

The Influence of German Legal Doctrine on the Formation of the Principle of Good Faith in the Civil Law of the Russian Federation

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ABSTRACT: The article discusses the formation of the principle of good faith in Russian civil law, influenced by German legal doctrine. It gives the main characteristics of the principle of good faith, adopted by Russian law-enforcement practice and theory from German doctrine. The paper draws the conclusion about the need for a deep understanding of the principle in order to prevent its application contrary to the objectives of this principle.

Key words: German civil law, the principle of good faith, German doctrine of good faith, Treu und Glauben, the principles of civil law.

INTRODUCTION

One of the significant results of the civil law reform in Russia is the legislative recognition of the principle of good faith in the Civil Code of the Russian Federation as a fundamental principle of civil law. This principle is reflected in paragraphs 3 and 4 of Article 1 of the Civil Code of the Russian Federation, in accordance with which: 3. In establishing, exercising and protecting civil rights and in performing civil duties, the

participants in civil relations should act in good faith; 4. No one has the right to derive benefit from their illegal or unfair behavior.

Positivism of the principle of good faith determines a wide range of practical and theoretical questions which can be resolved by referring to foreign legal orders that have extensive experience in applying this principle. Of course, German law and order, in this sense, is of particular interest to us in view of the significant influence of the German civil doctrine on the formation of modern civil law in Russia on the whole. German doctrine is especially relevant in relation to the principle of good faith since this principle has long been fixed at the legislative level (Paragraph 242 of the German Civil Code) and is successfully implemented in law-enforcement practice.

The reference to the German doctrine of the principle of good faith is also relevant because the recognition of the principle of fair practice of the Civil Code of the Russian Federation opens up a wide horizon of creative law enforcement, expands the boundaries of positive law and judicial discretion, however, these tendencies can be positive on condition that a deep theoretical understanding of the principle of good faith is provided. It should be noted that the need to take into account foreign experience when applying the principle of good faith is recognized by almost all researchers of this category in Russia (Egorov, 2018), because without a comparative legal understanding of this principle, its application can turn into a banal arbitrariness (Novikova et al, 2018; Oliveira, et al, 2018).

The methodological basis of the article is general scientific and special methods. The general scientific methods used in the paper are: dialectical, logical, analysis and synthesis, induction and deduction, etc. Among the private scientific methods of cognition are the following: formal legal, comparative legal, systemic and structural.

RESULTS

German civil law has a deeply developed doctrine of the principle of good faith (Treu und Glauben). It is important to note that the principle of good faith is termed by German law and order as universal, that is, it extends its effect to both private law and public law relations (Strätz et al., 1997).

A similar trend can be observed in Russian legal system, for example: abuse of law in civil and arbitration proceedings, etc. A significant part of the work on the principle of good faith in German science was published in the second half of the 20th century (Staudinger & Kommentar, 1961).

This period can be theoretically called the renaissance period of the principle of good faith. Before World War II, German civil law also turned to the study of the principle of good faith but attached less importance to it, compared with the post-war period. It seems important that the emergence of interest in the principle of good faith in Germany in the 30s of the 20th century is due to objective economic shocks, which enabled to state that the usual formal approach to regulating economic relations was clearly not enough. A similar trend was observed in modern Russia before the active application of this principle as negative phenomena (for example: the creation of artificial payables, the irresponsibility of persons controlling commercial organizations, one-day firms, “professional” directors, etc.) began to be perceived as natural contrary to the purpose of civil law.

Clearly, German science did not stand still, trying to systematize the accumulated practice of applying this principle. The initial systematization relied upon the

classification of manifestations of the principle of good faith by groups. There were general requirements of the manifestation of the principle of good faith in the implementation of methods for ensuring the performance of duties, additional rights and obligations, termination of a continuing legal relationship on the basis of a good reason, loss or absence of the basis of a transaction, limitation or loss of obligation due to other reasons, unacceptable exercise of the right (Kommentar zum, 1960).

However, the legal meaning of the principle of good faith in German doctrine is of most interest for our study since it is the legal nature of this category that makes it possible to regulate civil law relations by applying this principle. Given honesty is a philosophical category, the first question that needs to be answered is the **good faith-justice** relationship since justice as the goal of any legal regulation is largely achieved by applying the principle of good faith.

The principle of good faith is not identical in its meaning and content to the category of justice, although it is very close to it, like no other ethical and legal principle (Gernhuber, 1983; Ranjbaran, 2014). The implementation of the principle of good faith does not imply the resolution of a legal incident from the position of someone's subjective view, primarily a judge. This principle suggests a guide to such behavior of the subject of law being approved by society, community is generally accepted. In the case when such norms cannot be revealed, it is necessary to focus on the values that exist in society.

Russian law-enforcement practice has partially adopted the German approach in the relation to justice and the principle of good faith. According to paragraph 3 of part 1 of the Resolution of the Plenum "On the application by the courts of certain provisions of section I of part one of the Civil Code of the Russian Federation, "Assessing the actions of the parties fair or unfair, one should proceed from the behavior expected from any participant in the civil circulation, taking into account the rights and legitimate interests of the other party, assisting them, including in obtaining the necessary information" (Resolution of the Plenum of the Supreme Court of the Russian Federation of June 23, 2015).

As follows from the indicated opinion of the Supreme Court of the Russian Federation, law-enforcement practice is oriented towards establishing good faith by analyzing the behavior of a particular subject of law and the conformity of its behavior expected from any participant in civil relations. The value approach per se is not accepted by Russian law-enforcement practice due to the complexity of its application in Russian reality. This refers to the cultural diversity of the peoples of Russia, a very modest store of knowledge of professional participants in justice about the principle of good faith, the considerable constraint of the judicial community by positive law, etc.

Applying the principle of justice in resolving property disputes, German legal doctrine updated the issue of judicial law-making, which, as a general rule, is unacceptable. This problem can be very briefly accentuated by the question: does the decisive application of the principle of good faith imply the creation of new rules of law? German civil doctrine replies this question in the negative.

The application of the principle of good faith does not mean the creation by the court of new legal norms. Applying this principle suggests formulating the available legal regulation in relation to specific legal relations in accordance with their goals and meaning, as well as determining the legal boundaries of the formal legal status (Brox & Walker, 2017; Taubaye et al, 2018).

This thesis is fully accepted by the Russian law-enforcement practice, which,

without creating new rules of law, applies the principle of good faith to individual civil law institutions (See for example: Resolution of the Arbitration Court of the East Siberian District of 08.16.2019). Moreover, the application of the principle of good faith to individual civil law institutions greatly facilitates the role of law enforcement since the legal nature of each legislatively established institution is easy to detect.

After detection of the legal nature, it is necessary to compare the behavior of the subject of civil law with the goals pursued by one or another institution of civil law, and in case of deviation from such goals, to apply the principle of good faith with all the ensuing consequences for an unfair participant. Despite the simplicity of such an approach in arbitration practice, there are the instances of a formal approach far from single, despite the objections of the party regarding the dishonesty of the goals of certain subjects of civil law (See for example: Resolution of the Arbitration Court of the Volga-Vyatka District dated 06.22.2018 № Ф01-2208 / 2018 in the legal case № А39-258 / 2017).

One of their characteristic features of the principle of good faith is its **subsidiarity**. The indicated property of the principle of good faith means the ability to measure the behavior of a participant in civil relations with respect to good faith if there is no direct indication in the law of such instance. In general, one should agree with this approach and add that the principle of good faith, in this sense, is no exception. Any principle of law, including civil law, is applied only in the absence of direct laws governing this or that relationship. Subsidiarity is a natural property of the principle of good faith. Subsidiarity is also characteristic of Russian law-enforcement practice, as for Russian courts the application of the principle of good faith today is the exception rather than the rule.

As a result of the long-term application of the principle of good faith, German law-enforcement practice has identified another significant problem with the application of the principle of good faith – **the detailing of the principle of good faith through the goals and values of law**. The scholars of the indicated problems directly point to the fact that the objective of the principle of good faith is to ensure the legal regulation of relations in such a way that a result to be implied and pursued by applicable law is achieved (Medicus, 2000).

It should be noted that this characteristic of the principle of good faith in German doctrine has also influenced the application of the principle of good faith in Russian law-enforcement practice. So, Paragraph 5 of Part 1 of the above-mentioned Resolution of the Plenum, contains an indication that “if unfair behavior of one of the parties is established, the court, depending on the circumstances of the case and taking into account the nature and consequences of such behavior, refuses to protect their right in whole or in part, and also takes other measures to protect the interests of a bona fide party or third parties from unfair behavior of the other party (Clause 2 of Article 10 of the Civil Code of the Russian Federation), for example, recognizes a condition which an unfair party prevented or assisted, respectively, the matured or non-matured (Paragraph 3 of Article 157 of the Civil Code); indicates that the statement of such a party on the invalidity of the transaction does not have legal significance (Paragraph 5 of Article 166 of the Civil Code)” (Resolution of the Plenum of the Supreme Court of the Russian Federation of June 23, 2015 № 25).

In other words, under the influence of this thought, the principle of good faith in Russian law-enforcement practice acquire, as it were, new ways of implementing the very principle, which in itself is natural. Naturally, because the implementation of the principle

of good faith without ways to protect this principle will make it impossible to realize the principle itself.

CONCLUSION

The analysis of these characteristics of the principle of good faith in German doctrine allows stating that the principle of good faith in Russian civil law is largely formed under the influence of German doctrine. Internal systematics, the structure of fairness principle in Russian civil law is actually borrowed from German legal order.

This is attested to by both law-enforcement practice (See for example: Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation of 05.28.2018 in the legal case N 306-ES17-12245, A65-27690) and the most popular applied research publications (See for example: Basic Provisions of Civil Law: Clause-by-Clause Commentary on Articles 1–16.1 of the Civil Code of the Russian Federation). The indicated conclusion, first of all, concerns the internal systematics of the principle of good faith, namely its characteristics such as: correlation of the principle of good faith and the category of justice, rule-making and realization of the principle of good faith, subsidiarity of applying the principle of good faith, implementation of the principle of good faith through the goals and values of law.

It is submitted that in Paragraphs 3 and 4 of Article 1 of the Civil Code of the Russian Federation, it is necessary to formulate the ideas that the principle of good faith should be applied in assessing the behavior of a subject of law from the perspective of “expected from any participant in civil circulation, taking into account the rights and legitimate interests of the other party, assisting them, including in obtaining the necessary information”. It seems that it will not be amiss to legislatively consolidate that the application of the principle of good faith is possible within the framework of existing rules of law and should not create new rules of law.

The application of the principle of good faith in specific civil (arbitration) cases is connected with the clarification of the above characteristics, which are not only purely positivistic in nature. This circumstance actualizes the issue of expanding the teaching of legal disciplines of the philosophical and legal cycle and a special course in private law departments that is concerned with the principles of civil law in Russia.

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