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LOGICAL CLASSIFICATION OF LEGAL PROCEDURAL RESTRICTIONS

CLASIFICACIÓN LÓGICA DE LAS RESTRICCIONES PROCESALES LEGALES

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Abstract

This paper on the basis of analytical and synthesis research of a wide range of sources presents an approach to the classification of legal procedural restrictions, based on the division of the object by the modification of the feature at the basis of such division. The signs are considered subject to the diversity of types of legal means, as well as the temporal and sectoral criteria; the conclusions of the significance of the separation of the stated type of restrictions are made.

Keywords

Legal process – Legal restrictions – Legal procedural restrictions – Public authority
Restriction of power

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Introduction

Appeal to the interpretation of the concept "restriction" in reference sources showed that it is expressed in the retention within certain limits (boundaries), in moderation, curbing, constraint; a constraint that restricts rights and opportunities; limiting of the scope of activities, narrowing of opportunities, etc. Thus, linguistic interpretation unequivocally indicates boundaries (limits), and the use of "restrictions" in conjunction with the adjective "legal" indicates the establishment of boundaries (limits) precisely with the help of legal tools.

The legal reference literature provides no unified approach to the definition of restrictions. It arranges public authorities (limits, boundaries arising from laws, other regulatory legal acts, government decisions which the activities of subjects should not go beyond)[1], as well as private law accents (presence of conditions, prohibitions, statutory or adopted by authorized structures in the prescribed manner, hampering the right holder in the implementation of the right of ownership or other real rights to a specific object of real estate (servitude, mortgage, trust, property attachment, rent), etc.).

In order to eliminate the terminological confusion, we will make a remark explaining the relationship between the concepts of “legal restriction”, “restriction in law” and “restriction of rights”. The theory of law has the established position that “legal restrictions” and “restrictions in law” are synonymous words and aimed at restraining negative factors, including illegal acts in order to protect and defend and satisfy the interests of the individual and society.

Iu. N. Andreev believes that the concepts of “legal restrictions” and “restrictions in law” are not identical. The first is substantially broader and should be considered along with other restrictions - moral, religious, physical, etc. In the same case, when it comes to restrictions in a particular branch of law, specific restrictive provisions established by the legislator, court or contract, then, the author considers it necessary to apply the phrase “restrictions in law”[2].

We believe that the arguments by Yu. N. Andreev are far from convincing for a number of reasons: “provisions of the legislator” are legal; court decisions are based on the rules of law, but do not act as such; provisions of contracts (except for their international in public law) also do not apply to legal provisions. Therefore, we believe that the concepts of “legal restrictions” and “restrictions in law” are nevertheless equivalent, and the restriction of rights concerns subjective rights in their species diversity.

Regarding the latter, an interpretation is acceptable indicating the establishment of the boundaries (limits) for their implementation envisaged by law in public and private interests that restrain (constrain) the powers of rightholders through restrictive measures (prohibitions, obligations, suspension, etc.) in order to harmonize combinations of public, state and private interests[3].

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[1] G S. Belyaeva; B. V. Makogon; S. N. Bezugly; M. L. Prokhorova & D. Szpoper, “Basic Ideas of State Power Limitation in Political and Legal Doctrine”, J. Pol. & L. num 10 (2017).

[2] YU. N. Andreev, Ogranicheniya v grazhdanskom prave Rossii (San Petersburgo: YUridicheskij centr Press, 2011).

[3] YU. N. Andreev, Ogranicheniya v grazhdanskom prave Rossii…

Methodology

The research applied the classical methodology of qualitative analysis of systems and processes, in particular, a system-analytical approach to the study of research objects.

In addition, the research methodology is represented by modern tools. The study was conducted on the basis of the dialectical, as well as the widely used general scientific (analysis, synthesis, induction, deduction, analogy) and particular scientific methods of cognition of reality. The application of general scientific methods allowed the authors to comprehend the development of scientific ideas about legal, including procedural, restrictions, to determine the factors influencing the content of the declared subject, to formulate provisions relating to the subject, and meet the requirements of modern conditions.

The application of private scientific methods has contributed to the study of the subject in order to systematize the source array in relation to the criteria that can serve as a basis for the classification of procedural legal restrictions in their diversity.

The use of special methods such as a comparative legal method, a method of legal forecasting allowed us to holistically and comprehensively comprehend and disclose the subject of research.

Results and Discussion

We should note that the theory of law has two approaches to the interpretation of restrictions developed: subjective and objective. At the same time, most of the research is devoted to the first approach.

Subjective approach - given that the law itself is a deterrent - is based on the restriction of the subjective rights and freedoms of the individual (restriction of rights). In general terms, the meaning of this approach is reduced to the fact that human freedom cannot exist without restrictions, because real freedom is aware of its borders. The authors believe that the right, limiting the freedom of the individual to certain limits, ensures the unrestricted enjoyment of their rights, guaranteeing freedom within these limits. It is noted that the freedom of each person extends within the boundary that serves as the beginning of the freedom of another individual. Defining these boundaries, the law helps to establish order in the joint life of people.

Representatives of this approach treat the law (in an objective sense) as or identify it with a restriction (for example, restricting the freedom of each individual by its consent to the freedom of each other, to the extent permitted by law). Scientists note that the restriction of rights is one of the legal means to ensure the achievement of goals set by law and to satisfy the interests of legal entities.

As a result, the goal of restricting rights is a harmonious combination of individual and social needs, interests; regulation of the behavior of an individual, which would not allow violating the rights of other participants of public relations, the interests of public law and order[4].

[4] YU. N. Andreev, Ogranicheniya v grazhdanskom prave Rossii…

We believe that the accumulated theoretical developments in relation to the subjective approach (even more relatively objective) can be explained by the fact that the rights and freedoms of man and citizen, being a well-known axiological preference, are more attractive to researchers. At the same time, we believe that they should be considered as an integral part of the general theory relating to restrictions in law and promoting the development of private manifestations of establishing legitimate limits, including those addressed to subjects of public authority.

In terms of the second - objective approach - it seems appropriate to cite the position by A. V. Malko, defining the legal limit as a legal deterrence of an unlawful act, contributing to the creation of conditions to meet the interests of the counter-entity and society in the field of protection and defense; these are boundaries defined by the right, indicating the limits for the actors to act within, the exclusion of certain opportunities in the activities of individuals[5]. Thus, scientists are given an abstract definition of the term, allowing to include all other concepts in it, to some extent limiting the activities of individuals, legal entities, and the state in general. We consider it appropriate to adapt these theoretical developments to the limits of activity of subjects of public authority.

Based on the most common division of the norms of the right to substantive and procedural, we consider the latter to have significant potential in restricting the illegal activities of subjects that are carriers of public authority. We associate this, in particular, with such features of the procedural rules as the categorical nature of their prescriptions, as well as targeting, mainly, to subjects with vested authority.

According to the temporal criterion, procedural legal restrictions can be divided into permanent and temporary. The presence of the latter can be explained by the constant changes occurring in society and the state and the necessary reaction of the right thereto[6].

As a classification criterion for procedural legal restrictions we shall point out their sectoral affiliation — constitutional[7], municipal, administrative, financial, environmental, and also include procedural branches directly in their diversity.

Further, adhering to the approach by A. V. Malko, we note that depending on which element of the procedural rule contains restrictions, we should isolate: legal restricting fact (hypothesis), prohibition, suspension, duty, etc. (disposition), and penalties (sanction)[8].

Specific legal facts set the limits of free discretion, contribute to the prevention of offenses, as well as to overcoming of their negative consequences, as exemplified by multiple relevant rules of criminal procedure legislation.

The modern legal system identifies the rules intended for public relation protection. These are formalized in the form of prohibitions, i.e. indications of undesirable actions for society and the state.

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[5] A. V. Mal'ko, Stimuly i ogranicheniya v prave (Moscú: YUrist", 2003).

[6] H. Kelsen, General theory of law and state. Routledge. 2017; D. McBarnet, When compliance is not the solution but the problem: From changes in law to changes in attitude. 2001 y R. B. Seidman, The state, law and development. 1978.

[7] A. V. Stepanyuk; E. E. Tonkov; I. N. Kuksin; M. V. Markhgeym & S. V. Tychinin, "Principle of inviolability of property: restrictive context", Revista Publicando, Vol: 5 num 15, (2018): 1483-1491.

[8] A. V. Mal'ko, Stimuly i ogranicheniya v prave…

The difference between prohibitions and other norms is that they provide for a type of socially dangerous behavior and, thus, reveal themselves to be a categorical state condemnation of a possible offense.

The rule of conduct is regarded as such only insofar as it directs the behavior of people to certain boundaries. That is, the rule is the restriction. Any norm limits the behavior with socially useful forms. Different standards contain different concreteness and breadth of such boundaries. It depends on how abstract the rule of law is. At the same time, any of them represents, in the most general form, proper behavior, i.e. implies the obligation to refrain from violating the provisions contained therein.

We can confirm the above by the fact that the rule of law obliges to a particular act and thus prohibits to act otherwise than it provides. In this sense, the thesis about the recognition of such behavior as legally binding, the deviation from which is prohibited by the state, is indisputable.

It is necessary to isolate the prohibition in a broad and narrow sense. In the first case, the legal prohibition is implicitly expressed in any standard. The narrow meaning is that the legal prohibition is a prohibiting rule of law. Here the prohibition seems to stand out, which is ultimately mediated by the nature of regulated social relations.

Acting in accordance with the prohibition, the subject does not get any effect, but provides itself with a guarantee of non-application of sanctions thereto.

The role of the prohibition is not only to warn about unlawful behavior, but also to exert psychological influence on the subjects, to form the atmosphere of a certain legal duty, etc.

The issue of the meaningful relationship of prohibitions and restrictions has repeatedly been subjected to the scientific discussion. As a result, the theory can be divided into three approaches:

- the prohibition is a generic term with respect to the restriction;
- the restriction is a generic term in relation to a restriction;
- both of these are independent concepts.

Analyzing the relevant approaches, as well as having outlined the prohibition as one of the types of procedural restrictions, it seems logical to share the view that the prohibition is a particular manifestation of the restriction.

We shall further note the suspension as temporary and specific prohibitions on the use of certain functional powers by certain public authorities.

Suspension is not a type of legal responsibility, but contains coercive elements on the part of a superior, regulatory, supervisory or judicial authority that temporarily terminates the existing legal relationship, holding back the onset of possible socially harmful consequences (suspension of a service contract, grounds and procedure for suspending a preliminary investigation).

In contrast to such typical legal restrictions as prohibition and suspension, a legal obligation, for example, requires action rather than abstinence; it is still a right-restraining

factor, but very specific. A legal obligation, as the most "dynamic" legal restriction, simply has a strongly developed component responsible for negative incentives, which in general ensures the process of satisfying the interests of the entitled person. Responsibilities provide for an opportunity to carry out actions only in the manner specified in the law and, thus, limit the behavior of the obligated subject, restrain him from all other actions that conflict with the served subjective right. Responsibility is a duty, a necessity, which hides (in case of its violation) penalties.

As for the duty as a type of legal restriction in the activities of a subject of public authority, we shall refer to A.V. Malko's opinion: duties are meant to be the "reverse side" of subjective right, restrictions, rather than incentives[9]. In addition, if we analyze the definitions to the term "duty" in legal science, then it is clear that this is always proper behavior, limited by the appropriate boundaries whose violation entails responsibility[10]. The final element in the structure of the legal norm is a sanction, and since the focus of the study is restrictions, then we definitely mean their negative variety with regard to procedural restrictions. Thus, it is a different kind of punishment, which is a quite common phenomenon in the legal field.

Conclusions

We should point that the purpose of this work is not to present a wide range of legal norms indicating a diversity of types of procedural legal restrictions (according to temporal characteristics: temporary and permanent; according to industry characteristics and taking into account the diversity of types of legal means). At the same time, the already described norms give grounds for conclusions about the separation of the stated type of restrictions and the need for their further development in the theory of law. We believe that this approach will contribute to the development of both the fundamental legal science and the conceptual replenishment of its procedural branches.

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