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Legal Regulatory Mechanism of Social Relations for Ensuring Dynamics in Civil Relationship

Anatoliy Kostruba

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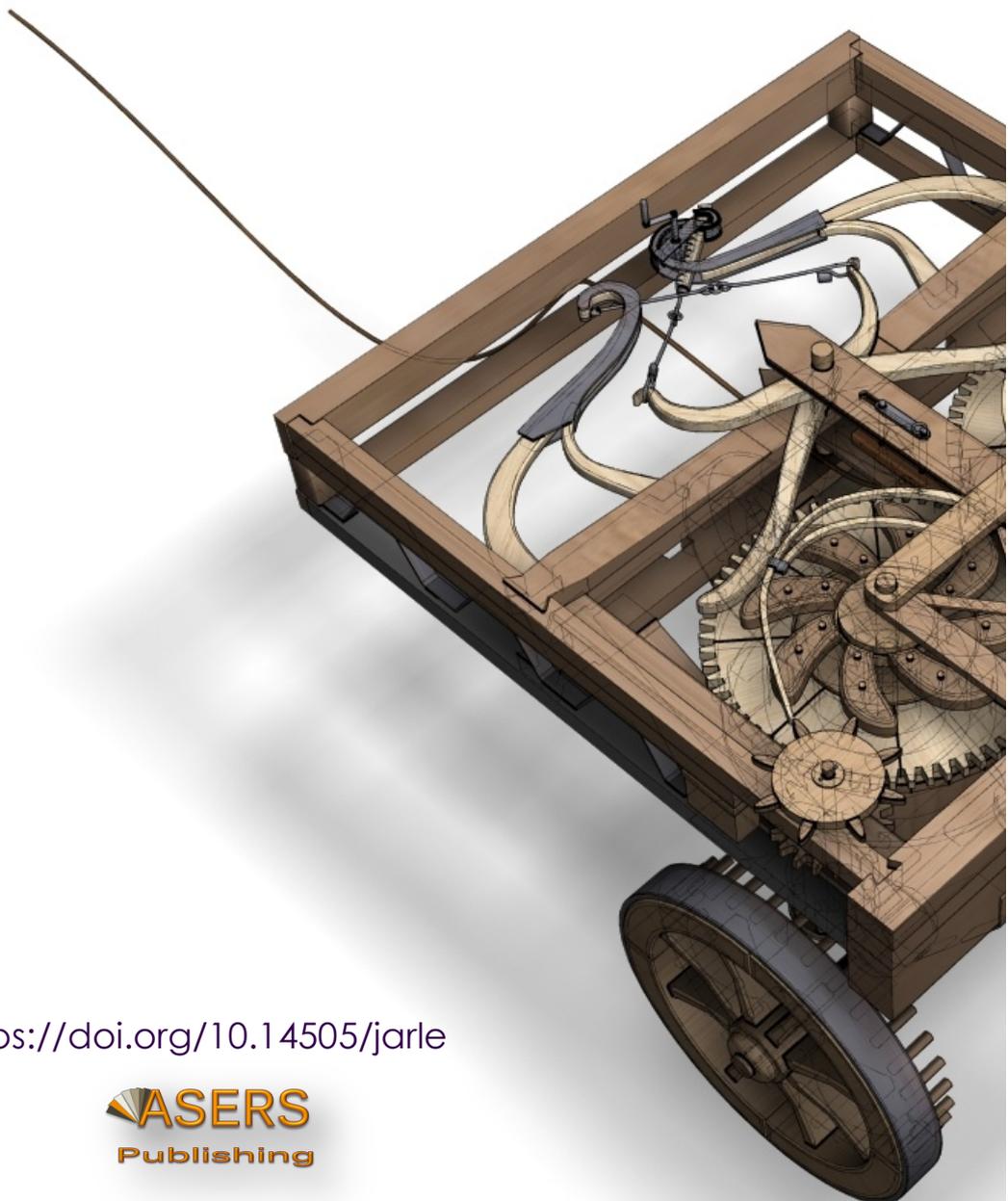
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Call for Papers

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Legal Regulatory Mechanism of Social Relations for Ensuring Dynamics in Civil Relationship

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Abstract:

Article is dedicated to the study of the legal regulatory mechanism of social relations, namely one of its elements – legal relations. The purpose of the article is to define the legal regulatory mechanism of social relations, its elements, and to study civil relations and legal facts as an integral part of this mechanism. The study also seeks to understand properties and features of regulatory legal facts in the legal regulatory mechanism. The article considers the structure and properties of elements of the legal regulatory mechanism of civil relations. As a separate question the article considers customary laws as the main source of law regulating social relations. The author examines legal relations through the lenses of legal acts and, in particular, the enforcement and regulation of legal facts, which is, certainly, a new way of looking at the legal nature of a specified mechanism. Likewise, the article examines currently existing gaps in scientific rationale of the legal regulatory mechanism of social relations in Ukraine.

Keywords: customary law; legal facts; legal facts enforcement; legal regulation; legal regulatory mechanism; social relations.

JEL Classification: K23; K36; K38.

Introduction

All various social relations take form of legal relations, in other words, a legal form, in which the course of conduct and actions of its participants are adjusted by legal norms and manifest themselves as legal rights and legal responsibilities. However, flaws in the work of any mechanism cause imbalance in the work of the whole legal regulatory mechanism, and therefore have the most negative impact on achieving the goal of legal regulation (for example, the existence of so called ineffectual norms in national legislation, which cannot produce legal relations, eliminates the possibility of regulation of particular social relations) (Sunegin 2009, 130). Legal relations occupy an important place in the legal regulatory mechanism. Because they emerge, change and cease under the facilitation of legal facts, the latter are an integral part of the legal regulatory mechanism of social relations. Properties of legal facts in the legal regulatory mechanism have not been thoroughly examined by the science of Civil Law, therefore the subject of the article is highly relevant.

There were a lot of papers dedicated to the study of the legal regulatory mechanism of civil relations, among which are works of such prominent scholars like Abramov, Bobylev, Vershinin, Kikot, Sunegin *et al.* It was they who clarified the problem of structure and properties of elements of the legal regulatory mechanism of social relations and laid the groundwork for future extensive studies in this field.

The purpose of the article is to define the legal regulatory mechanism of social relations, its elements, and to study social relations and legal facts as an integral part of this mechanism. The study also seeks to understand properties and features of the regulatory legal facts in the legal regulatory mechanism.

The sociological approach to understanding law formed in the second half of nineteenth century and was aimed at understanding the law as a social phenomenon that is relatively independent from the government. It

prefers actions or legal relations. Moreover, legal relations are compared with legal norms and constitute a focal point in the legal system. The law – is not what is intended and recorded, but what has formed in reality, in practical activities of targets of legal norms. Legal norms represent only part of the law, and the law is not limited to rules. Representatives of sociological approach to the law differentiate a law and a rule. Actually, the law consists of legal relations and a legal order, which is established on that basis.

Therefore, the law emerges directly from society. Through separate legal relations they gradually transform into customary laws and practices. A portion of these laws is recognized by state and is reflected in the current legislation. Therefore, the law - is not regulations imposed by state, but what really determines human conduct, their rights and duties, that manifests in legal relations. Legal relations precede legal norms. Law is what has emerged in life.

It is safe to say that the legal relations mechanism, which regulates and normalizes communities' actions, emerges from community itself on the grounds of its customary laws.

1. Main Approaches to Understanding of the Phenomenon and Law

General theoretical approaches to understanding categories of customary laws derive from common idea about the law. Customary law is one of the forms of law that can exist outside of a manifestation of state's will, may not be authorized by it, though due to their well-established resilience they can regulate legal relations. However, the difficulty of study of such a phenomenon as customary laws stems from a range of factors, among which are its affinity with other social norms, an ambiguous understanding of various historical conditions, a constant sophistication of social relations etcetera. For this reason, there is a need to research main approaches to understanding of the phenomenon.

According to Tolkachova a custom is defined as a 'historically resilient typical pattern of sociocultural behavior that is considered a necessary element of life in a particular community. Customs are established spontaneously, indiscriminately. It is imitated only because 'everyone does it', it is recognized, it validates the most useful behavior in everyday life, while resolving disputes, in other aspects of life. That said, customs are varied in their origins and sphere of social regulation: legislative, religious, ritualistic, etiquettal, lexical, military and ceremonial, judicial etcetera' (Tolkachova 2005, 51).

As stated by Oborotov at the core of a custom is a societal, and therefore natural necessity, which on a human basis brings customs closer to real people's needs and is a natural way of regulating their actions. Therefore, customs contain elements of social necessity, which will be the foundation of effective application and authority. Regulation and vital necessity in organized society required a public government, which would skillfully and successfully be able to coordinate people's activities. For this reason, such a government must be effective and authoritative, but it certainly has to rely on consciousness of all of its members, and also on moral authority that was ensured by a custom (Oborotov 2000, 49).

Komarov notes that a custom is a certain rule of conduct that forms in a certain social climate, is transmitted from generation to generation, acts as people's vital necessity, and as result of its frequent repetition becomes customary for them (Komarov 1998,145).

Thus, traditionally a custom is understood as a total of separate attributes that determine its social nature. Among the characteristics that determine a place and a role of a custom in a system of social regulators there are resilience, capacity for multiple usage for regulation of social relations, historical dependence, adjustment to real individual's necessities, ability to solve disputes, ability to adjust to real necessities, practical significance, effectiveness etcetera. In turn, an actual customary law has substantial differences that make it possible to emphasize it among other types of customs and form a general idea about its allocation in the system of forms of law. It enables us to conclude that the custom is an important factor in regulating social relations and forming laws and legal norms throughout all historical stages of societal and governmental development.

As noted by Grynyak and Protsenko, even lawyers of Ancient Rome differentiated several types of customary laws. First, 'secundum legem' customs (according to the law) play a key role, contribute to understanding of contents of those law or judgment terms and phrases that are used in special, different from commonly accepted meaning (abuse of rights, reasonable price, etc.). Second, 'praeter legem' customs (outside of the law) are applied in the case of gaps in law/legislation. Third, 'contra legem' and 'adversus legem' customs (against the law) appear during collision of law and a custom and play insignificant role in legal system (Grynyak 2015, 98).

However, for more contemporary perception of customary law's content and substance it is necessary to turn to current approaches of understanding of the category of 'customary law'. David and Jauffret-Spinozi point to two concepts of understanding of customary law: (1) the concept of sociological plane, in which a prevailing

role among sources of law is given to customs. It is customs that are the basis of law, determine ways of its application and development by legislators, judges, doctrines; (2) the concept is based on the school of legal positivism, according to which the role of the customs deteriorates. A custom plays a minimum role in comprehensively codified law, which is identified with legislator's will. For this position, in the authors' view, an absence of realism is common, while sociological school, on the contrary, overestimates the role of customs. Customs are not the basic and primary element of law, as sociological school desires it. It is only one of the elements that enable to find a just solution. And in modern society this element does not possess its paramount importance in comparison to legislation. But at the same time its role is not that insignificant as is presented by legal positivism (David 1996, 94 – 95).

Zhovtobryukh notes that customary laws are 'general rules of conduct, applicable within specific society to all of its members, who are combined by the contents of these rules, which are understood as lawful and mandatory, fulfill and are directly founded on the principles of natural law, act as a result of a long-term, unified and continuous practice of resolving legal situations, emerge on the basis of model relations in real life, are ensured by social sanctions, and can be protected by government authorities and courts' (Zhovtobryukh 2002, 13). Vasyanovich suggests the following definition of a customary law: 'a social norm that was recognized by society as useful, necessary, designed to resolve various disputes through continuous uniform application without changes and is validated by a legislator at the state level; is a legal norm for protecting the interests of a specific society, ensuring the exercise of rights and duties through establishing a specific legal sanction' (Vasyanovich 2010, 9). Skakun argues that customary law is an act-document that contains customary norm (a sustainable rule of conduct, established as a result of its continuous repetition), which is sanctioned and ensured by government (Skakun 2014, 184).

Golovkin identifies a number of attributes defining its nature in his analysis of the term customary law (Golovkin 2014, 159 – 160). The author established that customs share the following attributes:

- (1) are formed by society;
- (2) emerge spontaneously, indiscriminately;
- (3) are unwritten rules of conduct (occasionally oral form of the custom complicated proving its existence in court, as such over time a certain part of these customs has acquired written form);
- (4) can be applied at the level of a separate social group (local), as well as at a national level (general);
- (5) have uninterrupted and unified nature of observance;
- (6) their contents have specific rules of conduct;
- (7) are conservative by their nature (reinforce results of long-term social practices and can reflect general moral, spiritual values of the nation, as well as some prejudices);
- (8) are closely linked with religious and traditional norms.

Strelnikova and Pogorelov, while researching the position of customs in Ukrainian current law (Strelnikova 2010, 55), established that:

- first, the state recognizes customs as a source of law;
- second, a custom is an established, sustainable rule of conduct, which emerged as a result of multiple application in the sphere of social relations, but is not established by the legislation;
- third, from analysis of legislature it is possible to determine the following attributes of a custom as a source of law:
 - (1) a custom is a universally recognized rule of conduct, established as a result of a repeated and long-term unified appliance;
 - (2) fixation of a custom in documents is not necessary.

Therefore, it is possible to conclude that there is a peculiarity in authors' approaches to the term of customary law, which demonstrates the difficulty and ambiguity of this problem.

2. Influence of Customary Laws on the Legal Regulatory Mechanism

Consequently, despite close attention from theorists and practitioners to particular problematic, it is worth noting that among them no consensus has been reached on such an important question as the development of an approach to understanding of this category.

That is why determining the level of interdependence between customary laws and the legal regulatory mechanism lies within the plane of doctrinal research and has an abstract nature.

To resolve the question of influence of customary laws on the legal regulatory mechanism it is necessary, above all else, to refer to the analysis of the current legislature. For example, according to article 12 of the Ukrainian Act 'On the Ethnic Minorities of Ukraine', each citizen of Ukraine is entitled to an ethnic surname,

forename and patronymic. Meanwhile, said Act permits a person to restore their ethnic surname, forename and patronymic. If 'there is no custom to document 'patronymic' in person's national traditions, a person is entitled to enter in their passports only their forename and surname and in their birth certificates the forenames of their father and mother (The Ethnic Minorities of Ukraine 1992). Article 7 of the Ukrainian Civil Code defines that civil relations can be regulated by customs, in particular by business customs. The same article gives the definition of a custom, which is understood as a rule of conduct, which is not regulated by the Civil Code, but is established in a certain sphere of civil relations. A custom that contradicts contracts or civil acts is not applicable in civil relations (The Civil Code of Ukraine 2003). According to article 11 of the Family Code of Ukraine, the court, on the request of an interested party, may take account of a local custom, as well as a custom of an ethnic minority, which both or either party belong to, if they do not contradict the requirements of this Code, other laws or the moral basis of society (The Family Code of Ukraine 2002). However, despite an explicit reference about application of customs in the current legislation, there are several problems when defining their role in the legal regulatory mechanism.

Dnistryansky stated 'A custom does not have the same power that is granted to state law, but it still has a very vivid inner strength, since it carries authoritative mark of the nation' (Dnistryansky 1902, 38). The reason for this is that, first of all, a custom, as the oldest source of law, has influenced the development of Ukrainian law and many customs found their legal implementation through legal norms. Secondly, some regions of Ukraine are inhabited by people of different ethnic backgrounds, who preserve their culture, customs and traditions (Strelnikova 2010, 52). Meanwhile, one must agree with the views of Boshno: 'Normal regulation has several drawbacks, especially from the viewpoint of law enforcement, which in every dispute has to resolve a question about the existence of customary norms of social relations and their content in a certain sphere' (Boshno 2004, 18).

Today we can acknowledge the existence of multifaceted approaches to determining the place and role of a custom in regulating process of social relations. However, it is possible to identify a number of substantial regularities, to exercise social regulation and to ascertain the mutual influence of customs and the legal regulatory mechanism. They manifest themselves in the following tendencies:

First, bearing in mind inherent tendencies of social regulation development, it is clear that there is a need to use different models of individual behavior formation, some of which are outside of purely normative impact through the legal regulatory mechanism, meaning there is the possibility of creating relatively isolated regulatory means and, in particular, utilizing customs to determine general principles of interaction between parties of a legal relation in a specific life circumstances.

Second, on a certain stage of civilizational development, connected to a significant sophistication of social relations, interferences in ensuring an appropriate level of regulation of separate parties' conduct may arise, which are related to their excessive regulation, and that goes against the established rules of coexisting of individuals in society, thus there is a need to create an alternative impact on their conduct through common regulation.

Third, interaction between a custom and the legal regulatory mechanism is predicated on a need to overcome crises, characteristic for any social system involving a degree of its organization, in bipolar plane starting from lack of organization to total regulation, including objective and subjective factors of coexistence of all members of society.

Fourth, functioning of the legal regulatory mechanism has a subjective basis related to biological and physiological features of individuals, one of which is the perception and application of a custom.

Fifth, expression and provision of objective social interests in human behavior during social transformation requires a combination of normative and autonomous means of regulatory impact with the goal of creating prerequisites for regulation of social relations at an appropriate level.

Therefore, law established by Act and law that emerges in practice is as different as 'living' law and 'dead' law. Legal provisions become legal norms when they are utilized in practice. Legislators do not create a new legal norm, they just validate what has emerged in practice - though the most prominent member of sociological school in the early twentieth century Eugen Ehrlich. Among the founders of this school were Rudolph Ihering, Leon Duguit, Eugen Ehrlich, Roscoe Pound, Oliver Holmes Jr.

Under sociological approach to understanding of law (which is its advantage) a great importance is attached to judicial and arbitrage practice, freedom of judicial discretion, study on the effectiveness of legal norms and legal practice. However sociological school also has its drawbacks. First, there is the danger of dilution of the definition of law: it is rendered very indefinite; second, there is the danger of arbitrary process by judicial and administrative authorities, that is, any act by government administration and its officials will be considered law;

third, it ignores the fact that law is not subjects' activities, but a regulator of their activities and social relations. It is impossible to endow an action with attributes of a regulator.

Enforcement of social relations in legal regulation is a way to ensure a stable development of civil relations in Ukraine. The basis for incorporating it in the process of realization of civil relations is a nature of its development, reality and affiliation, which due to its social importance is ensured by a separate legal instruction of public authority. It manifests in case of need for the governmental influence on development of civil relations for the purpose of ensuring public interest. Its implementation is ensured by the legal regulatory mechanism.

Legal regulation, being an instrument of social governance, is intended to regulate social relations, ensuring realization of subjects' positive interests. Within this process various and numerous hindrances can be encountered, which lowers the impact of legal regulation if they were not eliminated in due time.

According to Alekseyev: '...the category of the term 'legal regulatory mechanism' exists in legal theory to demonstrate the instant of action and functioning of a legal form...' (Alekseyev 2004). In other words, it is a system of legal tools, means and forms by which normative law transforms into regulation of social relations, legal subjects' interests are satisfied, legal order is established and maintained (Bobylev 1999, 108).

Consequently, the legal regulatory mechanism consists of separate components, which ensure its functioning on every level of law (stages of legal regulations). This way the legal regulatory mechanism's structure consists of a lawmaking mechanism, a law establishing mechanism, a rights realization mechanism or a legal defense mechanism etc. Each of them, in turn, also contains components, which ensure functioning of legal relations within a respective process of legal regulation according to the specifics of their realization. The rights realization mechanism contains an enforcement mechanism, which existence reflects the same social legal aspects of objective reality as the legal regulatory mechanism overall, but with more details.

Identifying the enforcement mechanism during realization of civil relations, defining of its elements should be determined through the structure of enforcement mechanism, which reflects common principles of public authorities' activities. At the same time, Yermolenko aptly noted as, any legal relation is a method and a form of realization of legal norms (Yermolenko 2005, 77).

In summary, the enforcement mechanism in private law is an amalgamation of legal means by which we normalize legal public activities of state administrative body, which includes regulating civil relations during their realization in order to maintain the effectiveness of legal regulation and to ensure a consistent development of civil society. Moreover, the amalgamation of such legal means must be seamlessly implemented into the rights realization mechanism, which includes the enforcement mechanism, and is aimed at ensuring its functioning.

It is worth noting that 'classical' normative logical theory of civil relations gained traction in civil procedural law, as well as in substantive civil law. Its main points are such: legal relations are means of realizing of legal norms; contents of legal relations are rights and duties, and their object is conduct. To conclude, legal relations are equated with legal norms, and their distinctness is that legal relations represent logical balance between rights and duties. The necessary element in the categorical range of this concept was also normative logical prerequisites: legal fact, legal capacity or legal personality, and legal norms. Their presence is connected to the corresponding rights and duties. Researchers did not analyze real legal social relations emerging in people's activities, but their legal form, the normative logical construction of which provides usage for legal norms (Vershinin 1986: 55).

Legal relations as an additional phenomenon is interconnected with the core of legal additions - law. The key thing in this connection is the fact that legal relations are considered a phenomenon, which is derivative from law, while in an existing legal system legal relations occur and exist on the basis of legal norms (Gnatushchenko 2006: 60). Any relation is always some form of interconnection between people, objects, parties, elements etcetera, under such relation changes in one-side cause changes in the other.

Traditionally, the process of enforcement includes the following stages: (a) establishing of factual circumstances; (b) establishing of a model of the legal conduct of subjects of legal relations, in other words correlation of real-life situation with a specific legal norm designed to ensure its effectiveness; (c) resolving of a case and adoption of an individual legal act.

This way the realization of the process of enforcement in civil law of Ukraine is achieved through such elements (legal means), which directly follow and support each of the established stages.

Establishing of factual circumstances requires a concrete legal relation, particularly civil relation, identification of substantive characteristics of which is followed on the first stage of enforcement. Moreover, the enforcement practice committed by an administrative body supposes the existence of legal relations through which such practice is realized. In this case we can discuss the existence of civil relations as a subject of state

enforcement practice and of administrative legal relations as a sphere of activities of a corresponding governing body. This way legal relations are part of the enforcement mechanism.

Establishing a model of legal conduct of subjects of legal relations supposes a search and application of legal norms through which civil relations are regulated and their parties' interests are satisfied. In other words, legal norm is part of the enforcement mechanism. Norms regulate the activities of state administrative bodies on enforcement, determine boundaries of such activities, that corresponds with the methodological basis of activities of state authorities.

Finally, a court decision and adoption of an individual legal act creates momentum of further movement for civil relations. The specified occurrence is ensured by such element of the enforcement mechanism as a legal act of enforcement. The subject of enforcement chooses an optimal option of regulatory impact on civil relations and implements it through such acts. An act of application of legal norm moderates further behavior of civil relations participants at the stage of rights realization. It is the organizing force that ensures law implementation in the process of civil relations realization and is exactly the legal fact that influence further development of legal relations. According to Yavich, 'legal regulation of social relations begins from the moment of enacting of normative acts...' (Abramov 2008, 178 – 179).

Considering the foregoing we can make several conclusions.

The development of modern society in Ukraine is directly related to and determined by significant transformational processes inside the government and the formation of civil society in general.

Though at the first glance, the problems of improvement of norms of private law are not primary objective of this stage - problems of decentralization, judicial reform in the context of implementing changes to the Constitution, crackdown on corruption are on the agenda, while underestimation of importance of maintaining functioning of civil society in private law is profoundly erroneous, because during drafting stage of the Civil Code at the end of the previous century its creators emphasized the role of codification in private law and the place of the new Civil Code of Ukraine as a constitution of civil society during democratization of Ukrainian state (Solodovnik 2000,131).

Events of 2004 – 2005 and especially 2013-2014 have significantly mainstreamed the problematics of civil society, however, interest is usually limited to questions about correlations between the state and civil society, limitation of state power in favor of self-regulating processes, determining directions, scope and form of public supervision of state institutions, in other words the problems concerning public law regulation.

In this context the core principles of private law regulation of social relations seem 'to play a second role'.

It is believed that such approach 'narrows down' the capabilities of legal impact on the process of formation of civil society, though it also creates a major 'imbalance' in application of legal tools.

It is worth reminding that in civil society (as well as in civil law) the main axis, around which all variety of relations, constructions and, respectively, problems revolve, is a person, individual, personality.

Drawing upon the analysis of approaches to the question of social nature of customs, it is possible to state that a custom is intended to form stereotypes and tendencies of individual behavior on a subconscious level of perception of rules that coexist in society. On the one hand, state's attitude to such manner of regulating social relations derives from a tolerant disregard to using customs alongside legal norms within functioning of the legal regulatory mechanism. On the other hand, the importance of customs and their role on society are expressed in the fact that customs alongside other social regulators, including legal norms, can exist as independent, efficient means of impact on human behavior.

Conclusions and Further Research

As a result, regardless of form, content or specifics of customs realization, and regardless of the way they are applied: by themselves or in conjunction or collaboration with law, each custom fulfills a significant regulatory and educational role in society. Every custom acts as an indispensable component of a unified system of customs and all social norms existing and functioning in society during any of its development stages.

Therefore, the necessity that determines the efficiency of regulating social relations within a specific development stage of society is conditioned by determining the level of influence of customs on the legal regulatory mechanism. Customs and law exist in parallel with all their distinctive attributes. Unity of development of customs and legal means, which are the basis of the legal regulatory mechanism, is determined by the uninterrupted continuation of development of their mechanisms and their mutual influence. An objective link between the past, present and future determines the quality and affiliation of regulation of social relations through the respective legal regulatory mechanism, besides, usage priority of a common or legal origin is

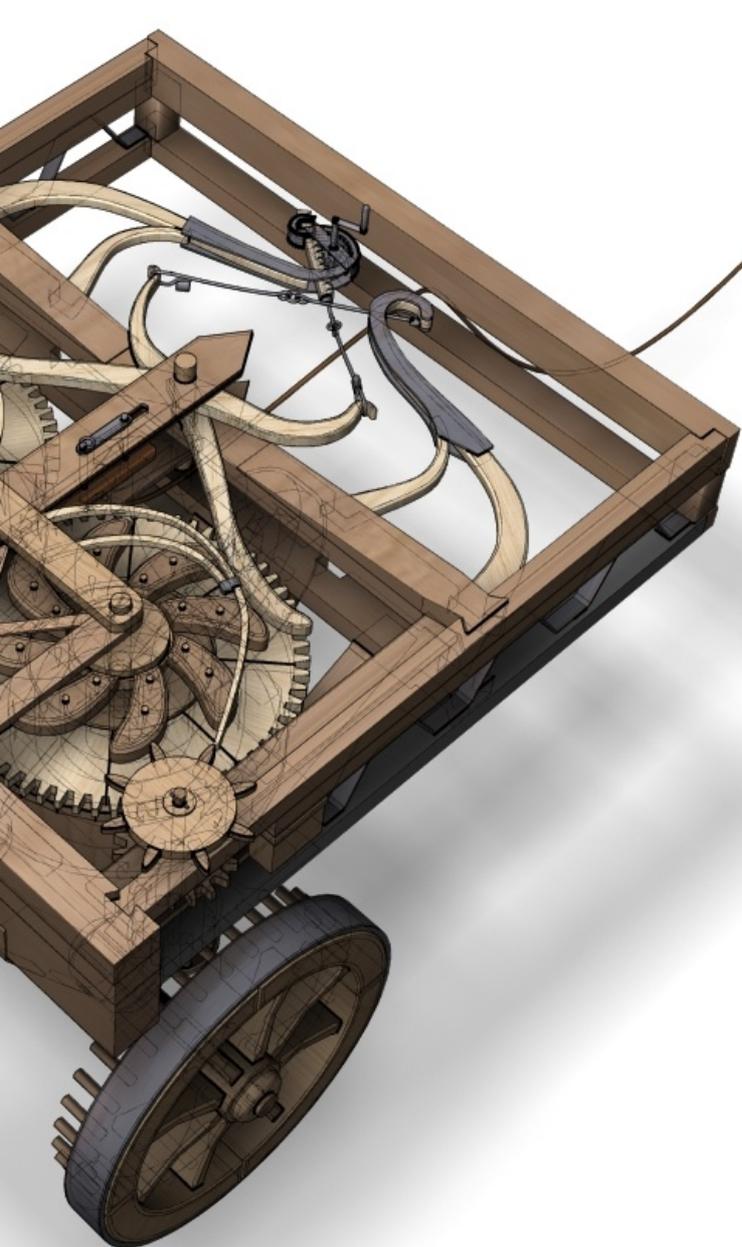
interchangeable, which is determined by historical conditions of societal existence and development, specifics of the state's legal system, category of regulated social relations and other factors.

It is appropriate to note that principles of egalitarianism, respect for ownership rights, human rights and freedoms, which are prevalent in modern civil society, are immanent to civil law. Therefore, by developing and deepening the fundamentals of private law regulation we create a potent foundation for functioning of civil society in general and its separate institutes in the best interests not only of domestic community, but also in the interest of adopting our internal legal norms to the norms and requirements of the international law.

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