

Artículo de investigación

Correlation of the categories “guilt” and “unfairness” in protective relations

Correlación de las categorías “culpa” e “injusticia” en las relaciones de protección

Correlação das categorias “culpa” e “injustiça” nas relações de proteção

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Abstract

The last decade was marked by a large-scale introduction of the category of “fairness” into the Russian legal system, which has acquired the character of the main principle of civil law, and its antipode - “unfairness”. This innovation in the field of protective relations gave rise to the problem of unfairness with the condition of civil liability as the offender’s guilt, as well as the problem of applying opposite presumptions: presumption of fairness and presumption of guilt. The objective of the study is to solve these problems. The authors conclude that Russian civil law implements two different approaches to the understanding of fairness (unfairness) - subjective and objective. Fairness (unfairness) in a subjective sense is a characteristic of the subjective side of a person’s behavior, namely, his/her innocence (guilt); fairness (unfairness) in an objective sense does not compete with the category of innocence (guilt), since characterizes the objective side of a person’s behavior, namely, its legality (illegality).

Keywords: fairness, unfairness, protective relations, legality, illegality, guilt, innocence, presumption of fairness, presumption of guilt.

Resumen

La última década estuvo marcada por una introducción a gran escala de la categoría de "imparcialidad" en el sistema legal ruso, que ha adquirido el carácter del principio principal del derecho civil y su antípoda: la "injusticia". Esta innovación en el campo de las relaciones de protección dio lugar al problema de la injusticia con la condición de responsabilidad civil como culpabilidad del delincuente, así como el problema de la aplicación de presunciones opuestas: la presunción de imparcialidad y la presunción de culpabilidad. El objetivo del estudio es resolver estos problemas. Los autores concluyen que el derecho civil ruso implementa dos enfoques diferentes para entender la imparcialidad (injusticia): subjetivo y objetivo. La imparcialidad (injusticia) en un sentido subjetivo es una característica del lado subjetivo del comportamiento de una persona, a saber, su inocencia (culpa); la imparcialidad (injusticia) en un sentido objetivo no compite con la categoría de inocencia (culpa), ya que caracteriza el lado objetivo del comportamiento de una persona, es decir, su legalidad (ilegalidad).

Palabras claves: imparcialidad, injusticia, relaciones protectoras, legalidad, ilegalidad, culpabilidad, inocencia, presunción de imparcialidad, presunción de culpabilidad.

Resumo

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A última década foi marcada por uma introdução em larga escala da categoria de “justiça” no sistema legal russo, que adquiriu o caráter do princípio principal do direito civil, e seu antípoda - “injustiça”. Essa inovação no campo das relações de proteção deu origem ao problema da injustiça com a condição de responsabilidade civil como culpa do infrator, bem como ao problema de aplicar presunções opostas: presunção de justiça e presunção de culpa. O objetivo do estudo é resolver esses problemas. Os autores concluem que o direito civil russo implementa duas abordagens diferentes para a compreensão da justiça (injustiça) - subjetiva e objetiva. Equidade (injustiça) em um sentido subjetivo é uma característica do lado subjetivo do comportamento de uma pessoa, a saber, sua inocência (culpa); A justiça (injustiça) em um sentido objetivo não compete com a categoria de inocência (culpa), pois caracteriza o lado objetivo do comportamento de uma pessoa, a saber, sua legalidade (ilegalidade).

Palavras-chave: justiça, injustiça, relações de proteção, legalidade, ilegalidade, culpa, inocência, presunção de justiça, presunção de culpa.

Introduction

The sphere of legal regulation of protective relations, along with the traditional category of “guilt”, uses increasingly the category of “unfairness”. Despite the active development of legislation, large-scale law enforcement practice, the extensive bibliography of the issue in this area cannot be considered satisfactory: this innovation has created the problem of correlating the concept of unfairness with the condition of civil liability as the culprit and, accordingly, the problem of applying opposite presumptions (presumption of good faith and the presumption of guilt). There is an obvious discrepancy between the solutions proposed in various regulatory sources for this issue. The lack of unity in approaches is also demonstrated by the doctrine of civil law, which is still far from creating a complete and consistent theoretical model of the categories in question and their correlation.

The objective of this study is to substantiate the concept, which allows revealing the ratio of the categories of “guilt” and “unfairness” in protective relationships. This goal is supposed to be achieved by solving the following tasks:

- identification and analysis of the approaches to the definition of the concept of guilt available in the doctrine, legislation and law enforcement practice;
- establishment of the meaning and significance of the category of fairness (unfairness) in Russian civil law and the peculiarities of its use in regulating protective relations;

- formulation of conclusions about the need to distinguish the above related categories.

Methods

The authors used in this paper both general scientific methods of cognition - induction and deduction, abstraction, analysis, synthesis, modeling, historical, etc., and special methods of legal research - systemic interpretation, formal legal and comparative legal, which led to scientifically based conclusions and suggestions.

Results and Discussion

- The doctrinal concept of guilt: One of the traditional categories of civil law is the category of guilt, which organizes the sphere of civil liability. It is, firstly, one of the conditions for the emergence of civil liability in various types of civil law enforcement relationships: contractual, tort, corporate, intellectual (par. 3, Art. 28 of the Civil Code of the Russian Federation; Art. 53.1 of the Civil Code of the Russian Federation; Art. 401, 538, par. 2 Art. 547, par. 1 Art. 777 of the Civil Code of the Russian Federation, par. 2 Art. 1064, par. 1 Art. 1073, Art. 1074, 1076 of the Civil Code of the Russian Federation, par. 3 Art. 1250, Art. 1253.1 of the Civil Code of the Russian Federation, Art. 61.11 of the Federal Law “On Insolvency (Bankruptcy)”; secondly, the form of the offender’s guilt may serve as a circumstance affecting the liability of the offender (Art. 151, par. 4 Art. 401, 1101 of the Civil Code of the Russian Federation).

The legal meaning of guilt is quite definitely expressed in the law; it does not cause any

disputes in the doctrine, except for the ongoing debate about the validity of the principle of guilt and the desirability of replacing it with the principle of causation (Andreev, 2008; Bogdanov, 2012), and is perceived by law enforcement practice. Paragraph 12 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 of June 23, 2015 "On the application by courts of certain provisions of section 1 of part one of the Civil Code of the Russian Federation" as well as a later Resolution of the Plenum of the Supreme Court of the Russian Federation No. 7 of March 24, 2016 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations" (as amended on 07.02.2017) (par. 5) confirm the traditional approach to guilt as an obligatory condition of civil liability, which is assumed until proven otherwise.

Such unanimity is hardly in evidence in the definition of the concept of guilt. There are two basic and widely discussed concepts of guilt in the doctrine: "psychological" and "behavioral". The first and, obviously, priority psychological theory in the doctrine is that fault is defined as the mental attitude of the offender to his unlawful behavior and its consequences (Ioffe, 2003; Matveev, 1995; Osipov, 2001; Shepel, 2014; Lurchak, 2015). Opponents of such an interpretation of guilt perceive it as a dead-end, alien to the sphere of civil legal relations, continuing, by inertia, the implementation of the criminal law approach "to the concept of guilt as one of the grounds (subjective side) of the crime" (Braginskii and Vitrianskii, 1997). The main reproaches are reduced to the hypothetical nature of this "mental" attitude, the impossibility of this approach in resolving civil disputes in court due to the practical impossibility of detecting mental experiences ("awareness", "foresight", "understanding"); the problematic nature of the "mental" understanding of guilt in relation to such an offender as a legal entity (Braginskii and Vitrianskii, 1997). Critics of psychological theory point out its uselessness, since "neither the person whose rights and interests are violated, nor the jurisdictional authority, which will have to consider a lawsuit, cares the debtor's mental attitude to his actions" (Puginskii, 1984), and some of its supporters are partly agree with, however, with the proviso that "the subjective internal attitude of a person to his unlawful behavior has no practical value in contractual law" (Kuznetsova, 2013).

Therefore, the dissatisfaction with this approach and the desire to develop a different, purely civil, practically applicable, pertaining to all types of persons and types of responsibility (contractual and non-contractual) concept of guilt is quite understandable. The goals of implementing these tasks are served by the behavioral theory of guilt, the essence of which is to objectively evaluate the behavior of the offender: guilt lies in the failure of the "offender" to take all possible measures to prevent the adverse consequences of his behavior "(Civil law, 2006), to prevent violations in the presence of a real possibility for the proper performance of the obligation (Puginskii and Safiullin, 1991). Opponents call a significant drawback of such a definition of guilt the concept of guilt and illegality ("guilt dissolves in illegal behavior") (Kuznetsova, 2013), the impossibility to determine the presence of intent in terms of the "failure to take measures", and, accordingly, delimit intent and negligence (Kuznetsova, 2013; Novitskii, 2006).

The recent literature has expressed opinions about the absence of irreconcilable contradictions between the basic concepts of guilt, and made attempts to reconcile them to some extent. For example, it is indicated that arbitration practice sees in the circumstances described in par. 2 p. 1 Art. 401 of the Civil Code of the Russian Federation, those external (objective) signs, by the presence of which one can judge about the subjective, mental attitude of the debtor to the violation of obligations. Just as a transaction is an act of a person manifesting outside his will to achieve legal consequences, just as all actions that are required of a debtor are acts of manifestation of the will to properly fulfill an obligation. The debtor's failure to take the necessary measures "testifies to the inadequate subjective mental attitude of the violator to his violation, that is, his fault" (Belov, 2011).

- The concept of guilt in civil law and law enforcement practice: Despite the predominantly negative attitude towards the behavioral theory of guilt in the doctrine of civil law, it found its implementation in civil legislation. For the first time the legal approach to the substantive definition of the concept of guilt was proposed in the Fundamentals of Civil Legislation of the USSR and Union Republics, approved by the Supreme Soviet of the USSR No. 2211-1 on 31.05.1991 (hereinafter the Fundamentals). Up to this point, the acting Civil Code of the RSFSR of 1964 in Art. 222 "Guilt as a condition of liability for breach of obligation" and in Art. 444 "General

grounds for liability for harm” legally established guilt as a mandatory condition of contractual and tort liability, the presumption of guilt, and for contractual liability - designated two forms of guilt without any definition (intent and negligence). Art. 71 of the Fundamentals of the “Grounds for liability for violation of an obligation”, a formula was proposed for determining the debtor’s innocence, which acts as the antipode of his guilt: “the debtor ... took all measures in his power for the proper performance of the obligation”. The same approach was implemented in Art. 401 of the current Civil Code of the Russian Federation “Grounds for liability for breach of an obligation”, but with some differences:

- the legislator specified the criteria for determining the composition of “all measures”, the adoption of which indicates the debtor’s innocence: based on the degree of care and diligence that is required from the debtor by the obligation and the terms of the transactions;
- the words “in his power” were excluded from the definition of the concept of innocence, i.e. indication of the need to take into account the individual characteristics of the debtor.

It appears that these changes really testify to the legislator’s departure from the use of a subjective criterion based on the individual characteristics of the offender¹⁸² (“taking into account the subjective capabilities of a particular person”, “did everything in his power”) and the transition to objectification of the criteria: a due degree of care and diligence is determined from the position of an ordinary, average person, a “rational owner” operating under the conditions presented to him by civil transactions (Nam, 2006), “standard of conduct of a reasonable and prudent businessman” . Increased requirements can be imposed only when the law or the agreement of the parties to the obligation

¹⁸² The literature questions the conclusion about the behavioral understanding of guilt in Art. 401 of the Civil Code of the Russian Federation with reference to the following: a) use in this article of psychological categories of care and prudence upon the determined concept of guilt (Dmitrieva O.V.); b) the Civil Code of the Russian Federation provides an objective

specifically establishes this. Thus, the Supreme Court of the Russian Federation in one of the specific cases indicated that “Russian legislation contains an increased standard of behavior of entrepreneurs in civil matters (p. 3 Art. 401 of the Civil Code of the Russian Federation) and a standard of expected fair behavior in their activities (Art. 10 of the Civil Code of the Russian Federation)” (Decision of the Supreme Court of the Russian Federation, 2013). Such an understanding of guilt, which is abstracted from the individual capabilities of a person, indicates an increase in responsibility and bringing it closer to “innocent, while still preserving guilt (though only from a formal point of view) as a condition of responsibility” (Li Ch, 2013).

Thus, the legislation and judicial practice follow the behavioral theory of guilt: an assessment of the defendant's arguments about his innocence is based on an analysis of his behavior, without resorting to solving the problem of the psychological state of the person at the time of the violation. Moreover, this approach is observed when establishing the guilt of the violator not only in contractual, but also in tort legal relations.

Thus, the Supreme Court of the Republic of Dagestan in its appeal decision of July 16, 2015 in case No. 33-2838 assesses the arguments of the respondent in favor of his/her innocence of causing harm by damage to the communication cable during unauthorized excavation (the defendant referred to the lack of knowledge of the communication line route, the remoteness of the excavation site from the cable route). According to the court, the defendant’s fault lies in the fact that he/she did not take any measures to prevent harm: he/she did not coordinate work with the local administration, residents of nearby houses, while if he/she did, he/she would become aware of the communication cable lines.

- The use of the category of unfairness (fairness) in the regulation of protective

characteristic of innocence rather than guilt (Rovnyi V.V.); c) guilt is defined through its forms: intent and negligence, which are subjective categories, differing in the degree of correlation between the intellectual and volitional moment of the mental attitude (Braginskii M.I., Vitrianskii V.V.).

relations: Simultaneously with the category of guilt (innocence), the system of legal regulation of protective relations uses another, as it turned out, competing category - the category of unfairness (fairness). It is traditionally used in the regulation of vindication relations (Art. 302 of the Civil Code of the Russian Federation - "a good-faith purchaser"); in the updated Civil Code of the Russian Federation, fairness penetrated into the norms on the protection of rights to non-documentary securities (Art. 149 3 of the Civil Code of the Russian Federation - "a good-faith purchaser"). In these cases, fairness of the opposite party is one of the conditions for the refusal to protect the right holder (the owner, the former holder of non-documentary securities) and is understood identically: "the person did not know and should not know" about certain circumstances (about having acquired property from a person not entitled to alienate him). Accordingly, unfairness of the "adversary" allows the right holder to be protected. For the unfair party, this results in property losses in the form of seizure of a thing, the return of non-documentary securities.

Unfair behavior is declared a condition of bringing to responsibility in the form of compensation for damages caused by conducting and interrupting negotiations (p. 2 Art. 434.1 of the Civil Code of the Russian Federation), which can be assessed as guilty behavior. The wording of p. 2 Art. 434.1. of the Civil Code confirms this conclusion. First, specifying the conditions of good conduct of the parties when entering into negotiations on the conclusion of an agreement, the legislator points to a form of guilt in disrupting negotiations, establishing the inadmissibility of starting negotiations on concluding an agreement knowing about the intention to reach the latter. "Knowingly" cannot be understood otherwise than intentionally. Secondly, the cases of presumption of unfairness in negotiation referred to in this paragraph largely relate to the characterization of the party's fault, for example, omission of circumstances that, by virtue of the nature of the contract, should be brought to the attention of the other party.

The law proposes to understand unfairness as entering into or conducting negotiations in the absence of the intention to reach an agreement with the other party. The Plenum of the Supreme Court of the Russian Federation in its Decree No. 17 of 24.03.2016 "On the application by courts of certain provisions of the

Civil Code of the Russian Federation on liability for breach of obligations" clarified that unfair behavior in negotiations may be manifested in the fact that a person enters into negotiations "with the aim of causing harm to the claimant, for example, trying to obtain commercial information from the claimant or to prevent the conclusion of a contract between the claimant and a third party". Such dishonesty requires evidence, because, as a general rule, "it is assumed that each of the parties to the negotiations acts in good faith and the termination of negotiations by itself without indicating the reasons for the refusal does not indicate unfairness of the respective party" (par. 19). However, Art. 434.1 of the Civil Code of the Russian Federation indicates circumstances the presence of which changes the presumption of fairness to the presumption of unfairness.

Fairness is also given value in bringing to responsibility the head of a legal entity and other persons specified in the law before a legal entity (Art. 53.1 of the Civil Code of the Russian Federation); the head and other supervising debtor-bankrupt individuals - before its creditors (par. 10 Art. 61.11 of the Federal Law "On Insolvency (Bankruptcy)"). In all these cases, along with the use of such an evaluative category as conscientiousness (without defining its concept and essence), the guilt of the persons brought to justice is mentioned. P. 10 Art. 61.11 of the said law establishes the presumption of guilt of the controlling person and determines the side of innocence that needs to be proved: "if one acted "according to the usual conditions of civilian circulation, in good faith and reasonably", and p. 2 Art. 189.6 of the same law, on the contrary, determines the signs of guilt: their decisions or actions established by civil law, the charter of the cooperative, the customs of business practice. Art. 53.1 of the Civil Code of the Russian Federation uses the third approach: neither verbally linking it to guilt or innocence, nor directly defining the presumption regarding guilt, the owner establishes the rule of liability, "if it is proved that in exercising his rights and performing his duties, he acted in bad faith or unreasonably, including if his actions (inaction) did not meet normal conditions of civil transactions or ordinary business risk," i.e. the presumption of fairness is established. It would seem that guilt is defined here as unfairness. Accordingly, a fair conduct is understood as innocent. This interpretation is widely spread in the doctrine: "in such cases, unreasonableness and unfairness in the actions of the head of the

organization mean his guilt” (Borovik, 2013). The courts as criteria of unfairness often use an assessment of the behavior of members of a body of a legal entity according to this principle, as in the assessment of guilt: taking care and diligence, taking all necessary measures to properly perform their duties (Decree of the Federal Antimonopoly Service of the Volga District in case, 2016).

But, first, the question arises about the advisability of using two different terms (guilt and unfairness) to refer to the same phenomenon. Secondly, there is an inexplicably contradictory solution to the presumption issue. The combination of innocence and good faith (guilt and unfairness) causes, among other things, the problem of applying opposite presumptions: presumption of good faith and presumption of guilt. Thirdly, the provisions of paragraph 53.1 of the Civil Code of the Russian Federation and, in particular, paragraph 4, Art. 61.10 of the Federal Law "On Insolvency (Bankruptcy)", which uses the following phrase: "illegal or dishonest behavior." In such a context, unfair behavior cannot be represented as guilty behavior.

- The concept of fairness in Russian civil law:

The revealed internally inconsistent legislative solution of the question of the relationship between guilt and unfairness in the rules is caused by the general uncertainty of the concept of fairness, the variety of existing approaches to establishing the legal meaning of these categories, including the category of fairness.

The so-called “subjective” approach is common in the doctrine, which involves using the category of fairness as an analogue of the category of innocence, meaning the person’s state, his ignorance of facts, circumstances, the “subjective state, excusable ignorance of certain facts” (Bogdanova, 2010), “an excusable misconception” (Mikhailov), factual error (Novikova, 2008), lack of awareness and directional behavior of a person. A variation of this understanding of fairness is the category of “a good-faith purchaser”, “a good-faith mortgagee”, which is understood to mean the mortgagee, who “did not know and should not have known” that the person who transferred the thing as a mortgage was not entitled to dispose of it (p. 2 Art. 33 of the Civil Code of the Russian Federation); the acquirer of the pledged property, who did not know and should not have known about the existence of this encumbrance

(cl. 2, p. 1, Art. 352 of the Civil Code of the Russian Federation), which judicial practice calls the “good-faith purchaser” (Definition of the Supreme Court of the Russian Federation No. 4-KG16-11 of 24.05.2016; Definition of the Supreme Court of the Russian Federation No. 307-ES16-14216 of 01.11.2016, etc.). It is significant what methods are used to interpret the category of fairness for such cases: “When resolving the issue of good faith (bad faith) of the acquirer of residential premises, it is necessary to take into account the acquirer’s awareness of the availability of an entry in the Unified State Register of Real Estate Rights and Deals with the Aliener’s Property Rights, as well as the adoption of reasonable measures to ascertain the competence of the seller to alienate the dwelling, whether a citizen showed reasonable discretion in concluding a transaction, what measures were taken to clarify the rights of the person alienating this property, etc.”

Accordingly, with this approach, this category becomes a subjective criterion to be taken into account along with objective (illegal behavior) and merges with the category of guilt.

The second approach is known too - “moral”, or objective. It was reflected in the Concept of Development of Civil Legislation, which noted that the regulatory consolidation of the principle of good faith is aimed at strengthening the moral principles of civil law regulation. In this case, such moral categories as honesty (“honest conduct of business”) should be used to evaluate behavior (Agarkov, 2002), compliance with the requirements of integrity, coordination of their behavior “with the ideas of society about morality, ... about good and evil” (Bogdanova, 2010), “knowing about the other, about his interests ... conforming one’s own interest with others, establishing certain boundaries for the manifestation of egoism, recognition of the interests of society” (Novitskii, 2006). The same idea was partly implemented in the updated Civil Code of the Russian Federation, though not in general provisions, but in the general part of the law of obligations, where a description of the good conduct of the parties when establishing and fulfilling the obligation was proposed: “... taking into account each other’s rights and legitimate interests, mutually rendering the necessary assistance to achieve the goal of the obligation, as well as providing each other with the necessary information” (p. 3 Art. 307). The Supreme Court of the Russian Federation gave a

general meaning of the assessment of fair conduct to this definition in establishing, exercising and protecting civil rights and in the performance of civil duties: the behavior expected from any participant in civil transactions, taking into account the rights and legitimate interests of the other party, facilitating it, including necessary information (p. 1 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 of 23.06.2015 "On the application by courts of certain provisions of section I part I of the Civil Code of the Russian Federation").

With this understanding of the requirement of good faith, it becomes an independent, objective criterion for evaluating a person's behavior as correct, proper, along with specific criteria of legitimate behavior enshrined in the law. Paraphrasing the provisions of p. 4 Art. 1 of the Civil Code of the Russian Federation, this requirement can be formulated as follows: "act lawfully and in good faith". "Lawful" - in the sense that a person must comply with the specific requirements of the law, and "in good faith" - that he must act in good faith and conduct business honestly, observing a balance of interests. Thus, fairness is perceived as a kind of "supralegal" measure of the correct behavior of a person. Accordingly, conscientiousness, understood as an external, objective criterion of a person's behavior to be applied by the court, does not replace a subjective assessment reflecting the attitude of the person to his behavior.

The antithesis of a person's prohibited behavior is "illegal or unfair" behavior. "Illegal" in the sense that a person does not comply with specific requirements of the law, and "unfair" when a person does not comply with certain moral imperatives without violating specific legal requirements. This understanding of fairness (unfairness) that appears to be expressed in the rules on transactions (p. 3 Art. 157 of the Civil Code of the Russian Federation), on invalid transactions (p. 5 Art. 166, p. 2 Art. 431.1 of the Civil Code of the Russian Federation), on the expected behavior of the participants of the obligation upon its establishment, execution and after its termination (p. 3 Art. 307 of the Civil Code); on the rules of negotiating when concluding a contract (Art. 434.1 of the Civil Code of the Russian Federation), on the responsibility of the head of a legal entity and other persons specified in the law (Art. 53.1 of the Civil Code of the Russian Federation); of the

head and other supervisors of a bankrupt debtor (p. 10 Art. 61.11 of the Federal Law "On Insolvency (Bankruptcy)"; of the members of credit bankrupt cooperative (Art. 189.6 of the Federal Law "On Insolvency (Bankruptcy)").

Unfair behavior, like illegal, can be conscious, directed, or, as the legislator says, "deliberately dishonest" (p. 1 Art. 10 of the Civil Code of the Russian Federation) or not. With this understanding, fairness characterizes not the absence of guilt, but the legitimacy of a person's behavior. This is also evidenced by the legislative recognition of the requirements in good faith: "participants in civil legal relations must act in good faith" (p. 3 Art. 1 of the Civil Code of the Russian Federation). It seems obvious that the law did not mean to demand to "act innocently". Thus, the civil legislation of the Russian Federation lacks a universal understanding of fairness. For different areas of legal regulation, either a subjective approach is used ("the person did not know and should not have known" about the presence of obstacles to the acquisition of rights, etc.), or an objective one - a person does not only comply with the requirements of specific regulatory prescriptions, the letter of the law, but also requirements of morality, honest business management, balance of interests, etc. An attempt to combine these approaches and the proposal of a universal definition of the concept of good faith seems to be incorrect: good faith in a legal relationship can act either as an external objective measure of a person's behavior, or to characterize his subjective attitude to his behavior. It cannot be the same simultaneously, as it cannot be united in one concept of "illegality" and "guilt".

Summary

The implementation of two different approaches to the understanding of the good faith (bad faith) in Russian civil law, makes it necessary to distinguish it from the adjacent category of innocence (guilt) as follows:

- conscientiousness in the subjective sense ("the person knew or should have known about ...") is a characteristic of the subjective side of a person's behavior, namely, his innocence, and is determined by means established for innocence: There is a permanent and optional presence in the identification of particular information (that the property belonging to it was not entitled to add it, the property was acquired, etc.). the presence of due care and discretion in detecting certain information is revealed (that the property

alienator did not have the right to alienate it; that the pledged property was acquired, etc.). For these cases it is necessary to apply the presumption of guilt of the offender established in relation to guilt;

- fairness in an objective sense ("a person acts as he should, that is, in compliance with the requirements of fair business") neither competes nor replaces the innocence category, since it characterizes the objective side of a person's behavior, namely, its legitimacy. For such cases, a presumption of good faith should be applied.

Reference

- Agarkov, M. M. (2002). Problems of abuse of law in Soviet civil law. Selected works on civil law. In 2 volumes. V.II. - M.: JSC "CenterlurInfor". 490.
- Andreev, A. A. (2008). Eventual responsibility in civil law. Arbitration and civil procedure. 9.
- Borovik, I. (2013). Bad faith means guilt. Ezh-lurist. Legal reference system "Consultant Plus". 10.
- Bogdanov, D. E. (2012). Justice as the main beginning of the formation of an innocent tort liability. Advokat. 6, 32 - 40.
- Bogdanova, E. (2010). Good faith of the parties to the contractual relationship as a condition for the protection of their subjective civil rights. Economy and law. 2, 111 - 117.
- Braginskii, M. I., & Vitrianskii, V. V. (1997). Contract law: general provisions. - M.: Statut. 847.
- Golubtsova, Iu. A. (2015). The legal construction of guilt in Russian civil law: author's abstract, PhD Law. - Kazan. 30.
- Civil law. (2006). In 4 volumes. V.I: General part. Chief ed. E.A. Sukhanov. - M.: Wolters Kluwer. 720.
- Ioffe, O. S. (2003). Responsibility under the Soviet civil law. Selected Works: in 4 volumes. V.I .. - St. Petersburg: Publishing House "Iuridicheskii Tsentri Press". 574.
- Kuznetsova, O. A. (2013). The ratio of illegality, guilt and force majeure on the example of the responsibility of the agricultural producer. Bulletin of Perm University. Jurisprudence. Legal reference system "Consultant Plus". 2.
- Kuznetsova, O. A. (2013). A case as a basis for excluding civil liability. Bulletin of Perm University. Jurisprudence. Legal reference system "Consultant Plus". 1.
- Li, Ch. (2013). The ratio of guilty and innocent responsibility in tort obligations. Vestnik VAS RF. Legal reference system "Consultant Plus". 4.
- Matveev, G. K. (1955). Guilt in Soviet civil law. - Kyiv. 307.
- Mikhailov, S. V. (2006). The value of the category of good faith for the obligations of relations and the consequences of the invalidity of contracts of assignment. Invalidity in civil law: problems, trends, practice: Collected papers. Ed. M.A. Rozhkov. - M.: Statut. Legal reference system "Consultant Plus".
- Nam, K. V. (2006). Grounds for recovery of damages arising from the violation of contractual obligations (comparative legal analysis). Losses and the practice of their compensation. Collected works. Ed. M.A. Rozhkov. - M.: Statut. Legal reference system "Consultant Plus".
- Novikova, T. V. (2008). Towards the question of the subjective meaning of the concept of good faith in Russian civil law. Society and Law. Legal reference system "Consultant Plus". 1.
- Novitskii, I. B. (2006). The principle of good faith in the draft law of obligations. Bulletin of civil law. Legal reference system "Consultant Plus". I (6).
- Osipov, E. B. (2001). General issues of liability in civil law. Civil notes. Interuniversity collection of scientific papers - M.: Statute. 297-318.
- Decision of the Supreme Court of the Russian Federation No. (2013). 308-ЭС 14-1400 of 08.06.2016 in case No. Ф20-2391/2013. Legal reference system "Consultant Plus".
- Pokrovskii, I. A. (2001). The main problems of civil law. - M.: Statut. 363.
- Puginskii, B. I. (1984). The civil law means in economic relations. - M.: Legal literature. 224.
- Puginskii, B. I., & Safullin, D. N. (1991). Legal economics: problems of formation. - M.: Legal literature. 240.
- Rabinovich, F. L. (1975). Guilt as the basis of contractual liability of the enterprise. - M.: Legal literature. 168.
- Shepel, T. V. (2014). Guilt in civil law: legislation and civil doctrine. Bulletin of the NSU. Series: Law. 10 (2), 50 - 55.
- Iurchak, E. V. (2015). Concepts of guilt in legal science. Actual problems of Russian law. Reference legal system "Consultant Plus". 7.