

Limits of Government Intervention in the Regulation of Civil Law Relations in the Republic of Tajikistan

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Abstract—The analysis of the civil legislation provisions of the Republic of Tajikistan with respect to the correlation of mandatory and permissive principles of the regulation of civil law relations presents one of the most important tasks. Conducting such an analysis makes it possible to detect contradictions in terms of the consolidation of permissive and mandatory principles of regulation. The question of the relevance of excessive intervention of government in the regulation of civil law always depends on the legal system of a particular country. It is the legal consciousness and legal mindset that are the starting point for the creation of legal presumptions of legal norms. The national mindset plays the role of an ideological factor that influences the process of the formation of law in society and the establishment of legal presumptions. The presumption of permissive rules in its true meaning, as it is understood in European law, is not entirely acceptable for the legal system of the Republic of Tajikistan in terms of the regulation of civil law relations. Limited legal awareness, far from European ideals, is the fear of the intensification of permissive principles of contractual law, which may contribute to an uncontrolled decline in contractual discipline and other abuses of participants of civil circulation.

Keywords—*freedom of contract; presumption of permissive rules; boundaries of mandatory principles; legal system; national mindset; customs; traditions*

I. INTRODUCTION

In the Republic of Tajikistan, the regulation of contractual relations is carried out by the norms of the Civil Code of the Republic of Tajikistan (hereinafter the Civil Code of the RT), adopted in 2000 [1]. The adoption of this legislation has provided legal regulation of all the most important civil and legal institutions typical of market relations for a long-term.

The process of the development of Civil Codes was carried out under the conditions of the creation of a single economic space in the post-Soviet states; therefore, the content of the civil codes of the CIS countries was provided with the possibility of regulatory convergence. In particular, the Civil Code of the Republic of Tajikistan, as well as the national Civil Codes of the post-Soviet states, was adopted on the basis of the Model Civil Code for the CIS member states with slight digressions [2].

As well as the majority of national civil codes of other post-Soviet states, the Civil Code of the RT establishes the principle of freedom of contract. Reflecting the idea of decentralization of economic decision-making, which lies at the basis of a market economy, the principle of freedom of contract finds its normative embodiment in the permissive principles of the regulation of legally binding relations.

As a general rule, the permissive principles of legal regulation reflect the ability of a person to dispose of subjective civil rights at his own discretion and to simulate behavioral options within the limits allowed by law [3].

Permissive rules, as a legal category, have an interdisciplinary character. In civil law it acquires special qualities and is filled with true content, since it is civil legal norms that are structured in such a way that they are aimed at protecting permissive principles and establishing certain guarantees for their real implementation. Such guarantees may be illustrated by the provisions of Article No. 23 of the Civil Code of the RT, enshrining the principle of the inadmissibility and arbitrary restriction of the ability of a citizen to choose options for the behavior allowed by law. Another example of the embodiment of the permissive principle is the provisions of Article No. 9 of the Civil Code of the Republic of Tajikistan, which guarantees the right of citizens and legal entities to exercise their rights at their own discretion.

However, it is quite obvious that, being the fundamental principles of civil law, the freedom of contract and discretionary regulation cannot be of unlimited character. That is why at the legislative level the limits of the disposition of legal norms are established through mandatory regulation. The authors of this article made an attempt to justify the relevance of government intervention in the regulation of civil law relations.

II. METHODOLOGICAL FRAMEWORK

It should be noted that the starting point of the impact of the system of legal norms on the subject of legal regulation is the method of legal regulation. Traditionally, the method of legal regulation is the legal means of influence used in the legal regulation of social relations. The method of the branch

of law answers the question of the regulation of social relations, which are the subject of a particular branch of law.

In the legal literature, the following characteristic features are distinguished: 1) the procedure for establishing the rights and obligations of participants regulated by the law of public relations; 2) the degree of independence of subjects; 3) the methods of regulating the activity of legal entities; 4) the ways and means of protection of established rights and the performance of duties [4]. The branch method allows discovering and understanding the features of a particular branch of law, as well as to draw a distinction between related branches.

The issue of the method of legal regulation in legal science is argumentative. When it is defined in the theory of law, the various approaches are presented. Some authors believe that the branch method should be single. For example, M.D. Shargorodsky and O.S. Ioffe when determining the method of legal regulation, see the expression of only one way of mediating social relations [5].

The same opinion is shared by L.S. Yavich [6]. N.D. Egorov has similar position believing that a method as a criterion that individualizes a branch of law should be characterized by only one feature, which is inherent in any norm of this branch of law [7].

Another group of scientists in the context of legal regulation of social relations allows the use of several methods in their whole. Thus, according to S.S. Alekseev, the law in a strictly legal sense is the basis for determining legitimate, state-prescriptive and legally unlawful behavior and depending on the branch of law, the combination of these models may change [8]. Therefore, the method, in its understanding, is “special methods, means, techniques used in the legal regulation of qualitatively peculiar kind of social relations” [9]. Moreover, the scientist talks about a set of methods (means, techniques).

This point of view is dominant in the theory of law. The majority of the representatives of legal science proceed from a broad understanding of the method of legal regulation, believing that a single branch of law may have not one but several methods of legal regulation. According to this, traditionally the method of legal regulation is represented by a set of techniques, methods and forms of expression of specific regulatory properties and functions inherent in the rules of law of this branch. The variety of numerous techniques and methods used in a particular branch of law in order to regulate social relations is predetermined by the features of diverse and numerous social relations that make up its subject.

In the theory of law, such basic means of legal regulation as prescriptions, prohibitions and permissions, as well as such techniques as mandatory and permissive regulation are known. The choice of two methods of legal regulation: the mandatory method (centralized) and the permissive method (decentralized) – is carried out from the position of the division of right into public and private.

As it was mentioned before, despite the fact that permissive method is the fundamental method of legal regulation in civil law, its application cannot be infinite. It is

reasoned by the fact that in civil law the freedom of one person is always opposed by the freedom of other subjects, as well as public interests. Therefore, a legislator understands the freedom of contract in the same sense as philosophy defines it, that is, as a derivative component of restrictions.

III. RESULTS AND DISCUSSION

It is restrictions and limits of freedom that determine freedom itself, since complete freedom, which does not have such limitations and boundaries, is not freedom, but is its complete negation, leading to complete lack of freedom. Johann Gottlieb Fichte also wrote that the freedom of an individual is limited by the same freedom of another individual and the right is based on such equality of restrictions [10].

According to such reasoning, the legislator of the Republic of Tajikistan, guaranteeing the permissive principles of the regulation of civil law relations, at the same time establishes the limits of the contractual behavior of participants in economic relations. As a rule, the freedom of contract is limited in the public interest by establishing mandatory prescriptions. The limits of the permissive principles of contractual relations are expressed in mandatory norms, which contain positive prescriptions, from which such limits unambiguously follow. At the same time, the limits of the freedom of contract directly depend on the creation of a contract and the legal regime established for it. Thus, the legal regulation of business contracts is more mandatory than the legal regime of civil law contracts.

Thus, the freedom of contract and the limits of permissive principles depend on the will of the government, which determines the limits of the free discretion of the parties to contractual relations in particular case.

In this regard, in the scientific literature of recent years, the issue of the limits of government intervention in the freedom of contractual relations and the degree of optionality of the norms of contract law are often discussed. Some authors justify excessive government intervention in the regulation of contractual relations through mandatory prescriptions. Other authors, on the contrary, speak in favor of expanding the limits of contractual freedom and reducing mandatory norms in the regulation of contractual relations.

Before expressing the position of the authors on this matter, it is advisable to analyze the provisions of the civil legislation of the Republic of Tajikistan regarding the correlation of mandatory and permissive principles of civil law regulation.

Permissive principles in the sphere of regulation of contractual relations, first of all, is proclaimed in Article № 453 of the Civil Code of the Republic of Tajikistan, which discloses the legal content of the concept of freedom of contract. This, in the first place, is indicated by the enshrining of the right of the parties of contractual relations to enter into a contract, both provided and not provided by law or other legal acts, as well as enter into a mixed contract containing elements of various contracts.

In addition, the paragraph No. 1 p. No. 4 of the above mentioned article of the Civil Code of the Republic of Tajikistan gives the concept of the permissive norm – this norm is applied to the extent that the agreement of the parties does not establish other variants.

However, the provisions of paragraph No. 2 p. No. 4 of the Civil Code of the Republic of Tajikistan are of particular interest in the framework of the declared title of this article. At first glance, this provision establishes the presumption of the permissiveness of civil law, because it establishes as a general rule that “the terms of the contract are determined at the discretion of the parties, unless the content of the relevant condition is prescribed by law or other legal acts. The legal technique of this norm indicates the presumption of the permissiveness of civil law rules governing the terms of the contract, since it is built on the principle “everything is permitted that is not prohibited”.

This norm would not provoke questions if the presumption established by it on the permissiveness of civil law norms would not be denied by the norms of the obligatory part of the Civil Code of the Republic of Tajikistan. The fact is that the legal technique used in the second part of the Civil Code of the Republic of Tajikistan led to the fact that the general rule on the permissiveness of civil law norms, enshrined in the paragraph No. 1 p. No. 4 of the Civil Code of the RT, began to look more like an exception, and the mandatory regulations acquired the character of a general rule.

The formulation of the overwhelming number of regulations of the second part of the Civil Code of the RT is such that it establishes a presumption of mandatory principles of civil law norms, which can be refuted only by the presence in the rule itself of a reservation on the right of parties to choose a different behavior. Such reservations have the following formulation: “unless otherwise provided for by the contract”, “unless otherwise provided for by mutual agreement of the parties” and are built on the principle “everything is forbidden that is not allowed”.

If according to this principle, we count how many such permitted reservations are provided for in the second part of the Civil Code of the Republic of Tajikistan, we find out that 155 of them are of mandatory character.

Thus, the analysis of the provisions of the first and second parts of the Civil Code of the Republic of Tajikistan makes it possible to detect contradictions in terms of enshrining the considered legal presumptions resulting from the use of various legal techniques. Such incorrectness, of course, is unacceptable and requires speedy correction.

As for the question of how such a superiority of mandatory principles of civil law regulation over dispositive principles is justified, then, in our opinion, there is no definite answer. In relation to a particular legal system, the answer to this question will always be of a different nature, because it will depend on social and legal experience, legal knowledge, legal culture and legal value orientations of a particular society.

We believe that it is the legal consciousness and legal mindset that are the starting point for building legal presumptions in the legal norms. It is the legal conscience that

serves as the basis for the normative consolidation of the legal presumption and its further modification. The presumption, in its turn, is a means of materialization of legal consciousness and national mindset. At the same time, when considering the characteristics of the manifestation of the national mindset, such criteria as the attitude of society to the law, the level of legal culture and legal education, and religious consciousness should be used. These criteria play the role of an ideological factor that influences the process of the formation of law in society and the establishment of legal presumptions.

As an example, let us step a little away from contractual relations and give an example that demonstrates the forced actions of the Tajik legislator to settle relations with mandatory norms, which, by their nature, should not be subject to government intervention.

The fact is that in Tajikistan a peculiar, respectful attitude to customs and traditions has historically formed. M.A. Makhmudov draws attention that even the old harmful customs quite strongly affect the consciousness and behavior of Tajik citizens [11].

It is possible to say that the Tajik people are more respectful of customs than the norms of positive law, although customs are often unfavorable and burdensome. Such a rigorous attitude to customary law even put the state in front of the need to adopt in 2007 the Law “On regulation of traditions, celebrations and rites in the Republic of Tajikistan” [12] and to form a department of religion, regulating traditions, celebrations and rituals in the structure of the Executive Office of the President of the Republic of Tajikistan.

The above mentioned Law aimed at the protection of social interests of the population and prevention of unnecessary expenses that seriously damage the material interests and moral standards of citizens, imposed a ban and restrictions on the performance of certain types of rites. The very adoption of such a law indicates the strength of customary law in Tajikistan.

As an example, let us give extracts from this Law. In accordance with Article No. 8 of the Law, birthdays can be celebrated only in family. According to the Article № 9 of the Law, the rite on the occasion of circumcision needs to be regulated. In particular, it is mandatory determined that a feast (banquet) on the occasion of circumcision is conducted voluntarily for one day with up to 60 people participating only within one event with low expenses. Such a feast can be held together with wedding on the occasion of marriage. During the celebration on the occasion of circumcision, it is prohibited to hold events of the *maslikhatoshi* (adviser on the preparation of a celebration), *buzkashi* (goat dragging game), *gushtingiri* (national wrestling), *ordbason* and present gifts to people other than a boy – hero of the occasion.

As for the wedding on the occasion of marriage, it is held voluntarily for no more than two days with a banquet of up to 150 people and a wedding treat for up to 200 people at the expense of both parties. At the same time, the organization of events “*fotikha*” (espousal rite), *maslikhatoshi* (adviser on the preparation of a celebration), *idonabari* (holiday gift),

sandukbaron, sarupobinon (demonstration of the clothes of bride and groom), chougstak (a celebration for girlfriends of a bride), “raistalbon”, “kudotalbon” (nepotism), presenting of clothes for guests of both sides and relatives of a bride and a groom with the exception of presenting gifts to a groom, bride and their parents (Article No. 10 of the Law).

The law also regulates funeral rites and mourning. Thus, the Janoza ritual (the funeral prayer) is performed without limiting the number of participants. The rite on the occasion of the “third day” after death is held without arranging a meal. The ceremony of the “Forties of Days” is conducted voluntarily with the participation of up to 80 people with a meal from one dish (Article No. 11 of the Law).

The violation of the specified requirements according to the Article No. 481 of the Code of the Republic of Tajikistan on Administrative Offenses entails the imposition of a fine on individuals in the amount of from 100 to 120 indicators for calculations¹.

However the established prohibitions and restrictions and responsibility for their violation do not stop the population from following the rules of behavior perceived from the past, as evidenced by published information about the number of offenses and the amount of fines imposed for violating the above mentioned Law.

The reason for ignoring the law is not at all in skeptical attitude towards it. The compliance with the requirements of usually unfavorable custom is explained not only by disregard of the established order, but also by the manifestation of adaptability.

It is evident that, for many Tajiks, the observance of individual customs is a highly undesirable and burdensome action. But, as A.G. Khalikov, noted “no single positive legislation, no single canonical right has such power and strength as the customs and traditions created by the people over the centuries” [13]. And therefore, “being drawn into a chain of relationships, covered by an age-old tradition, not everyone is able to act in the appropriate situation contrary to the expectations of most people in this social environment” [14]. The cause is the negative reaction of society to the behavior deviating from social expectations.

The above mentioned aspects indicate the peculiarities of the national mindset in the Republic of Tajikistan in the best possible way and largely explain the reasons for the presence of mandatory principles of legal regulation where, in fact, they should not exist.

¹According to the Law of the Republic of Tajikistan “On the Indicator for Calculation”, the indicator for calculations is established annually in the Law of the Republic of Tajikistan “On the State Budget of the Republic of Tajikistan” for the relevant year the amount of money used to calculate taxes, duties, other mandatory payments and penalties for the calculation of certain value of the marginal (lower or upper) values, social benefits and allowances in accordance with the legislation of the Republic of Tajikistan. In 2018, the indicator for calculations is 50 somoni, which is approximately equal to 5 US dollars.

IV. CONCLUSION

Therefore it is possible to conclude that the presumption of permissiveness in its true meaning, as it is understood in European law, is not entirely acceptable to the legal system of the Republic of Tajikistan in terms of the regulation of property and other civil-law relations. Limited legal awareness, far from European ideals, is the fear of the intensification of permissive principles of contractual law, which may contribute to an uncontrolled decline in contractual discipline and other abuses of participants of civil circulation.

Moreover, not only economic entities are interested in this or that activity, which mediates property relations, but also the state and society as a whole are also involved. The payment of taxes, the creation of jobs, the production of goods, the performance of work and the provision of services — all these aspect constitute not only private but also public interest. With increasing publicity of entrepreneurial activity, public interest in certain goods, works and services in one form or another, the government establishes an increasing number of all possible deviations from the principle of freedom of contract, from understanding the contract as an agreement of the parties. Therefore, the restriction of the rights and freedoms of citizens in order to ensure the rights and freedoms of other citizens, public order is allowed at the constitutional level in the first place.

By limiting the freedom of individual economic entities, placing their interests below the public ones, the government thereby guarantees the protection of the interests of society as a whole. By imposing such restrictions, the contradictions that exist between public and private interests are relaxed and aligned. The balance between them is established. In this regard, we believe that excessive government intervention in contractual relations is much more perfect and humane than the possible arbitrary behavior caused by excessive freedom in the contractual sphere.

The provided restrictions on the freedom of entrepreneurial activity and freedom of contract do not pursue the goal of infringement upon the civil rights of civil turnover. On the contrary they are directed, first of all, at the protection of the weak side of relations, secondly, at the protection of the interests of creditors, thirdly, at the protection of the interests of the government and general public interest.

The freedom in law, in our opinion, should be understood in the same sense in which philosophy defines it, that is to say as a derivative component of restrictions. The restrictions and limits of freedom represent their own freedom, since complete freedom, which does not have such limitations and boundaries, is not freedom, but the denial of it, leading to complete lack of freedom.

Acknowledgements

The author expresses her gratitude to the Russian-Tajik (Slavonic) University for the financial support of the research under the University Development Program for 2018.

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