THE CONCEPT OF GOOD FAITH AS A PHILOSOPHICAL AND LEGAL CATEGORY GIVEN ITS SEMANTIC CHARACTERISTICS IN THE UKRAINIAN LANGUAGE

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Abstract*. The study made philosophical understanding of the category " good faith" looking at its semantic and etymological characteristics in the Ukrainian language. The analysis of separate components of the word-combination " good faith" was made, their philosophical and legal analysis and comparison with the meaningful characteristics of this legal category was carried out. The article analyses subjective-objective approaches to understanding of the category "good faith" both together and separately and makes a conclusion that conscientiousness has a subjective-objective character with dominance of a subjective component, at that it is noted that prefix "good" is marked as an objective component of this category, and prefix "conscience" - is responsible for its subjective component, which together quite precisely reflect subjective-objective character of the latter. It is concluded that semantic-etymological characteristics of the category " good faith" in the Ukrainian language fully enough reveals the main characteristics of this principle, but is not exhausted by them.*

Keywords*: good faith, bona fides, updating of civil legislation, private law, protection of rights, balance of interests*

INTRODUCTION

The category of good faith as a principle of civil and family law has for many centuries attracted the attention of both academics and legal practitioners, and in recent years in Ukraine is becoming particularly important in view of the widespread use of its use in the practice of the Supreme Court as a self-contained basis for resolving a varied range of legal disputes. In view of this, the proper clarification of the place, meaning and significance of the category of "good faith" acquires particular relevance.

The development of this category was engaged by such scientists as O.O. Bakalinskaya, T.V. Novikova, E.A. Sorokina, V.V. O. Bakalinskiy, T.O. Novikova, T.A. Sorokikina, T.Y. Vitryanskiy, A.S. Dovgert, V.A. Bialov, Yu. A. Drozdova, M.M. Dobkin, V.V. Drozdova, M.M. Dobkin and others, but there was no unified view on the above-mentioned issues.

MATERIALS AND METHODS

Methodology of research is determined by its goal, which is a philosophical and legal analysis of the category of "good faith" as the basis of civil and family law, taking into account its semantic and etymological characteristics in the Ukrainian language, to optimize the correctness of theoretical understanding and practical application of this category. Normative legal base of this research included provisions of both national legislation of Ukraine, such as the Civil Code of Ukraine, the Family Code of Ukraine and others, and international, including the UN Charter, the UN Vienna Convention on the Law of Treaties 1969, the UN Convention on Contracts for the International Sale of Goods 1980 and others. The object of the study were also the provisions of the domestic legislation of the USA, the Russian Federation, Switzerland and Japan.

In this study were used philosophical, dialectical, comparative-legal, general scientific and special scientific methods of research. All of the above methods of research were used in interrelation and interdependence, which helped to ensure comprehensiveness, objectivity and completeness of the study. Preference was given to the philosophical and dialectical method of research, through which the content and meaning of the category of " good faith " was comprehended, which allowed to lay the foundation for further directions of scientific development and theoretical comprehension of the specified category.

RESULTS AND DISCUSSION

In our time in lawmaking and law and order practice more and more attention is paid to the principle of good faith in law, which is recognized as the universal regulator of social relations and the fundamental standard of the entire legal system. The universality of the principle of good faith lies in the fact that its action is not limited to any branch of law, and its action permeates in fact the entire legal system.

In this regard, A. S. Dovgert notes that «all positive and natural law, as well as the consequences of its application, should be assessed and interpreted through the prism of the natural principles of justice, good faith, and reasonableness» [1; c. 85].

For example, in accordance with part 2 of Article 2 of the UN Statute, all members of the United Nations Organization in good faith fulfil their obligations under this Statute. Article 2, paragraph 2, of the UN Statute, all members of the United Nations Organization in good faith fulfill the obligations assumed under this Statute, in order to ensure to all of them the rights and benefits deriving from their membership in the Organization [2].

Article 4 of the preamble to the 1969 Vienna Convention on the Law of Treaties states: The States parties to this Convention recognize that the principles of international law and good faith and the rule of pacta sunt servanda are universally accepted. Article 26 of this Convention stipulates that every written treaty is binding on its parties and must be fulfilled in good faith. According to Article 31 (1) of the Convention, the agreement must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the agreement in their context, as well as in the light of the object and purpose of the agreements [3].

According to Part 1, Article 7 of the UN Convention on Contracts for the International Sale of Goods (1980) states: The interpretation of this Convention should take into account its international character and the need to contribute to achieving its uniform application and maintaining good faith in international trade [4].

The category of good faith is enshrined as a general principle in constitutional law (e.g., Articles 5, 9 of the Swiss Constitution) [5], in civil law (for example, part 2 of article 1 of the CC of Japan) [6], in commercial law (for example, Articles 1-304 of the Uniform Commercial Code of the United States) [7], in tax law (e.g., paragraph 7 of Article 3 of the PCRF) and other areas of law [8].

As a request to public persons in the field of public law, good faith is enshrined in Article 101(3) of the UN Statute and Article 20 of the Statute of the UN International Court of Justice [2].

From the above it appears that the principle of good faith, having originated within the limits of civil law, has now acquired a general legal meaning and applies to both private and public law, both national and international.

In modern science it is proved that the study of fundamental categories requires a multidimensional approach, which involves looking "under different views: both from the perspective of sociology and history, as well as from the perspective of philosophical viewpoint". From the semantic analysis of the definition "goodness" in the Ukrainian language its components are obvious: goodness and conscience. As T.V. Novikova rightly points out, philosophical meaning of «good» and «conscience» inevitably influences the meaning and essence of the category «goodness» [9; c. 14].

In ancient philosophy one can find the rudiments of those views on the good, which later were developed within the framework of independent currents. For example, Plato defined the good as an idea in the realm of absolute essences, and Aristotle gave us the idea of those philosophers who said that people have the ability to «choose the true good» already from their birth. [10].

Categorically about the nature of goodness were said by religious philosophers. They asserted that God is a living embodiment of the good. In medieval philosophy such views were reflected in the works of Augustine and Thomas of Aquinas [10]. In Russian philosophy, a special role in the development of these provisions was played by the works of NA Berdyaev, IA Ilyin, VS Solovyov, and SL Frank. Thus, NA Berdyaev wrote: «God can not want lies, evil and ugliness not because He is limited by truth, goodness and beauty, but because He is truth, goodness and beauty.» [11; c. 218-222].

The works of R. Descartes, who connected the good with truth, and W. Leibniz, who put the rule of good to the "truths of reason", which are in the mind of God, deserve attention in philosophy of the XVII-XVIII centuries. The position of B. Spinoza, who said that goodness is exclusively a "modus operandi" formed in human beings when they compared the relevance of one thing to another and compared it to themselves [2].

Within the framework of German classical philosophies the absolutist approach of I. Kant deserves special attention, who proposed the famous categorical imperative as a way of "autonomous consideration, morality". In Hegel the concept of good is "The absolute ultimate goal of the world". [12; c. 366-367].

Thus, we can conclude that the good is a certain general moral and ethical ideal, which is perceived by people as something absolutely valuable, ideal, desirable, important. Goodness is the goal that every person strives for, it is the ethical standard that must be established in all spheres of human life.

As for the category of good faith, the word "good" corresponds to the moral and ethical side of good faith, acts as an objective measure of a person's own actions and the ideal to which a person should aspire in his or her life and activity.

Considering this characteristic, it is impossible not to emphasize that the main characteristic of goodness as a legal category is its moral and ethical nature.

So, for example, V.P. Gribanov, speaking about good faith, believes that this term in its literal meaning expresses the obligation, adherence to the rules of moral order [13; c. 177].

S. Alekseev analyzing the legal aspect of Kant's philosophical heritage noted that in the plane of transcendental (perceptional) principles of pure intellect in the spiritual world the first place is given to the good and conscience, the combination of which, as you can see, is goodness of conscience. In view of this we should consider that the principle of good faith is as much legal as philosophical and ethical, because it has much in common with the categorical imperative of I. Kant, which requires an individual to

behave so that the norm of his behavior could become a general law [14; c. 188].

I. Sharkova notes that Bona fides as a basic legal category in its content is one of the highest moral and legal imperatives, which implies the ideals of Good and Justice. In its form it is a doctrinal creation in the coordinates of the philosophy of natural law [15; c. 59].

Analyzing the notion of good faith the modern scientist Yu. Tobota points out that it is not only a component of proper fulfillment of a legal duty, but also at the same time a moral duty, because this term is composed of two - "good" and "goodness", which indicates the moral and ethical nature of the category, which we are considering, and the principle itself, one of the components of which is goodness [16; c.24].

Some scholars do not agree with this statement. In particular, in Schneider's opinion, a view of the principle of good conscience through the use of general ethical considerations is misleading. The scientist believes that the relationship between law and justice does not depend on the reference to good conscience in the rule of law. The norm is given only a certain fineness, but not the possibility of resolving the case in accordance with ethical requirements. Schneider regards good conscience, first of all, as the principle of virtue and obedience to the treaty, the adherence to the given word [17; c. 54].

A similar position is supported by adherents of fierce positivism, at that they refer not only to the principle of good faith, but to all law in general, stating that there is no connection between law and morality, nor can there be. They confirm that any moral and ethical category can be regarded as law only if it is directly enshrined by the legislator as a legal norm. However, even then, there is no connection between law and morality, because law remains law for other reasons, independent of it [18; c. 142-143].

It is hardly possible to agree with this, because, in our view, this contradicts the origin of this category and its very nature. Good faith has a moral nature. At the etymological level, this term means "good and conscience" or "goodness and conscience", which indicates its moral and ethical nature. This is one of the moral and legal categories, which occur in law, especially civil and family law, in order, such as justice and moral principles of society.

It should be noted that the provenance of the principle of good faith is related to the need for the implementation of moral and ethical principles in the categorically formalized Roman legal approach. For example, Cicero notes: «Who does not agree that those declarations made under the influence of fear or being inadvertently deceived should not be valid? However, most of these agreements are dissolved under praetorian law, and some are dissolved under the law». [19; c. 25-26]. Praetorian law, of course, refers to the law that was created by praetors on the basis of bona fides, that is, the law that was the result of the penetration of morality into the ancient Roman legal system.

The same Trifonin spoke about that: «bona fides, necessary in treaties, are required for high justice (aequitas): but do we have to judge about it, based only on the law of nations or also taking into consideration the civil and praetor's writings? For example, a person accused of a criminal offence gave you a hundred coins to keep, then he was banished, and his property was confiscated: should this money be returned to him or surrendered to the authorities? If we proceed solely on the basis of natural law or the right of nations, they should be returned to the one who gave them; But if on the basis of civil law and the order established by the laws, it is faster to surrender them to the power, because the one whom the society sues, so that he serves as another example, who turns away from atrocities, must be punished for the disadvantages»[20; c. 41-42].

With this in mind, we support the position of those scholars and philosophers who advocate the moral and ethical nature of the legal principle of "good faith" and the implementation of the ideals of goodness and justice into legal reality by means of this principle.

Conscience is also one of the most important philosophical understandings. It is a ethical category, which expresses the highest form of a person's capacity for moral self-control, the side of his or her self-consciousness [10].

At the turn of the fifth and fourth centuries B.C., Democritus did not yet know the special word «conscience», but declared: «Learn to be more conciliatory to yourself than to others». [21].

According to Ozhegov's Dictionary, conscience is a sense of moral responsibility for one's behavior to the people, society, the ability to evaluate one's actions in terms of their compliance with the ethical ideal [22].

C. Priyma says that conscience is the power of people to critically evaluate their actions and their results; their inner tribunal [23; c.401].

T.V. Novikova, analyzing the philosophical views of I. Kant, F. Nietzsche and M. Heidegger and comparing them with the approaches to the concept of good, concludes that conscience is a subjective awareness of good and at the same time acts as an internal regulator of behavior of a person [24; c. 24].

We believe that conscience should be understood as the inner ability of a person to evaluate his own actions for compliance with the criterion of «goodness», the moral requirement for positive behavior of a person and moral disapproval, which the person feels in case his behavior does not meet the criterion of «goodness». For the purposes of goodness, conscience is a subjective criterion that imposes an internal psychological requirement for a person's behavior in accordance with the standards of goodness and fairness.

Taking this into account, in the modern doctrine of private law another significant feature of the category of good faith is stressed, which is its subjective

nature, Because "conscience", as can be deduced from the above, is exclusively an internal subjective assessment of the personal actions of the person in question. Thus, E.V. Bogdanov believes that good faith should be understood as the subjective side of the behavior of participants in civil law relations, when such participants did not know and could not know about the rights of third parties to the property in question, or did not know and could not know about their other ineligibility [25].

Another scientist V.I. Yemelyanov noted: "an individual should be recognized as benevolent in the case when he or she acts without consideration of causing harm to another person, as well as does not allow lightness (self-involvement) and discontent in relation to the possible causing of harm". Good faith, in the opinion of the scientist, is seen only as a subjective attitude of a person to his/her iniquities, that is also limited to only the subjective aspect [26; c. 91].

Other scientists, including M.M. Dobkin, agree with this. Dobkin, who points out: "it is also worth considering that the assessment of good faith or even bad faith is made on the basis of the assessment of the subjective side of a person's behavior on the real possibility of anticipating negative legal consequences of their behavior". [27; c. 233].

At the same time there is another point of view, according to which good faith is a relative category in view of the fact that it is a principle or a norm enshrined in the provisions of law, As a consequence, participants in social relations are obliged to abide by it regardless of their subjective attitude to this category. Thus, D. Kondratyuk defines good faith in the general sense as a principle of civil law aimed at achieving equality of interests of the relationship subjects, while in the individual sense good faith is an innocent fault of the subject to the opposability of his behavior [28; c. 51-52]. T. Drozdova says that «depending on the place and mechanism of implementation in the law good faith can be considered in the objective and subjective senses. The objective dimension considers the category of good faith as a requirement of civil law. In the subjective - as the absence of knowledge about the existence of legal rights. Accordingly, the essence of the notion of good faith in the moral aspect is more suitable for good faith in the personal sense, while good faith in the subjective sense has mainly an intellectual aspect». [28; c. 52].

In this regard, we note that, indeed, from a formal point of view, it is correct, and for this approach we can say about good faith in the objective sense. This approach is based on the general approach of law to the right in a subjective sense, that is, the right as a measure of possible behavior of the subject of legal relations; and the right in an objective sense - as a totality of enshrined in the established order of legal norms. However, as for the law in general, such an approach is fully valid and appropriate, since it fully discloses the essence of "law" as a category, As for the category "good faith" and its comprehension in the philosophical and legal aspect, without regard to formal correctness, it does not in any way reveal the essence of this category. According to this approach, it can be said that every legal category, which is a part of law, has an objective meaning, since it is reflected in the legal norms, and, consequently, exists in the objective sense. Therefore, in its pure form no legal category as a subjective one exists, as it will always be considered objective. Also from the position of philosophical understanding it is difficult to conceive of the notion of "conscience" in a subjective sense, because when it comes to "subjective conscience" other categories are in mind, Namely morality or the moral and ethical assessment of the behavior of this or that person, which is completely based on the understanding of "good" as a component of goodness. So, in fact, there is a change of understanding, which does not lead to the clarification of the truth.

Another attempt to explain the objective nature of good faith is the position that good faith is an aggregate of generally accepted norms, rules and customs concerning individuals, Such as the state and its bodies, local self-government bodies, legal entities and other associations, which, accordingly, do not and cannot have a subjective side, and, therefore, for them good faith is always objective in nature.

Thus, for example, A. D. Shchokin, pointing to the objective nature of conscientiousness, refers to Art. 53 of the civil code of the Russian Federation, which enshrines the obligation of a person acting on behalf of a legal entity in accordance with the law or statutory documents to act in good faith and reasonably in the interests of that legal entity [28; c.52].

We consider the position of Yu.A. Toboti as a substantiated response to all similar arguments. Tobota, who states: «But, as is known, the body of a legal entity is composed of physical persons; they, of course, express their will and they are entrusted by the establishing document to perform certain functions, including business functions. That is why the actions of the body of a legal entity are the actions of individuals, of which it is composed (even if one-piece body), and these actions, as noted by S.. C. Vilkin, in turn, are regarded as such, which are indirectly committed by a legal entity. Therefore, it is fully understood not about good faith and reasonableness of the body of a legal entity as a separate, independent entity (which it is not), but about good faith and reasonableness of actions (behavior) of physical persons, which make up such a body, and, therefore, the legal entity itself». [29; c. 119].

Therefore, in consideration of the above, we can conclude that it is the subjective criterion that is decisive for the qualification of a person's behavior as a virtuous one. In turn, the definition of good faith as an objective category in the form of generally accepted rules, norms and customs, when in conflict with the subjective criterion, leads to mutually exclusive conclusions, the resolution of which is always decided in favor of the subjective approach.

However, in general, it would be unwise to deny the existence of good faith in an objective sense, since historically known cases are those that refute the exclusively subjective nature of the latter. An example of the impossibility of establishing the subjective side of the person and deciding about eligibility based solely on the objectivity criterion is the provision of Article 20 "Provisions on Copyright" to the "Copyright Law" of Chapter XX of the Laws of the Russian Empire, as amended in 1915: "a person who has been fully or partially granted copyright on a work does not have the right to publish or publish this work with additions or modifications without the permission of the author or his associates, in general, with modifications, except those resulting from a clear necessity, modifications to which the author could not in good conscience refuse. [30].

An example of the case, when the definition of good faith of a person does not refer to a particular designated case, but refers to its general characteristic is clause 2 of article 411 of the XXth Code of Laws of the Russian Empire, as amended in 1832, according to which: «For the determination of bondman in the clerk is required, in particular, good behavior and visible honesty». [31]. A similar provision is currently in force in Article 101(3) of the UN Statute: «In hiring and determining the conditions of service should be guided primarily by the need to ensure a high level of performance, competence and integrity. Special attention should be given to the importance of selecting the staff on as wide a geographical basis as possible». [2].

Therefore, good faith is subjective and objective, and in the vast majority of cases the subjective criterion is given preference, and the appeal to the objectivity of this category is a unit exception to the general rule.

T.Y. Drozdova comes to a similar conclusion. Drozdova, pointing out: «at this it should be noted that most states recognize the presence in their legal systems of the difference between objective and subjective good faith. Subjective good faith, as a rule, relates to knowledge of facts or their absence, is relevant to the rights of property and does not cause a serious controversy. The absolute differences concern objectively good faith, which is an unspecified standard that allows judges to develop the law depending on the circumstances». [9; c. 49].

O.O. Bakalinska notes that in the general sense good faith is the requirements for the behavior of an unspecified group of participants of civil law relations, which are specified by the norms of law, by the rules of business turnover. In the subjective sense, good faith is an assessment of the behavior of a subject of civil law relations for compliance with the norms of morality formed in society, respect for the rights of other participants of legal relations [31; c. 201].

Also D. Pavlenko points out that «of course, in contractual legal relations the good faith of their subjects has an actual-subjective nature, which is expressed in the following. The objective side means that the actions of the subject must comply with generally accepted standards of good faith as expressed, inter alia, in the rules of business turnover, and the subjective side expresses its internal attitude to its actions as lawful and notifying that such actions do not violate the rights and interests of other persons». [28; 54].

Thus, more reasonable, in our opinion, is the position according to which good faith has a subjective-objective character, according to which in the objective sense of good faith corresponds to the moral and ethical idea of "good", and in sub active - a philosophical understanding of "conscience". The combination of the concepts of "good" and "conscience" and constitutes good faith in the modern sense. S. Priyma comes to the same conclusion [23; c. 401].

CONCLUSIONS

At the same time, it is impossible not to notice that the philosophical and legal view of the mentioned category with regard to its semantic characteristic in the Ukrainian language is not exhaustive and does not adequately disclose this category. In Latin, for example, the words "bona (good, good) fides (faith, trust)" (literal translation: "good trust") are used together. Analogous nomological combination is used in Italian (buona fede), French (bonne foi), Spanish (buena fe), English (good faith). Of course, the Ukrainian-Slavic approach to the definition of this category is largely similar to the foreign definition of the term «good faith» (which are the ancestors of the latter as a legal category) and covers the basic meanings of this category as a measure of subjective-objective moral and ethical degree. responsibility and integrity of the conduct of the subject of law. However, for example, the German Treu und Glauben, which denotes the category of «good faith», has a completely different semantic meaning: fidelity and trust, while - trust (Glauben) literally means (believe; believe), and in this sense reveals a number of other particularly important meaningful features of the philosophical and legal category of «good faith».

Considering the above we come to the conclusion that "good faith" is a moral and ethical and essentially subjective legal category, which is based on the general awareness by a person of the notion of goodness and justice and the determination of his own behavior in connection with this awareness of compliance with the specified criteria. At the same time, this understanding of the category of "good faith" is not exhaustive, and its consideration from other aspects requires separate scientific research.

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