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Code in the system of alternative regulatory legal acts: priority issues

Código en el sistema de actos jurídicos reglamentarios alternativos: un asunto prioritario

Igor Vasev[1]
Altai State University - Russia
vasev1986@mail.ru
Konstantin Sinkin[2]
Altai State University - Russia
ska76@mail.ru
Oksana Avilova[3]
Altai State University - Russia
avilova-oksana@rambler.ru
Yuriy Zelenin[4]
Altai State University - Russia
uri-zelenin@yandex.ru

ABSTRACT

Modern practical jurisprudence faces many difficulties caused by inconsistencies in the current legislation. This problem concern the collision between codified and special legislation. We have formed a unified approach to solving the conflict of norms of codes and other federal laws with the help of general scientific methods (analysis, synthesis, and analogy), and special, private scientific methods (formal legal, functional methods, and method of legal modeling). We have formulated a collision rule according to which the norm of a special law takes precedence over the norm of an ordinary law (including codified one). Mentioning or not mentioning the code about the admissibility of the adoption of a special law in a particular case has no legal significance. We believe that the thesis that the codified act automatically acquires increased legal force in relation to uncodified laws, which is widespread in modern science, should be recognized as incorrect.

Keywords: Collision of law; codified law; special law; legal effect of the law.

RESUMEN

La jurisprudencia práctica moderna enfrenta muchas dificultades causadas por inconsistencias en la legislación actual. Este problema se refiere a la colisión entre la legislación codificada y especial. Hemos formado un enfoque unificado para resolver el conflicto de normas de códigos y otras leyes federales con la ayuda de métodos científicos generales (análisis, síntesis y analogía), y métodos científicos privados especiales (métodos formales legales, funcionales y métodos de modelado legal). Hemos formulado una regla de colisión según la cual la norma de una ley especial tiene prioridad sobre la norma de una ley ordinaria (incluida una codificada). Mencionar o no mencionar el código sobre la admisibilidad de la adopción de una ley especial en un caso particular no tiene importancia legal. Creemos que la tesis de que el acto codificado adquiere automáticamente una mayor fuerza legal en relación con las leyes no codificadas, que está muy extendida en la ciencia moderna, debe reconocerse como incorrecta.

Palabras clave: colisión de leyes; ley codificada; ley especial; efecto legal de la ley.

1 PhD, Associate Professor, Theory and History of State and Law, Altai State University, Russian Federation.
2 PhD, Associate Professor, Theory and History of State and Law, Altai State University, Russian Federation.
3 PhD, Associate Professor, Theory and History of State and Law, Altai State University, Russian Federation.
4 PhD, Associate Professor, Theory and History of State and Law, Altai State University, Russian Federation.

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INTRODUCTION

In modern Russian legal science, the opinion about the special - increased - legal force of the code in the system of sources of a particular branch of law is firmly established. The fact that the legislator has given the status of a codified legal act to the legislator automatically places it at the top of the industry pyramid. Moreover, indeed, there is no doubt that the Civil Code, and the structure of labor law by the Labor Code (Makovskii, 2009) rightfully crown the structure of civil law.

It is for this reason that the attention of the reader familiar with the text of a particular code does not stop at introductory provisions fixing the provision of this act among other legal acts. Thus, a provision, the standard version of which is established, for example, in paragraph 2 of Article 3 of the Civil Code of the Russian Federation, is perceived quite routinely:

> "The civil legislation consists of the present Code and other federal laws (further - laws) regulating relations specified in points 1 and 2 of article 2 of the present Code accepted according to it. Norms of the civil right, containing in other laws, should correspond to the present Code".

The same provision (with minor variations) is found in other codified acts (Osborne and Charles, 2007). From these and similar provisions it follows that if a provision of another law does not comply with the provisions of the Code, it is not applicable. The conflict of laws rule established through this is as follows: when a codified act collides with an uncodified priority, it has the first one (Braginskii, 2009).

It would seem that there is nothing wrong with this rule: the Code, playing a systemic role within the legal industry, is entitled to claim a special status. Therefore, giving it a little more legal force seems to be quite justified.

However, the indisputability of this idea disappears as soon as we turn to other conflict of laws rules. A really stalemate situation becomes when a code with "increased" legal force comes into conflict with a special uncodified law.

For example, Clause 3 of Article 103 of the Civil Code of the Russian Federation (as amended before September 1, 2014):

> "The executive body of the company may be collegial (management board, directorate) and (or) sole (director, general director).
>
> At the same time, Article 69 of the Federal Law "On Joint-Stock Companies" of 1995 stated:
>
> «1. Management of the Company›s current activity is performed by the sole executive body of the Company (Director, General Director) or the sole executive body of the Company (Director, General Director) and the collegial executive body of the Company (Management Board, Management Board)».

Thus, within the meaning of the Federal Law "On Joint-Stock Companies" the executive body could not be represented only by the collegial executive body. At the same time, a special law in comparison with the general law (the code) even narrows down the range of opportunities provided by the law, i.e., from the point of view of the subject of civil law is less attractive. The question arises: which of the two acts (code or special law) is to be applied? In addition, how will the answer be affected by the fact that a special law turns out to be "less advantageous" for the law enforcer?

The general theory of law has long ago developed a hierarchy of conflict of laws rules:

1) "Lex superior derogat legi interior";
2) "Lex specialis derogat generali";
3) "Lex posterior derogat priori".

Schematically, the hierarchy of these rules looks like this:

Absolute priority rule of law industry: rule on resolving conflicts of law of different legal force – industry priority rule – rule on common and special norm – temporary conflict resolution rule.

The value of this hierarchy is that it clearly establishes the sequence of application of individual conflict of laws rules: primacy always remains over the norm of greater legal force (rule 1 always wins rule 2 and 3). In the absence of a hierarchical collision, primacy remains a special norm (rule 2 wins 3, but not 1). And only in the absence of all other collision relations, priority is given to the rule later (rule 3 is subordinated to rule 1 and 2).

For us, this means that, since the code has "increased" legal force, the abovementioned conflict should be resolved according to the first rule on the priority "lex superior". The rule about "lex specialis" is not used at all as having a lower specific weight. In the conflict between Clause 3, Article 103 of the Civil Code of the Russian Federation (as amended before September 1, 2014) and Article 69 of the Federal Law "On Joint-Stock Companies", it is necessary to recognize the superiority of the Civil Code of the Russian Federation.

After all these arguments, the question naturally arises: why do all these numerous special laws exist, if they immediately yield their positions to the codes, if they do not coincide in their content? Obviously, a special law will be effective only if it duplicates the provisions of the code. Then the need for such a special law will be doubled. So, the "lex specialis" rule practically does not seem to have a chance to be applied to the code. We will try to understand these and related issues.

DEVELOPMENT

Code as a law of "increased" legal force? History of the problem

Legislator, in fact, points to the mandatory consistency and even compliance with the Civil Code of all other civil law laws (Pablo, Norge, 2015). This means that in the event of a conflict or even more so, other federal laws are not applicable. Article 4 of the Law of the Russian Federation "On the Implementation of Part One of the Civil Code of the Russian Federation" clearly states that until the laws and other legal acts in force on the territory of the Russian Federation are brought into compliance with the Civil Code of the Russian Federation, they are applied insofar as they do not contradict the Civil Code of the Russian Federation.

Article 3.2 of Part I of the Civil Code of the Russian Federation, adopted in 1994, gave rise to an extensive scientific discussion on the legal force of the codes in the domestic legal system. Apparently, the general opinion is steadily inclined to the recognition of some kind of legal supremacy of the code in relation to the entire sectorial regulatory framework headed by this code. This view of the code's provisions is called "primus inter pares" (Henderson, 2010).

Let us cite the opinion typical of this concept: "The legally fixed priority of the Civil Code is a manifestation of its legal force, which allows this normative legal act to take a place in the system of horizontal hierarchy (hierarchy of civil law federal laws) between federal constitutional and current (non-codified) federal laws" (Ruzanova, 2007). The idea of the supporters of the concept of "primus inter pares" is quite clear: the code has a higher legal force and therefore has priority over the current federal law (even if the latter contains a special rule of law!).

Or the proponents of the idea of "primus inter pares" choose an intermediate version: it is assumed that p. Article 3 (2) of the Civil Code of the Russian Federation justifies the precedence of the Code over "ordinary" federal laws, at the same time allowing the existence and priority application of special laws, but only in case of direct reference to them by the Civil Code itself.

Thus, analyzing the item. V.A. Rakhmilovich concludes that, firstly, the norms detailing the rules of the Civil Code or establishing derogations from them are admissible only in cases and within the limits provided for by the corresponding norm of the Civil Code itself, and, secondly, in everything that is not directly defined by the norm of this special law, this civil legal relationship is subject to the rules of the Civil Code.

At the same time, the author considers this location of the Civil Code among other laws not as a drawback, but as a virtue of the new code. Since the only Civil Code does not exhaust the system of civil legislation, it is necessary, in his opinion, to take measures against the emergence of contradictions within this system. This is the reason why the norms of the code take precedence over the norms of civil law, which are outside the Civil Code. In case of contradiction between the Civil Code and other laws, courts are recommended to apply the relevant provision of the Civil Code. When the legislator admits the need to deviate from the general rules of the Civil Code, he, according to V.A. Rakhmilovich, should at the same time make an addition to the relevant provision of the Code, adding a reservation: "unless otherwise provided by law" (Falileev and Kozlov, 1997).

P.A. Falileev and V.B. Kozlov rightly point to the recklessness of this approach, since "the legislator, putting himself within the narrow limits of the Civil Code, will probably be forced in the future to exhaust the entire Code of Conduct with such reservations, and where for any reason they will not appear, there will be grounds for unnecessary disputes" (Falileev and Kozlov, 1997). In other words, to make the application of a special law dependent on a reference to it by the Civil Code of the Russian Federation means to refuse to apply another special law, which the Civil Code of the Russian Federation has "forgotten" or "failed to mention", in each specific case. Such an approach to the relationship between the Civil Code of the Russian Federation and the developing legislation is obviously wrong.

Therefore, it is necessary to realize the severity of the problem: the Civil Code of the Russian Federation (as well as any other code), which is formally the same federal law as the "ordinary" federal laws, unilaterally indicates its "increased" legal force in relation to other federal laws. Therefore, the concept of "primus inter pares" is in urgent need of theoretical discussion.

To understand the essence of the item. Article 3, paragraph 2, of the Civil Code of the Russian Federation requires a historical way of interpreting the law. The history of the formation of the idea of "primus inter pares" in the national jurisprudence is clearly demonstrated in the work of A.A. Petrov and V.M. Shafirov "Subject-Hierarchy of Regulatory Legal Acts". Here are some excerpts from this work:

"At the end of the 1950s, the Soviet legislator and legal scholars faced a problem, the solution of which required significant tension in legal theory and law. Its essence was the following. In accordance with the Law of the USSR of February 11, 1957, "On Reliability of the Legislation on the Organization of Courts of the Union Republics, the Adoption of Civil, Criminal and Procedural Codes" it was decided, "to refer the adoption of the corresponding codified acts to the jurisdiction of the Union republics" (Petrov, Shaferov, 2014).

However, in order to ensure the unity of the legal space of the USSR, a form was required that would allow unifying the future union codified legislation in a framework order. As such, theoretical science proposed the Fundamentals of Legislation of the USSR as a special kind of codified acts. These Foundations were intended to set the general directions of development of the republican legislation in a framework format. This made it possible

for theoretical science to consider the Fundamentals of Legislation "as an act of a higher rank than simple laws regulating a relatively narrow range of issues in the industry" (Scientific, 1981).

This idea was later embodied in paragraph 2 of Article 3 of the Civil Code of the Russian Federation. Discussion of the draft of the new Civil Code revealed all the contradictions of the political situation in the state. The political victory won by the supporters of liberal reforms in the economy did not seem to be strong due to the unpopularity of such a program of reforms among many party factions in the State Duma in 1993-1995.

Therefore, the new Civil Code had great hopes for a radical market transformation of the economy, which is called the "economic constitution of Russia" and even the "Free Society Manifesto" (Alekseev, 2010). The desire to make economic reforms irreversible and to prevent their revision was dictated by the content of paragraph 2 of Article 3 of the Civil Code of the Russian Federation. Through these reforms, it was as if "safe" for the future from attempts of the State Duma to correct the adopted Civil Code with the help of subsequent laws. "Civilists - developers of the Civil Code of 1994 openly called the new Civil Code "economic constitution" of the new capitalist Russia.

Apparently, they were very much afraid that the State Duma with its communist majority would "shred" the conceptual ideas of the State Duma through the adoption of specific federal laws and thus nullify the efforts of the developers of the State Duma to form the foundations of a market economy" (Petrov, Shafirov, 2014). The arguments in favor of a "larger gravitational mass" of the code, which were taken from the Soviet jurisprudence regarding the status of the Fundamentals of Legislation, were very useful. The arguments were substantiated by indications of the systemic function of the Code within the industry, its political and practical importance, its application throughout the country, etc.

The immediate effect achieved by implementing the concept of "primus inter pares" in civil law may have been positive. In the context of economic collapse, at least some stability has been achieved in the development of the sector. Nevertheless, the consequences of this step were far from certain. After all, the law enforcer naturally had a question: "If the Civil Code points to the need for compliance and consistency with the entire body of civil legislation under threat of non-application of the latter, then why do we need such legislation at all? If the "ordinary" civil law contradicts the Civil Code of the Russian Federation, it obviously does not apply; if it corresponds to the Civil Code of the Russian Federation (in detail, I suppose), then the norms of the Civil Code of the Russian Federation are sufficient. In fact, the penetration of the principle of "primus inter pares" into the body of law has devalued the traditional principles of resolving collisions of "lex specialis derogat generali" and "lex posterior derogat priori" (Barak, 2005).

Example p. Article 2, paragraph 3, of the Civil Code of the Russian Federation was extremely contagious. A number of acts introduce in their text a reference to their "increased" legal force. As a result, A.A. Petrov and V.M. Shaferov are about to become members of the Board of Directors in 2014. Fifty federal laws indicating their priority (surprisingly, but among them uncodified acts prevail). All this gives grounds to assert that the experience of the Ministry of Justice of the Russian Federation in the field of human rights and fundamental freedoms is the basis for the claim that the experience of the Ministry of Justice of the Russian Federation in the field of human rights and fundamental freedoms is the basis for its development. Article 3, paragraph 2, of the Civil Code of the Russian Federation was considered by the legislator as positive and necessary for spatial expansion.

Legal positions of the Constitutional Court of the Russian Federation on the issue of the legal force of the Code

The Constitutional Court of the Russian Federation contributed to the resolution of the issue of "primus inter pares" admissibility. In a number of its acts (mainly up to 2000), it pointed out the inadmissibility of vertical hierarchy among federal laws and formulated the following legal positions:

1) The 1993 Constitution of the Russian Federation itself distinguishes only three types of federal laws (the law on amendments to the Constitution, the federal constitutional law and the federal law), so arbitrary proclamation of the codes themselves as a separate version of the Federal Law does not correspond to the Constitution of the Russian Federation;

2) The code is also adopted by the Federal Assembly of the Russian Federation and according to the procedure provided for the adoption of non-codified federal laws;

3) Therefore, "by virtue of Article 76 of the Constitution of the Russian Federation, no federal law has greater legal force in relation to another federal law. The correct choice based on the establishment and study of factual circumstances and the interpretation of the rules to be applied in a particular case does not fall within the jurisdiction of the Constitutional Court of the Russian Federation, but rather within the jurisdiction of courts of general jurisdiction and arbitration courts;

4) This means that conflicts arising in practice should be resolved by the enforcer based on the conflict of laws rules on special and late rules of law by courts of general jurisdiction (Barak, 2005).

In general, the position taken by the Russian Constitutional Court (in acts prior to 2000) on the issue of "primus inter pares" should be characterized as correct. The CC of the Russian Federation did not follow the path of recognition of some increased legal force for the codes, as it instinctively realized this path as destructive for the whole system of state law. At the same time, the CC of the Russian Federation limited itself to half measures: not recognizing the principle of "primus inter pares", at the same time, it did not recognize any of the provisions of the

existing codes on their priority (for example, paragraph 2 of Article 3 of the Civil Code of the Russian Federation) contrary to the Constitution of the Russian Federation, which would be logical.

The Constitutional Court of the Russian Federation has as it were removed from the final resolution of the dispute, shifting the burden of doctrinal and practical decision on the shoulders of courts of general jurisdiction and arbitration (until recently) courts.

The acts of the Constitutional Court after 2000 concerning the "primus inter pares" finally confuse the law enforcer. Here is an example of such a highly controversial Resolution of the RF Constitutional Court.

Resolution of the Constitutional Court of the Russian Federation of June 29, 2004, T13-P:

"The Code of Criminal Procedure of the Russian Federation, which, according to part one of its article 1, establishes the procedure for criminal proceedings in the territory of the Russian Federation, being an ordinary federal law, does not have an advantage over other federal laws from the point of view of the hierarchy of normative acts defined directly by the Constitution of the Russian Federation...

In essence, the requirement of priority of the Code of Criminal Procedure of the Russian Federation formulated in the first and second parts of Article 7 of the CPC of the Russian Federation in connection with its Articles 1 and 8 and relating to the procedural law, corresponds to the most codified state of criminal law, providing the most adequate procedural form of its implementation as a substantive right. At the same time, the legislator proceeded from the special role played in the legal system of the Russian Federation by the codified normative legal act that carries out complex normative regulation of certain relations.

Consequently, federal legislators - with a view to implementing the constitutional principles of the rule of law, equality and a unified regime of legality, and ensuring State protection of human and civil rights and freedoms in the field of criminal justice - are entitled to establish the precedence of the Code of Criminal Procedure over other federal laws in the regulation of criminal procedural relations (Phelps, 2003).

At the same time, the priority of the Code of Criminal Procedure of the Russian Federation over other ordinary federal laws is not unconditional, but is limited to the framework of a special subject of regulation, which, as it follows from its articles 1 - 7, is the procedure of criminal proceedings, i.e. the procedure of proceedings (pre-trial and judicial) in criminal cases on the territory of the Russian Federation.

The Constitutional Court has mixed up to an unimaginable level several conflict of laws rules, which in principle do not allow such a possibility. At the same time, the text of the Resolution refers to some mysterious "conditional priority of the CPC" in relation to all other Federal Laws. "It seems that the Constitutional Court of Russia has tried to reconcile the irreconcilable - recognition and denial of the subject hierarchy - and has suffered a natural failure, adding only oil to the flames of discussion, because now its conclusions can be interpreted in its favor by both supporters and opponents of the subject hierarchy.

The former will leave the quotations of the motivating part of the CC's definitions with everything concerning why the provision of Article 7 of the CPC of the Russian Federation was not recognized as unconstitutional (the necessary unity of sectoral regulation, specificity of codified acts, etc.), while the latter will omit it and rely on the thesis that the CC stressed that the "subject" priority is weaker than the principles of lex special and lex posteriori, and therefore it cannot be attributed to the hierarchical one" (Petrov, Shaferov, 2014).

CONCLUSIONS

Domestic jurisprudence is in dire need of a clear doctrinal approach to resolving the conflict of norms of equal legal force (including between a codified and non-codified act). Further progress towards thoughtlessly giving more legal force to codes is completely unpromising and only generates "legal inflation". Non-critical trust in a single formal legal criterion of admissibility of a special law ("unless otherwise provided by law") also fails to withstand criticism from either a practical or doctrinal point of view (Barak, 2006). The Code is certainly not an ordinary federal law. However, its uniqueness lies in a fundamentally different level of generalization of legal material, in a concentrated expression of the method of legal regulation applicable to the subject matter. Therefore, the Code deserves attention and respect as a systemically important monument both for practice and for science of law (Hage, Akkermans, 2014). It should be followed by "the power of authority", but not "the power of force".

In this regard R. David wrote: "When it comes to the oldest and most highly respected codes, their practical significance is higher than that of other laws: there is a clear tendency for lawyers to attach more value to the principles established by these codes, as they have studied them specifically" (David and Zhoffre-Spinozi, 1988), in which they have seen the "essence of law". Therefore, we can quite well accept the admissibility of giving priority to the application of the code as a general law over a special law if the special law deviates from the "spirit" of the branch of law (when the special rule does not fulfil its purpose of continuing the general rule). However, this is an exceptional case of "son's disrespect" of a special norm in relation to the general one. For the most part, however, the code has the same legal force as the uncodified laws (Bast, Pyle, 2011).

Therefore, the only correct solution to conflict of laws cases involving the code is the following: the provision of a special law takes precedence over the provision of the "ordinary" law (including the codified one, see Vranes, 2006). Mentioning or not mentioning the code about the admissibility of a specific case of a developing special law has no legal significance. However, the priority of a special rule is not even limited to the time of adoption of the conflicting rules. (If a new rule of the code and an old special rule come into conflict, priority should be given to the old special rule).

Thus, modern jurisprudence, which is extremely disoriented by the "war of priorities" of codes and other laws, faces the task of deep and consistent understanding of the way out of the current stalemate situation, formation of a scientific approach to the problem.

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