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MECHANISM OF LEGAL REGULATION OF PASSENGER TRANSPORTATION: CIVIL ASPECTS

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The problem of providing adequate social adjustment, and including civil relations are quite complicated. The problem is compounded by the tendency for the isolation of some areas of sectoral differences. As a result, young researchers, jurists, mainly focus on its contractual regulation of legal structures. Undoubtedly, an agreement in the field of self-discretionary public relations is the basis of relationships, the way they formalize and control the rights and obligations of participants.

Background of our study is due to the specifics of a particular contract of carriage of passengers (passenger transportation contract is a public treaty of accession) and the need to ensure the implementation of the principle of equality of arms. This creates a situation in which a passenger is unable to influence the terms of the contract, he is entitled to, or enter into a contract on the terms offered by the carrier or refuse their installation. In the absence of legal guarantees, the carrier forms a relationship with his passenger, limiting the amount of the duties and establishing limited liability of a company, or even excludes it not in favor of either passengers or stability of civil relations.

The author supports the view that in situations where the parties of the contract can not or do not want to self-regulate their relationship, or when self-regulation is at odds with those who the public authorities must protect, possible and necessary to the legal regulation of contractual relations with the state.

Key words: the mechanism of legal regulation, normative regulation, contractual regulation, contract, agreement, contract of passenger transportation, an individual's right to freedom of movement.

Сумкин С.А. МЕХАНИЗМ ПРАВОВОГО РЕГУЛИРОВАНИЯ ПЕРЕВОЗКИ ПАССАЖИРА: ГРАЖДАНСКО-ПРАВОВОЙ АСПЕКТ / Запорожский национальный университет, Украина

Проблема обеспечения адекватного регулирования общественных, и в том числе гражданских отношений, является достаточно сложной. Проблема усугубляется тенденцией выделения отдельных сфер по отраслевым различиям. Как следствие, молодые исследователи-цивилисты в основном свое внимание уделяют договорным конструкциям правового регулирования правоотношений. Бесспорно, именно договор в сфере диспозитивного саморегулирования общественных отношений является основанием возникновения правоотношений, способом их формализации и регулятором прав и обязанностей участников.

Актуальность темы исследования обусловлена особой спецификой договора перевозки пассажира (договор перевозки пассажира является публичным договором о присоединении) и необходимостью обеспечить реализацию принципа равенства сторон. Это порождает ситуацию, в которой пассажир не имеет возможности влиять на формирование условий договора, он вправе либо заключить договор на условиях, предложенных перевозчиком, или отказаться от их заключения. При отсутствии нормативных гарантий, перевозчик формирует свои взаимоотношения с пассажиром, ограничивая

объем своих обязанностей и устанавливая ограниченную ответственность, или исключает ее вообще, что не на пользу ни пассажирам, ни стабильности гражданских отношений.

Автор поддерживает позицию, что в ситуации, когда стороны договора не могут или не хотят самостоятельно урегулировать свои правоотношения, или когда самостоятельное регулирование идет в разрез с интересами, которые должна защищать публичная власть, возможным и необходимым является правовое регулирование договорных отношений со стороны государства.
Ключевые слова: договор, механизм правового регулирования, нормативное регулирование, договорное регулирование, договор, сделка, перевозки пассажира, право человека на свободу передвижения.

Сумкін С.О. МЕХАНІЗМ ПРАВОВОГО РЕГУЛЮВАННЯ ПЕРЕВЕЗЕННЯ ПАСАЖИРА: ЦИВІЛЬНО-ПРАВИЙ АСПЕКТ / Запорізький національний університет, Україна
Проблема забезпечення урегульованості суспільних, і в тому числі цивільних відносин, є досить складною. Проблема посилюється тенденцією виокремлення сфер за галузевими відмінностями. Як результат, молоді дослідники-цивілісти, здебільшого, свою увагу приділяють договірним конструкціям правового регулювання правовідносин. Безперечно, саме договір у сфері диспозитивного саморегулювання суспільних відносин є підставою виникнення правовідносин, способом їх формалізації та регулятором прав та обов'язків учасників.
У класичному розумінні значення договору важко переоцінити, враховуючи те, що законодавець закріпив принцип свободи договору та гарантії його реалізації.

Актуальність теми нашого дослідження зумовлена особливою специфікою договору перевезення пасажира та необхідністю забезпечити реалізацію принципу рівності сторін. У дослідженнях інших авторів неодноразово підкреслювалося, що договір перевезення пасажира є публічним договором про приєднання. Це породжує ситуацію, у якій пасажир не має змоги впливати на формування умов договору, він має право або укласти договір на умовах, запропонованих перевізником, або відмовитися від їх укладання. За відсутності нормативних гарантій, перевізник формує свої взаємовідносини з пасажиром, обмежуючи обсяг своїх обов'язків та встановлюючи обмежену відповідальність, чи взагалі, виключає її. Це не на користь ні пасажирам, ні стабільності цивільних відносин.

Автор підтримує позицію, що в ситуації, коли сторони договору не можуть або не хочуть самостійно врегулювати свої правовідносини, або коли самостійне регулювання йде в розріз з інтересами, які має захищати публічна влада, можливим і необхідним є правове регулювання договірних відносин з боку держави.

Зазначена теза є ключовою в розумінні спрямованості, яка лежить в основі механізму правового регулювання. Останній, як зазначив С.С. Алєксєєв, забезпечує здійснення регулятивного впливу права на суспільні відносини, забезпечуючи переведення загальних правил у конкретні юридичні права і обов'язки суб'єктів [1, 129]. Він же зазначав, що в праві є два важливих питання – як право регулює суспільні відносини і за допомогою яких засобів, або який механізм правового регулювання?

Лише усвідомлення того, що адекватне правове регулювання того чи іншого правовідношення можливе через формування адекватного механізму правового регулювання, може забезпечити досягнення мети – забезпечення урегульованості цивільних правовідносин, що ґрунтуються на принципах цивільного права.

Оскільки в спеціальних цивілістичних дослідженнях досить мала роль приділяється визначенню ролі договору в механізмі правового регулювання правовідносин, а щодо правовідносин з перевезення пасажирів – вони взагалі відсутні, автор досліджує їх та робить висновки.

Треба розуміти площини та рівні правового регулювання, оскільки роль договору в межах різних площин – різна. Розглядаючи рівень нормативно-правового регулювання, де елементами механізму правового регулювання визнають норми цивільного права, юридичні факти, суб'єктивні права та обов'язки (зміст правовідношення), їх здійснення, захист порушених цивільних прав та інтересів, договір є юридичним фактом (підставою виникнення цивільних прав та обов'язків – ст.11 ЦК України), що переводить норми права в площину їх реалізації (реальні правовідносини).

При цьому нормативний рівень встановлює межі можливої договірної саморегуляції прав і обов'язків суб'єктів цивільних правовідносин.

На рівні договірного регулювання сторони самостійно формують «піднормативну» модель механізму регулювання їх прав та обов'язків, включаючи відповідальність за порушення зобов'язань, але в межах дозволеного нормативним рівнем регулювання.
Ключові слова: договір, механізм правового регулювання, нормативне регулювання, договірне регулювання, договір, правочин, перевезення пасажира, право особи на свободу пересування.

The problem of ensuring a high level of legal regulation of social as well as civil relations is quite complicated. The problem is exacerbated by the tendency of isolating areas according to sectoral differences. Via differentiation of public and private law that is some jurists' attempt to separate and to single out and make an independent sphere of civil relationships and mechanism of regulation of the legal system that provides comprehensive legal regulation.

Of course, this was the result of a process that took place during the Soviet era – an attempt to organize social relations (and even those that are classically within the scope of civil law) via administrative remedies and normative regulation of public governance in different areas and with the use of typical administrative law remedies.

The dialectical approach to understanding the nature of legal phenomena necessitates consideration of all the factors affecting the mechanism of legal regulation of relations in general, and for passengers – in particular. However, the dynamics of social relations determines the dynamics of this process.

So our goal is to research the social relations within passenger transportation of certain types, the mechanism of their regulation, including the level of regulatory and contractual regulations and recommendations concerning some theoretical propositions concerning the scope of the study and the reform of positive law.

The works of some individual researchers (on general theoretical level or the level of civil law theory) were devoted to the issues researched in this study. They are M.M. Agarkov, O.C. Joffe, S.S. Alekseev, A.O. Sobchak, R.O. Halfina, D.V. Bobrova, T.V. Bodnar, V.I. Borisova, M.I. Braginsky, S.M. Bratus, V.V. Vitryanskyy, O.V. Dzera, I.V. Zhylinkova, V.M. Kossack, I.S. Kanzafarova, N.S. Kuznetsova, V.V. Lutz, R.A. Maidanyk, N.O. Saniahmetova, M.M. Sibilov, I.V. Spasibo-Fateeva, R.O. Stefanchuk, E.O. Haritonov, O.I. Kharitonova, J.M. Shevchenko, R.B. Shyshka, E.O. Michurin, V.L. Yarotskiy, L.K. Weretelnyk, S.O. Pogrebnoy et al.

Special studies of contractual regulation mechanism of passenger transportation in Ukraine are currently not available. Some attempts take place in the writings of Nechypurenko O.M. "Civil Legal Regulation of Transportation by Taxi" (2008), Minchenko A. "Contract of Carriage of Passengers and Luggage by Rail in Ukraine" (2011) [2].

In Russia it is worth mentioning such works as «Legal Regulation of Passenger Road Transportation in the Russian Federation» by Akhundov Rasim Adil oglu (2005), Zarapina L.V. "Legal Regulation of the Carriage of Passengers by Road in the Long-Distance Communications" (2005), S.Y. Gurzhiy "Legal Regulation of Public Passenger Transportation by Urban Road" (2007), S.E. Heygetova "Legal Regulation of the Carriage of Passengers by Road" (2007), A.V. Vigodyanskiy "Civil Law Regulation of Transportation Contracts of Cargo and Passengers" (2011).

Unfortunately, the works devoted to the study of the mechanism of legal regulation for passengers at all, air and water transport are currently unavailable.

As a result, some researchers mainly focus on its contractual regulation of legal structures. Undoubtedly, an agreement in the field of self-discretionary public relations is the basis of relationships, the way they formalize and control the rights and obligations of participants.

In its classic sense the contract can not be overemphasized, taking into consideration that the legislator affirmed the principle of freedom of contract and guarantees its implementation.

The topicality of the topic is due to the specificity of a particular character of contract of passenger transportation and the need to ensure the implementation of the principle of equality of arms. In their studies other authors have repeatedly emphasized that the contract of passenger transportation is a public agreement on accession. This creates a situation in which a passenger is unable to influence the terms of the contract, he is entitled to or enter into a contract on the terms offered by the carrier or refuse its singing. In the absence of legal guarantees, the carrier forms a relationship with his passenger, limiting the amount of the duties and establishing limited liability of company, or even excludes it. It is not in favor of either passengers or stability of civil relations.

Of course, not every contract of passenger transportation is a public contract. Part 2 of Art. 915 CC of Ukraine secures that the carriage by public transport is a public contract. For example, in contrast, individual transportation by taxis is not such one. The principle of freedom of contract is most evident in them – the parties are free not only in their singing up a contract, but also in shaping its environment.

As Minchenko A.O. stated, the public nature of the contract of passenger transportation by public transport obliges a carrier to provide transportation to all who turn to him [2, 111]. This regulation stems from the concept of a public contract that is enshrined in Part 1 of Art.633 CC of Ukraine, according to which the public contract is a contract in which one party – the entrepreneur has a duty to

sell the goods, works or services to anyone who addresses to it (retail, transportation by public transport, communication, medical, hospitality, banking services, etc.). This rule is imperative. It provides to consumers the consistency of its terms (except those who are legally provided with appropriate incentives) (Part 2 of Art.633 CC of Ukraine) to anyone and everyone who will have a proposal to its signing up; it prohibits the entrepreneur to prefer one over another consumer to conclude a public contract, unless otherwise provided by law (Part 3. 633 CC of Ukraine); it prohibits entrepreneurs to refuse concluding a public contract if he has an opportunity to provide relevant consumer goods (works, services) (Part 3. 633 CC of Ukraine).

Nechypurenko O.M. supported the position of Lutz V. and recognized contract of passenger transportation as a Treaty of Accession, as its terms are defined in the standard form developed by the transport ministries and departments under the regulations. This set of criteria can be taken only by a passenger by the way of acceding to the proposed contract as a whole (Article 634 CC of Ukraine) [3, 102; 4, 623].

Objectively, under the circumstances where a passenger can not influence the formation of the contract, as it is in the case of the public treaty of accession, it presents a weak side of the obligation.

As discussed in the legal literature, the existence of peremptory norms is due to the need of protection of public interests or the interests of the economically weaker party agreement [5, 442].

It is not known reliably whether the group of public contracts singled out by the legislator from the general system of civil contracts in the new Civil Code of Ukraine is related with the need to ensure the protection of consumer rights and interests.

It is necessary to mention a current scientific debate regarding which G.V. Samojlenko, O.M. Nechypurenko and S.V. Reznichenko in their monograph noted the following [3, 10]. M.I. Bragynsky and V.V. Vitryanskyy, citing the research of L.S. Tal, noticed that three points of view that were made about the importance of the law and the contract. According to supporters of the «volitional theory», an agreement as an act of contractors is the first source, and the law only limits their freedom. The representatives of "theory of the priority of the law" came from the fact that the contract has legal effect derived from the law. The supporters of the third, "empirical theory", believed that the will of the parties deliberately aimed for a certain economic effect, while the effects of the agreement are defined as a means of its exercise about which the parties are not often clear [6, 9].

It is seen that via the mechanism of legal regulation, particularly with regard to the role of passenger transportation contract in it, this debate in the author’s opinion is different from the mentioned above theories. But, nevertheless, it generally supports them, but it contains a dialectical approach to understanding of certain aspects.

In general, it should be noted that the legal regulation of relations is not that simple, it is dynamic and multistage.

To start with, we will take the dynamics that needs to take into account changes and vectors in the society and to respond to them adequately.

At his time, S.S. Alekseev mentioned that the legal system, as a social formation, is affected by the general political and civil conflicts of subjective and objective plan. However, its development is primarily determined by its own dialectical contradictions, which can be divided into internal and external ones.

The main internal contradiction of the legal system of any society is that it contains both natural and artificial principles related to a human and state.

The naturally-legal aspect of the legal system reflects the origins of law, as an indispensable quality of human life. A degree of freedom lies in it, which is due to natural and human communication, which is essential for normal human existence and continuation of the human race.

The state-legal principle of legal system describes three main points: fixedness and guarantee of human rights by positive law; new legal possibilities of the rights enshrined in legal acts, the law limits.

The internal antagonism of legal system depends on the level of economic development, culture and politics, from the contradiction between the objective and subjective right, between the right and the law, between the structural elements and components of the legal system [1, 242].

Alekseyev S.S. cited arguments of G.V. Plekhanov, who expressed the opinion that any legal phenomenon sooner or later turns into its opposite: at first, it helps to meet the necessary social needs, at first it is useful, it is necessary, regarding these needs. Then it starts getting worse and worse to meet those needs, and finally, it becomes an obstacle for their satisfaction: it transforms from necessary to harmful, and then it is destroyed [1, 242].

The change of legal regulation orientation has become a good example for the last fifty years. Halfina R.A. noted that till the mid 1950-ies in the Soviet Union the norms of administrative law were dominant. However, the excessive regulation of the relations with the rules of administrative law prevented the use of means of civil law. Enhancing the role of civil law contributed to the consideration of society's needs while planning production and distribution and developping initiatives of the parties [7, 267].

The adoption of the Civil Code of Ukraine in 2003 marked the approval of the principle of freedom of contract and the establishment of implementation safeguards.

As we have already noted, the proponents of "the priority of law theory", including S.S. Alekseev, believed that the mechanism of legal regulation ensures the implementation of the regulatory impact of law on social relations, providing the transfer of general rules to specific legal rights and responsibilities [1, 129].

On the contrary, the supporters of the "volitional theory", among them S. Pogribnyi should be called, express the view that only in the situations where the parties of the contract can not or do not want to self-regulate their relationship, or when self-regulation is at odds with those that the public authorities must protect. The legal regulation of contractual relations with the state is possible and necessary [8, 27]. To support this, he cites normative reflection of this idea in Part 3 and 4. 6 of CC of Ukraine, according to which parties or a person may derogate from the provisions of civil law and regulate their relations on their own. The imperatives are exceptions.

And it is just this fact, especially with regard to the contract of passenger transportation, that forces us to the conclusion that the level of regulation that have their own mechanisms of legal regulation.

In any case, the regulatory requirements or prohibitions have priority. Regarding the discretionary (contractual) legal regulation of the relationships investigated, they have the nature of the general permit (it is permitted if it is not prohibited).

Thus, according to A. Oleinik, the legal norms fix certain possibilities of an individual or citizen, that is, their subjective rights, except obligations and prohibitions relating to the duties. The implementation of the rights is done in human relations. The forms of the rights realization depend on the type of law and may be in the form of compliance, performance, use [9, 150].

The planes and levels of legal regulation should be understood, as the role of the contract within different planes is different. Considering the level of normative and legal regulation, where the elements of the mechanism of legal regulation recognize civil law, legal facts, subjective rights and duties (the contents of legal relationship), their implementation, protection of violated civil rights and interests, the agreement is a legal fact (the basis of the civil rights and obligations is Art.11 CC of Ukraine), which puts the law on the plane of implementation (real legal relationship).

Therefore, normative regulations set the limits of possible self-potential contractual rights and obligations of subjects of civil relations.

On the level of contractual regulation the parties form their own "under regulations" model of the mechanism that regulates their rights and obligations, including liability for infringement of obligations, but within the permissible level of regulatory control.

While studying the mechanism of contractual regulation of passenger transportation relations, we should also explore the category of "sekundary rights", since in the study contract, it borders on the one hand with the category of personality, on the other – with the ability to perform certain legally significant actions that ensure the need to tolerate the consequences of such action by a third party. In this case it is the duty of the carrier to perform the passenger delivery after he has accepted his destination. Namely, it is no longer an individual's ability to enter into a contract, but it is a specific right granted by the Civil Code of Ukraine, which provides a real opportunity. A passenger having accepted a public offer of a carrier (it is an acceptance, which can be expressed in the form of entering

a vehicle or purchasing of the ticket), requires a carrier's duty fulfillment. As a matter of fact, the implementation of sekundary passenger rights is a legal fact that activates the mechanism of regulatory as well as contractual levels of legal regulation of passenger transportation.

As Yarotskiy V.L. has stated, the self-organization of private domain determines the possibility of acquiring and smooth implementation of subjective civil rights within the civil law enabled with normative influence, but ultimately created by the participants in civil relationships to meet their interests. The self-organizing principles of this area functioning primarily are determined by the nature and range of the relationships covered by it. These principles are based on legal equality, free will and property independence of their members. Taking into account their specificity provides fixing legal structures [10, 115].

It appears that the mechanism of legal regulation of passenger transportation is rather a complex phenomenon. It is additionally determined by the formation of a contract that regulates relations as a public accession. As we have already defined, specific relations of passengers reduce the level of self-organizing discretionary regulation. This process aims to balance the provisions of passenger transportation contract on the principles of equality, to guarantee a passenger's right to freedom of movement, including limiting the principle of freedom of contract and human carrier (via normative regulation of his rights and obligations in the transport charters and codes, regulations of passenger transportation or transportation services).

The referential nature of the rules of the Civil Code of Ukraine is thus justified. They regulate legal relations for passenger transportation charters and codes, rules of passenger transportation that contain features of normative regulations of passenger transportation.

However, despite the existing relatively formed mechanism of normative and contractual regulation of passenger transportation by different types, its element – the protection of rights of the parties – has the greatest drawbacks as in the specified regulations the carrier's liability (or the consequences of non-performance or improper performance of the passenger transportation contract) are not largely provided and it requires a correction.

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