of methods for mandatory and permissive is only a general trend. Basic methods are able to transform into branch, where each method detects its own specific set of techniques and methods of regulation[27]. She maintains a position that the specificity of the method of legal regulation is determined by the specifics of the subject, but calls for "not detracting the feedback effect exerted by the method on the subject of the branch". The method of legal regulation is fixed as a prioritized and gets its material expression as a branch namely by means of the subject. Interaction and interference of the object of law branch and branch method are so strong that the perception of these two legal phenomena separately, in isolation from each other, becomes practically impossible[28]. The author of this paper agrees that the method cannot be a criterion for dividing the law into branches, but it is an important characteristic of the branch, an indicator of its specificity.

M.I. Baitin disagrees with a negative attitude to the method as a criterion for dividing the law into branches. He believes that the method of legal regulation may be predicated by the subject,

26 Ibid.

27 Rukavishnikova, I.V. (2003), "Method in the system of legal regulation of public relations" ["Metod v sisteme pravovogo regulirovaniya obshchestvennykh otnoshenii"], *Izvestiya vuzov. Pravovedenie*, No. 1, p. 220.

28 Ibid.

but the truth of this statement refers only to procedural branches. "Only methods of procedural branches are predicated by the subject of relevant branch of substantive law to a certain extent. But this conditioning is mediated by the subject of this procedural branch, which being produced from the subject of substantive law, has a direct ultimate impact on the method of regulation"[29]. The position seems to be quite reasonable, because the process – is a method of legal regulation in effect, and the method gets its consolidation precisely in procedural rules. But the presence of this, even mediated connection of the subject of legal regulation and the method of branch regulation still gives an opportunity to talk about the existence of the branch method. On this occasion, the opinions of scientists are quite similar. For instance, they agree that the method is an established by the rule of law peculiar way of influencing the behavior of parties of relations in a particular area of public life. Method concentrates the main legal arrangements of the branch, but the concept of the method cannot be attributed only to one legal feature. It is always a set of legal techniques, tools, methods, reflecting in an integrated manner the uniqueness of the branch influence on public relations[30]. M.I. Baitin and D.E. Petrov note that it must be still concurred with the original provisions, which must comply with the branch method elements, although the consensus regarding its composition has not been achieved: 1) each element expresses a single content of a branch method; 2) the elements of the method are largely predicated by the nature of the controlled relationship; 3) these elements represent a single complex, organically linked and characterize each other; 4) this complex is unique of expresses the specificity of the branch, special aspects of its effect on the subject of regulation and dissimilarity from other branches; 5) elements of the method of legal regulation of one branch of law are mediated in relation to other elements of the method of other branch; 6) branch method not only summarizes the specific features of this part of the objective law, but also predetermines common specific features of the mechanism of legal regulation[31]. Many legal experts, analyzing the structure of the method of legal regulation, rate the features of legal norms, legal status of the subjects, legal facts, approaches to for-

29 Baitin, M.I., Petrov, D.E. (2006), "Method of regulation in the legal system" ["Metod regulirovaniya v sisteme prava"], *Zhurnal rossiiskogo prava*, No. 2, p. 90.

30 Ibid.

31 Yakovlev, V.F. (1972), *Civil legal method of regulating social relations*, Sverdlovsk.

mation and support of subjective rights and legal responsibilities of the subjects of legal relations among its constituent approaches and techniques. I.e., the elements of the structure must answer the questions: what are the support measures for this branch, who owns the initiative of protective measures setting[32].

Considering the characteristics of the method of legal regulation, a number of authors highlights external and internal among them, namely essential. The first group of characteristics include the features of the elements of branch method, the second – the specific means of legal regulation. Among the external characteristics can be identified: a) individualities of legal status of the subjects as a consequence of the action of the method of legal regulation; b) features of the rights and obligations implementation; c) features of the occurrence of legal liability for violation of general legal instructions. The essential features, characterizing elements, the content of the method, include: a) branch principles of legal regulation; b) functions of this branch of law; c) methods of formation, modification and termination of subjective rights and legal responsibilities; g) methods and means of protection of subjective rights and enforcement of legal obligations. M.I. Baitin and D.E. Petrov, with reference to P.S. El'kind, notice that one sign isolated from a common system of signs, characterizing the method of legal regulation, cannot serve as a basis for any conclusions. Moreover, taken in isolation from the other properties of this method, it can characterize not a particular, that is the most important, but a common in the methods of legal regulation, typical for different branches[33]. However, according to Baitin and Petrov, one or more properties of the method can most clearly reflect its content and be more distinguishing for it among the methods of legal regulation, similar in some traits[34].

In the literature is often possible to meet A separation of the concepts "method of legal regulation" and "form of legal regulation". The first of these consists of certain methods of influence on social relations and, therefore, they should not

32 Baitin, M.I., Petrov, D.E. (2006), "Method of regulation in the legal system" ["Metod regulirovaniya v sisteme prava"], *Zhurnal rossiiskogo prava*, No. 2, pp. 84-95.

33 El'kind, P.S. (1963), *The essence of the Soviet criminal procedure law* [*Sushchnost' sovetskogo ugolovno-protsessual'nogo prava*], Leningr. un-t, Leningrad, p. 48.

34 Baitin, M.I., Petrov, D.E. (2006), "Method of regulation in the legal system" ["Metod regulirovaniya v sisteme prava"], *Zhurnal rossiiskogo prava*, No. 2, pp. 84-95.

be homologated[35]. Rukavishnikova I.V. indicates that the concept "method of legal regulation" is broader in its meaning, than the "form". The latter is included in the structure of the method as a subcomponent. Legal prohibitions, permissions, regulations, recommendations, promotions, coordinations, etc. serve as forms of legal regulation[36]. This statement is perfectly justified. If we accept the division of methods for mandatory and permissive, the corresponding forms are easily classified by type. Thus, the mandatory method includes such forms as enforcement and prohibition, and permissive – permission, recommendation, coordination.

Let's refer to the characteristics of the traditional forms of legal regulation – prohibition, permission, enforcement. S.S. Alekseev places special emphasis to these forms[37]. Prohibition are an expression of protective functions of law, they are supposed to "approve, elevate to a state of inviolable, immutable of the existing order and relationships"[38]. That is why they appear as a legal obligation implementation in the passive form, i.e. refraining from actions of unlawful nature. Prohibitions are confirmed in prohibiting rules of law. Legal responsibility is primary means of their providing. According to S.S. Alekseev, the very essence of legal responsibility is to ensure the maximum efficiency of the legal prohibition in actual true life relations. Introduction of legal sanctions for a conduct that previously was not considered illegal, in fact, is a way of establishing the prohibition. The extent of severity and categoricity of prohibitions determines the type and nature of legal liability. To give greater force to prohibitions, the legislator introduces tougher sanctions[39]. S.S. Alekseev rightly observes that prohibitions are characterized by formal strict certainty, that stands for their mandatory consolidation in the rule of law, as well as the designation of clear boundaries. S.S. Alekseev indicates two options for prohibitions consolidation in the law: 1) the establishment of direct prohibitions; 2) the establishment of legal liability for the conduct, which content is in violation of the prohibitions. How-

35 Rukavishnikova, I.V. (2003), "Method in the system of legal regulation of public relations" ["Metod v sisteme pravovogo regulirovaniya obshchestvennykh otnoshenii"], *Izvestiya vuzov. Pravovedenie*, No. 1, pp. 217-222.

36 Ibid.

37 Alekseev, S.S. (1969), *General permissions and general prohibitions in Soviet law* [*Obshchie dozvoleniya i obshchie zaprety v sovetskom prave*], Yurid. lit., Moscow, 288 p.

38 Ibid. P. 48.

39 Ibid. P. 50.

ever, he opposes too severe interpretation of prohibitions, according to which the prohibition is implicitly presented in any rule of law. In this sense, the prohibition is interpreted as an inadmissibility of the 'other' behavior than that which is estimated as a legitimate. This view is held by A.G. Bratko[40]. Not sharing the position of the latter, S.S. Alekseev said that such prohibitions are in evidence of conservative or authoritarian regimes, but in this case there is a change of the appearance of whole regulatory mass, and the law acquires a pronounced prohibitive nature. That is for prohibitions, which become the basis and meaning of the legal regulations. Meanwhile, the true nature of law is in permissions, and precisely they constitute the legal foundation.

Considering the nature of legal prohibitions, Alekseev addresses the question of the relationship between structures such as "prohibition" and "absence of permission" and argues that they cannot be equated. "Legal restrictions are only in those cases when they are directly provided in the texts of regulations, either in the form of special prohibiting regulations or as protective legal instruments containing the prohibition in a hidden form"[41]. In addition, S.S. Alekseev indicates a problem of "flexible" prohibitions, which implementation depends on the discretion of individuals. The wording of the prohibition in this case might be: "usually not allowed", "without written consent". But S.S. Alekseev does not consider such directive as prohibition, since the so-called flexible prohibitions are actually pointing out exceptions from the general regime[42]. In the author's view, this type of injunctions and subsequent behavior should be called not prohibitive, but "lawful under the circumstances". The prohibition is aimed at creating a barrier for misconduct, thereby preventing it; it is "charged" with legal liability. By establishing prohibitions, the legislator expresses its fundamental attitude toward this or that situation. Another thought of S.S. Alekseev in regard to prohibitions deserves attention. He does not relate the prohibition purely to legal phenomenon, and calls it "a socio-legal phenomenon which bears the imprint of the conflict, anomalous and yet mass and social situations, relationships and, con-

40 Bratko A.G. (1975), *Prohibitions in Soviet law* [*Zaprety v sovetskom prave*], Yurid. lit., Moscow, p. 14.

41 Alekseev, S.S. (1969), *General permissions and general prohibitions in Soviet law* [*Obshchie dozvoleniya i obshchie zaprety v sovetskom prave*], Yurid. lit., Moscow, p. 53.

42 Ibid.

sequently, the degree of activity of social behavior"[43].

Legal permission is expressed in certain empowerment to commit a certain type of action or to refrain from such opportunities. According to S.S. Alekseev, in permission, the emphasis is placed on the subject's own activity. Permissive regulations are characterized by three points: 1) legal permission can be secured in the regulations, as well as may be resulted from the set of legal norms; 2) being a subjective right, permission has all its features; 3) it can be expressed both in active and passive behavior, and the latter is shown in the right to claim. S.S. Alekseev raises the question of meaning hold the provisions of legal responsibility for permission. The essence of the question in the following: does the presence of liability for any behavior imply that the latter was prohibited? And if the liability is not established, does this fact mean the permissibility of such behavior? This statement is called in question by S.S. Alekseev, since in this case the significance of permissions consolidation in the rule of law would have disappeared. Consequently, the mere absence of legal liability does not mean the presence of permissions[44].

The third form of legal regulation is a positive enforcement. It, in the same manner as for permission, is characterized by three points: 1) it is a legal obligation; 2) it is expressed exclusively in the active conduct; 3) it certainly gets formalized consolidation. S.S. Alekseev points out that the enforcement is mediated by relative legal relationship, in which only one side is burdened by responsibility to make dynamic actions, while the other has the right to claim, and in case of non-compliance – the right of chose in action, designed to ensure the actual implementation of legal obligations[45]. The enforcement is characterized by typical kind of imposition, encumbrance: the persons are prescribed to commit that thing what they would not have made if would not be burdened with responsibility. Positive enforcement is a broad area in the law and outside it, and is one of the conditions of its existence. S.S. Alekseev believes that positive enforcement is peculiar to the state to a greater extent than to the law, as prohibitions and permissions

43 Alekseev, S.S. (1982), *General theory of law in two volumes. Vol. II* [*Obshchaya teoriya prava v dvukh tomakh*], Yurid. lit., Moscow, p. 221.

44 Alekseev, S.S. (1969), *General permissions and general prohibitions in Soviet law* [*Obshchie dozvoleniya i obshchie zaprety v sovetskom prave*], Yurid. lit., Moscow, p. 56.

45 Ibid. P. 58.

constitute the basis of the latter. In addition, the enforcement also exists outside the law. On the contrary, A.B. Vengerov writes that enforcement is objective in nature, since it follows from the objective conditions of life – farming, ranching, exchange, and therefore inherent in the law rather than the state[46].

Considering forms of legal regulation, S.S. Alekseev introduces the concept of an "area of legal regulation". He writes that between the prohibition and permissibility exists something in between that cannot be attributed neither to legally prohibited nor to permissible behavior[47]. In this regard, it highlights areas of intensive and non-intensive regulation. One indicator of the intensity is its degree. In the non-intensive regulation areas two situations may be present: 1) the presence of such extents of public and private life that require legal regulation, but which have not been really settled yet or insufficiently regulated; 2) the presence of social relations that do not require legal regulation. The degree of legal regulation depends on both the objective and subjective factors. For instance, the non-intensive regulation areas includes the so-called "soft" regulation, for example, the establishment of rules of the transaction. Here we see the dispositive regulation. By the way, during the reforms, the intensity of legal regulation can be increased.

S.S. Alekseev links the concept of the area of legal regulation with the character of relation of permissions and prohibitions. In the course of intensive legal regulation, a detailed, "voidless" legal regulation takes place, where mandatory elements prevail. Therefore, permissions and prohibitions as if held tightly to each other. Providing a subjective right, i.e. measures of permitted behavior, occurs by narrowing the prohibition. In such areas, the principle of mirror reversal is in force – the absence of prohibition indicates on a presence of permission[48]. The situation is different in the areas of non-intensive regulation. There is a "sparse" space between the permission and prohibition. They do not affiliate each other directly, but unconsolidated, separated from each other. Their regulation meanwhile or permanently occurs apart, and, for instance, the absence of legal permission is not a reflection of the fact that this

46 Alekseev, S.S. (1982), *General theory of law in two volumes. Vol. II* [*Obshchaya teoriya prava v dvukh tomakh*], Yurid. lit., Moscow, p. 117.

47 Alekseev, S.S. (1969), *General permissions and general prohibitions in Soviet law* [*Obshchie dozvoleniya i obshchie zaprety v sovetskom prave*], Yurid. lit., Moscow, p. 66.

48 Ibid. P. 69.

issue is addressed by means of the prohibition. It bears repeating that a situation may appear in a non-intensive regulation area, when relationships require legal regulation, and in future its forthcoming is anticipated. But it may be that any public relations may always be in the area of non-intensive legal regulation. Permissions and prohibitions exist separately, and there is no mirror reversal.

Apart from the areas of legal regulation, S.S. Alekseev highlights special kinds of permissions and prohibitions, namely general prohibitions and general permissions. "The general, with regard to permissions and prohibitions, is understood in the sense that the relevant statutory provision is an initial guiding legal beginning at this extent of social relations"[49]. And if we are talking about the general permissions and prohibitions, then the normativity of a higher level, than in establishing the specific prohibitions and permissions, takes place. "General prohibitions and permissions express a higher level of generalization, when typical situations, covered by general prohibitions and permissions, are worthy of legal regulation in the form of separate legal regulations"[50]. General prohibition means that in the general and entire the prohibition acts as a general rule in the regulation of relations, and cases of permissions are only sporadic. The opposite situation exists in general permissions. On the background of permissible regulation, the cases of prohibition may exist.

The types of legal regulation are derived from general permissions and prohibitions. The latter present two tightly linked pairs, one of which is headed by the general prohibition, and other – by general permission. Each pair "has something in common – either permission or prohibition, and at the same time, the exceptional, providing a framework of the general, shows their role in law. Each of these pairs expresses the existence of two types (orders) of legal regulation"[51]. Thus, the type of legal regulation implies a predominance of permission or prohibition, which determines the specificity of legal regulation. Correlating the concepts – types and forms of legal regulation, it should be noted that if permissions, prohibitions, positive enforcement express the ways of influence of law on public relations, then types of legal regulation affect the deeper layers of law, namely the order of exposure and its orientation. Type of legal regulation responds to a question about the

49 Ibid. P. 82.

50 Ibid. P. 99.

51 Ibid. P. 104.

grounds and forms of such regulation, on the provision of general permissibility or introduction of general prohibition of the conduct of subjects of public relations.

Conclusion

In summary, we can say that the problem of the method of legal regulation has many aspects that are identified, analyzed and solved in the research process. The matter of concern is associated with both scientific fundamental knowledge of law and its essence and with access to the empirical field, where the election of a particular method directly affects the degree of effectiveness of law. It is hoped that the method of legal regulation will continue to be in the interests of lawyers, academics and practitioners.

References

1. Alekseev, S.S. (1982), *General theory of law in two volumes. Vol. II* [*Obshchaya teoriya prava v dvukh tomakh*], Yurid. lit., Moscow, 359 p.
2. Alekseev, S.S. (1961), *General theoretical problems of Soviet law* [*Obshchie teoreticheskie problemy sistemy sovetskogo prava*], Gosyurizdat, Moscow, 187 p.
3. Alekseev, S.S. (1966), *The structure of Soviet law* [*Struktura sovetskogo prava*], Yurid. lit., Moscow, 264 p.
4. Alekseev, S.S. (1969), *General permissions and general prohibitions in Soviet law* [*Obshchie dozvoleniya i obshchie zaprety v sovetskom prave*], Yurid. lit., Moscow, 288 p.
5. Baitin, M.I., Petrov, D.E. (2003), "The system of law: to overcome the debate" ["Sistema prava: k preodoleniyu diskussii"], *Gosudarstvo i pravo*, No. 1, pp. 25-34.
6. Baitin, M.I., Petrov, D.E. (2004), "Main branches of the modern Russian law" ["Osnovnye otrasli sovremennogo rossiiskogo prava"], *Pravo i politika*, No. 1, pp. 19-30.
7. Baitin, M.I., Petrov, D.E. (2006), "Method of regulation in the legal system" ["Metod regulirovaniya v sisteme prava"], *Zhurnal rossiiskogo prava*, No. 2, pp. 84-95.
8. Bratko A.G. (1975), *Prohibitions in Soviet law* [*Zaprety v sovetskom prave*], Yurid. lit., Moscow, 264 p.
9. El'kind, P.S. (1963), *The essence of the Soviet criminal procedure law* [*Sushchnost' sovetskogo ugolovno-protsessual'nogo prava*], Leningr. un-t, Leningrad, 120 p.

10. Mavrin, S.P. (2003), "On the role of the method of regulation in the structuring and development of positive law" ["O roli metoda pravovogo regulirovaniya v strukturirovanii i razvitii pozitivnogo prava"], *Pravovedenie*, No. 1, pp. 205-216.
11. Popondopulo, V.F. (2002), "System of social relations and their legal forms (the question of the legal system)" ["Sistema obshchestvennykh otnoshenii i ikh pravovykh form (k voprosu o sisteme prava)"], *Pravovedenie*, No. 4, pp. 78-101.
12. Protsevskii, A.I. (1972), *Method of legal regulation of labor relations* [*Metod pravovogo regulirovaniya trudovykh otnoshenii*], Yurid. lit., Moscow, 288 p.
13. Rukavishnikova, I.V. (2003), "Method in the system of legal regulation of public relations" ["Metod v sisteme pravovogo regulirovaniya obshchestvennykh otnoshenii"], *Izvestiya vuzov. Pravovedenie*, No. 1, pp. 217-222.
14. Sapii, A.V. (2008), "The development of the concept of "method of regulation" in the general theory of law" ["Razvitie ponyatiya "metod pravovogo regulirovaniya" v obshchei teorii prava"], *Zakon i pravo*, No. 1, pp. 47-49.
15. Shargorodskii, M.D., Ioffe, O.S. (1961), *Issues of theory of law* [*Voprosy teorii prava*], Gosyurizdat, Moscow, 380 p.
16. Sheindlin, B.V. (1959), *The essence of Soviet law* [*Sushchnost' sovetskogo prava*], Leningr. un-t, Leningrad, 423 p.
17. Sorokin, V.D. (2002), *Administrative process and administrative procedure law* [*Administrativnyi protsess i administrativno-protsessual'noe pravo*], Yurid. in-t, St. Petersburg, 474 p.
18. Sorokin, V.D. (2003*), Legal regulation: the subject, method, process (macro level)* [*Pravovoe regulirovanie: predmet, metod, protsess (makrouroven')*], Yurid. tsentr Press, St. Petersburg, 661 p.
19. Vasil'ev, A.M. (1965), *Theory of state and law* [*Teoriya gosudarstva i prava*], Moscow, 416 p.
20. Vitchenko, A.M. (1972), *Method of legal regulation of socialist public relations* [*Metod pravovogo regulirovaniya sotsialisticheskikh obshchestvennykh otnoshenii*], Saratov, 161 p.
21. Yavich L.S. (1961), *Problems of legal regulation of Soviet public relations* [*Problemy pravovogo regulirovaniya sovetskikh obshchestvennykh otnoshenii*], Gosyurizdat, Moscow, 172 p.

22. Yavich, L.S. (1960), "On the subject of legal regulation methodology", *Questions of the general theory of Soviet law* ["K voprosu o predmete i metode pravovogo regulirovaniya", *Voprosy obshchei teorii sovetskogo prava*], Gosyurizdat, Moscow. pp. 44-66.

Метод правового регулирования как проявление сущностных свойств права

Сорокина Юлия Владимировна
Доктор юридических наук, профессор,
профессор кафедры теории и истории государства и права,
Воронежский государственный университет,
394006, Российская Федерация, Воронеж, Университетская пл., 1;
e-mail: yulia_sor@mail.ru

Аннотация

В данной статье исследованы проблемы метода правового регулирования, который является важнейшим правовым средством воздействия на общественные отношения и одним из критериев деления права на отрасли. Рассмотрена эволюция концепций понимания этого правового феномена, проанализированы взгляды современных ученых-юристов. Также предпринята попытка представить собственные выводы в отношении содержания метода правового регулирования.

Ключевые слова

Метод, право, регулирование, отрасль, средство, отношения, воздействие, критерий, эволюция, концепция.

Библиография

1. Алексеев С.С. Общая теория права в двух томах. – М.: Юрид. лит., 1982. – Т. II. – 359 с.

2. Алексеев С.С. Общие дозволения и общие запреты в советском праве. – М.: Юрид. лит., 1989. – 288 с.
3. Алексеев С.С. Общие теоретические проблемы системы советского права. – М.: Госюриздат, 1961. – 187 с.
4. Алексеев С.С. Структура советского права. – М.: Юрид. лит., 1966. – 264 с.
5. Байтин М.И., Петров Д.Е. Метод регулирования в системе права // Журнал российского права. – 2006. – № 2. – С. 84-95.
6. Байтин М.И., Петров Д.Е. Основные отрасли современного российского права // Право и политика. – 2004. – № 1. – С. 19-30.
7. Байтин М.И., Петров Д.Е. Система права: к преодолению дискуссии // Государство и право. – 2003. – № 1. – С. 25-34.
8. Братко А.Г. Запреты в советском праве. – М.: Юрид. лит., 1975. – 264 с.
9. Васильев А.М. Теория государства и права. – М., 1965. – 416 с.
10. Витченко А.М. Метод правового регулирования социалистических общественных отношений. – Саратов, 1972. – 161 с.
11. Маврин С.П. О роли метода правового регулирования в структурировании и развитии позитивного права // Правоведение. – 2003. – № 1. – С. 205-216.
12. Рукавишникова И.В. Метод в системе правового регулирования общественных отношений // Известия вузов. Правоведение. – 2003. – № 1. – С. 217-222.
13. Сапий А.В. Развитие понятия «метод правового регулирования» в общей теории права // Закон и право. – 2008. – № 1. – С. 47-49.
14. Сорокин В.Д. Административный процесс и административно-процессуальное право. – СПб.: Юрид. ин-т, 2002. – 474 с.
15. Сорокин В.Д. Правовое регулирование: предмет, метод, процесс (макроуровень). – СПб.: Юрид. центр Пресс, 2003. – 661 с.
16. Попондопуло В.Ф. Система общественных отношений и их правовых форм (к вопросу о системе права) // Правоведение. – 2002. – № 4. – С. 78-101.
17. Процевский А.И. Метод правового регулирования трудовых отношений. – М.: Юрид. лит., 1972. – 288 с.
18. Шаргородский М.Д., Иоффе О.С. Вопросы теории права. – М.: Госюриздат, 1961. – 380 с.
19. Шейндлин Б.В. Сущность советского права. – Л.: Ленингр. ун-т, 1959. – 423 с.

20. Элькинд П.С. Сущность советского уголовно-процессуального права. – Л.: Ленингр. ун-т, 1963. – 120 с.
21. Явич Л.С. К вопросу о предмете и методе правового регулирования // Вопросы общей теории советского права. – М.: Госюриздат, 1960. – С. 44-66.
22. Явич Л.С. Проблемы правового регулирования советских общественных отношений. – М.: Госюриздат, 1961. – 172 с.