World Applied Sciences Journal 24 (1): 126-129, 2013
ISSN 1818-4952

DOI: 10.5829/idosi.wasj.2013.24.01.13176

Civil Legislation Stability and Principles Providind it (By the Example of the Russian Federation and the Republic of Belarus)

Valeri Gennadievich Golubtsov and Natalya Leonidovna Bondarenko
Perm State National Research University, Bukireva St., 15 614990, Perm, Russia

Submitted: Jul 9, 2013; **Accepted:** Aug 3, 2013; **Published:** Aug 07, 2013

Abstract: The process of the civil legislation formation in the Russian Federation and in the Republic of Belarus started not long ago, when the countries got their independence. This permanently lasting process is still far from being complete and this makes the problem of the current legislation stability provision even more important. The authors analyze the reasons of this problem and see the opportunities to overcome it in the subsequent realizations of the civil legislation fundamentals – the worldwide acknowledged civil law principles that were fixed for the first time in the legislation of Russia and Belarus. Special attention was given to the research of the inviolability of property, freedom of contract and inadmissibility of intentional interference into private affairs. In the authors' opinion, it is their observation that can provide for the definiteness and the predictability of the civil legislation as the key factors of its stability.

Key words: Civil legislation stability · Civil law principles · Intentional interference · Participants of the relations · Guarantee of stability · Property inviolability · Freedom of contract · Fixing in the legislation · public need · Legal norms

INTRODUCTION

For Russia and Belarus, similar to other countries of the former USSR, the process of the national legislation formation is comparatively new; and the stability of the national legislation is one of the most essential and urgent issues. As the changes in the legislation very often happened without regard to the interests of the participants of the relations being regulated, the guarantee of the legislation stability is nowadays viewed as a mandatory condition for the state to gain the trust.

As referred to the civil legislation, the guarantee of stability shall be viewed as the officially fixed promise of the state to refrain from the constant interference into the sphere of the private relations of the parties. This guarantee is given to make the civil turnover participants sure that the "rules of the game" will not be intentionally changed by the state.

The Belorussian legislator proposed a rather original approach to providing the stability of the legislation. In accordance with Article 38 of the Law of the Republic of Belarus dated January 10, 2000, # 361-Z "On the normative legal acts of the Republic of Belarus", changing the normative act earlier that in a year after its adoption (publishing) is allowed only in exceptional cases on the basis of the requirements of the normative act having a prevailing legal force, if not otherwise specified by the laws of the republic of Belarus or the decisions of the President of the Republic of Belarus [1]. However, the approach when the legislation stability presumes its inalterability for a definite period of time is only partially correct and the proposed measures aimed at the legal system stability provision are inefficient due to the following considerations.

Stability and Dynamism of the Civil Legislation: We proceed from the assumption that the stability does not exclude a certain dynamism of the legal system, because the law itself is an open and dynamic system. In the process of evolution, the legal system can renovate and fill itself with new contents. The political, economic and social conditions of the life of the society can change and this leads to changes in the volume of rights and duties of the society members.

For example, the civil Code of the Russian Federation, as amended in 1994 [2] and the Civil Code of the Republic of Belarus, as amended in 1998 [3] integrated many new institutions and legal norms not known to the Soviet civil

Corresponding Author: Valeri Gennadievich Golubtsov, Perm State National Research University, Bukireva St., 15, 614990, Perm, Russia.

legislation earlier in force. This is explained, firstly, by the economy refocusing to the market management. As the legal systems of the market economy countries (the same as Russia and Belarus today) cannot be closed, they demonstrate global tendencies of internationalizing and commercialization of the civil law and the result of that is in particular emerging of new types of contracts in the civil law such as factoring, franchising, leasing etc. It is natural that many legal norms were included into the codes texts with no necessary approbation and then during practical usage the necessity appeared to amend and specificate them and adopt other civil legislation acts.

Since the law is the means of realizing the social, economical and other tasks, it should contribute to the progressive development of the society. Under the influence of different factors, the legislator has to constantly amend the legislation with new legal norms. It is more often that the necessity to introduce changes is caused by the needs of the social development, by the necessity to provide for additional protection of the specific participants of the civil turnover, by the gaps in the legislation, inability to efficiently manage the emerging public relations using the current legal norms etc. The legislator often has to introduce not only the new norms but the whole legal institutions, so that the legislation does not stop the development of the public relations but efficiently manage them. The legislation must constantly be improved and correspondingly change.

Such instability of the civil legislation is perceived as a serious problem by many participants of the civil turnover. However, in our opinion, the scale of this problem is significantly exaggerated; it does not have a serious risk. Let us make a small remark – the difference of the Soviet civil legislation was in its significant level of stability and definiteness of the formulations, with this it did not comply with the requirements of the citizens' rights and freedoms provision and the civil turnover efficient management. Consequently, the stability of the law is an important factor, but it is not the principle criterion for evaluating the state civil legislation quality.

Let us propose a thesis that the stability of the legal system is provided not by the stability of the legal norms but by the strength and steadiness of the legal basis on which it is built. This basis is the civil law principles. For example, the French Civil Code adopted in 1804 nowadays continues to be the most important source of the current civil law of France. Only constant renovation of its contents helped to keep the document as a normative act that is still in force. With this, the main principles used for creating the French Civil Code (the inviolability of the private property, of the freedom of contract and equity, inadmissibility of intentional interference into the private affairs) stay unchanged for the whole period of its existence [4].

These civilized world acknowledged private law principles are also named as the main fundamentals of the civil legislation of the Russian Federation and the Republic of Belarus (Article 1 of the Russian Civil Code, Article 2 of the Belorussian Civil Code). This should be deemed as the beginning of a new civil legislation development phase. With this, the legislative fixation of the principles imposes obligations on the legal system which should be reformed and function in full compliance with its main fundamentals.

The Civil Law Principle Notion and Features: The scientists researching the legal phenomenon of the civil law principles traditionally point out such features of theirs as the normalization, the generality, the universalism and the fundamental character. For example, O. Kuznetsova views the principles as the "imperative utmost general norms defining the contents of all the other civil legal norms and having a higher juridical force over them" [5, p. 47]. In opinion of E. Komissarova, the principles are the "normatively described main ideas having the character of fundamental and supporting for all the civil legal regulation and characterized by the contents that describe the methods, features and characteristics of the legal regulation" as the "initial postulates of the whole process of the civil legal regulation" [6, p. 14].

The question now arises of how the fundamental character of the legal principles complies with the possibility of their limitation and if we allow for such a possibility – where the maximum admissible limitations of the civil law principles are. O. Ioffe reasonably noticed that "every principle no matter now general it is, does not lose its meaning even in case it faces these or those exceptions if the latter are true exceptions…" [7, p. 29].

We have to pitifully state that the legislative fixation of the principles does not yet mean their final transfer from the legal consciousness sphere to the practical sphere. In the process of the specific normative act development, the requirements of the principles are often not taken to account by the legislator and this leads to the situation when the norms of the specific legal act contradict the civil legal principles. This is explained by the fact that a proper legal evaluation of the principle meaning is only given at the doctrinal level so far. Vice versa, in the legislative practice and law application practice, there is no clear understanding of what the law principles are.

In particular, both in Article 1 of the Russian Federation Civil Code and Article 2 of the Belorussian Civil Code, the definition of the civil law principle is not given. Therefore the issue of which norm is to be viewed as a principle is not solved and consequently it is not clear which norm is a determinative one for the rest of the norms. It is often that the legal notions turn to be mixed up in the legal acts of different levels. Among the principles the rights and freedoms of the individual, legal institutions, juridical guarantees and legal presumptions are often named. The practicing lawyers continue to support the main civil law idea developed in the Soviet period that the principle as the directly regulating legal component is aimed only at detecting the drawbacks in the legislation when using such a formal juridical tool as "general sense of the legislation". We shall agree with O. Kuznetsova, that "every practicing civilian uses not the main legal ideas, not the leading juridical fundamentals, not the main legislative provisions but the real norm of the law" [5, c. 10]. With that, as Martijn W. Hesselink noticed it right, sometimes it more sensible to refer to the principles not the rules [8, p. 17]. We can prove the thesis is true after the legislation analysis.

The Principle of the Inviolability of Property as the Main Guarantee of the Civil Legislation Stability: It is generally known that the stability of the whole civil turnover largely depends on the proper assurance of the inviolability of property. The normal market economy can normally function as long as the majority of the civil law subjects act as owners. Property - the highest right a person can have in any thing [9, c. 364]. Everyone has the right to ownership of properties, which may be the products that he has received from his own labour and his exchange with others, the inheritance from other and the rewards that he has gained in peaceful competitions [10, c. 261].

Abandonment of the Soviet idea of "no right to anything at all" [11, p. 63], was accompanied by the fixation of the property inviolability principle among the main fundamentals of the civil legislation. However, the Belorussian legislator was not successive enough in this issue. On the one hand, Article 2 of the Belorussian Civil Code fixes that the forced transfer of property is allowed only based on the public necessity motifs and with the observation of the conditions and the order prescribed by the law. At the same time, the confiscation of property from the owner is accepted as a sanction for committing a crime or other offence in cases provided in the legislative acts (Article 244 of the Belorussian Civil Code). Thus, term "law" is replaced with more inclusive term "legislative acts", which contain not only the laws of the Republic of Belarus but also the decrees and the orders of the President of the Republic of Belarus. However, only the law enacting procedure guarantees that the legislation will not be changed suddenly and unpredictably.

The contents of the principle of the inadmissibility of the direct intentional interference into the private affairs is even more freely interpreted by the Belorussian legislator: "interference into the private affairs is not allowed, with the exception for the cases when such interference is practiced on the basis of the legal norms and in the interests of the national security, public order, protection of morality, health of the population, rights and freedoms of other persons." (Article 2 of the Belorussian Civil Code). Thus, holding the right to limit the principle's requirement with the legal norms that can be contained in any legislative act, the legislator practically neutralizes the principle's meaning, leaving it as a declarative statement of the Civil Code. To compare: the Russian legislator allows for the civil relations participants right limitation only on the basis of the federal law (Article 1 of the Russian Federation Civil Code).

The Principle of the Freedom of Contract as the Guarantee of the Civil Legislation Stability: One of the central civil law principles both in Russia and Belarus is the principle of the freedom of contract meaning that physical persons and legal persons are free in making contracts. Article 391 of Belarus states that forcing to make a contract is not admissible, with the exception for the cases when the obligation to conclude a contract is prescribed by the legislation or the obligation earlier voluntarily assumed. It is necessary to note that the Belorussian legislation contents include also the orders of the President of the Republic of Belarus, regulations of the Government of the republic of Belarus, the acts of the Constitutional, Supreme and Supreme Economic Court, the National Bank of the republic of Belarus; as well as the Acts of the Ministries, other republican bodies of the state control and self-control. So, each of the mentioned acts can contain rules limiting the force of the civil law fundamental. To compare: in accordance with Article 421 of the Russian Civil Code, the forced making of the contract is not admitted except the cases when the obligation to make a contract is defined by the civil code, other law or by the obligation earlier voluntarily assumed. Thus, the Russian legislator puts the freedom of contract higher, allowing for an opportunity of interference into the private legal relation only in exceptional cases and only through the acts of the highest legal force.

For the same reasons, the objections arise concerning norm of Item 2 of Article 392 of Belorussian Civil Code "Contract and legislation": "In case a legislative act was adopted after the contract conclusion and before its termination and it sets mandatory rules for the parties, that contradict to those in force at the moment of the contracts conclusion, the conditions of the contract should be put in compliance with the legislation if not otherwise provided by the law." Apart from the Belorussian legislator, the Russian legislator follows the presumption of the contract inviolability, insisting on changing it only in case a law is adopted that directly stating that it covers the relations associated with the contracts concluded earlier (Item 2 of Article 422 of the Russian Federation Civil Code).

An important element of the freedom of contract is providing the contract relations subjects with the opportunities to conclude a contract, both the one that is mentioned in the law and the one that is not mentioned in the law or other acts, but will fully comply with the essence of the relations between the parties and control them optimally (Article 421 of the Russian Federation Civil Code). It is a pity, Item 2 of Article 391 of the Belarus Civil Code does not contain an indication for an opportunity for parties to conclude the so-called non-defined contracts (which are not known to the law but do not contradict the fundamentals and the sense of the civil legislation). The parties can conclude only a contract that contains the elements of different contracts provided by the legislation (a mixed contract). This rule seems to be rather obsolete in the conditions of the well-developed civil turnover.

It would be incorrect to underestimate the meaning of the principle of the freedom of contract, which goes far beyond the contractual law. As E.A. Farnsworth notices, "From a utilitarian point of view, freedom of contract maximized the welfare of the parties and therefore the good of society as a whole. From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely" [12 p. 20].

CONCLUSION

The consistent realization of the requirements of the civil law principles can improve the authority of the state legal system and fuel investors' confidence in the existing of definite limitations for the legislator that will not allow him to act spontaneously being guided by any practicability but not by the law. In some way, "principles of civil law could be the outcome of a transnational dialogue» [8, p. 50].

An important feature of the civil and legal principles is that they were created using the intellect of not an only one person, but of many generations of people, being the result of the centuries-ling development but not the result of the new solutions and approaches having no precedents. No one invented and formulated those principles and so – no one has the right to change or limit them as he thinks expedient, because the principles reflect the most important requirements for the nature of a man: the independence of the will, the freedom of contract, the equity, the sanctity and inviolability of the private property. In case there is a need for the limitation of the mentioned principles, the civil law subjects should be sure that such a limitation is possible as an exception from the rule and only in cases stipulated by the law.

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