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Relationship of the Categories of “Guilt” and “Unconscientiousness” in Russian Civil Law

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The last decade was marked by a large-scale introduction of the categories of “conscientiousness” and “unconscientiousness” into the Russian legal system. Previously used only in institutions for the acquisition and protection of property rights, where conscientiousness was understood as ignorance of certain circumstances of the receipt of a thing in the illegal possession of a person (“did not know and should not have known”, was in a state of so-called “apologetic error”), the category acquired the character of the basic principle of civil legislation, in the form of a general requirement addressed to the subjects of all civil legal relations: to act conscientiously in the establishment, implementation and protection of the entity overt civil rights and in the performance of civil obligations (Clause 3 of Article 1 of the Civil Code). In particular, from the position of conscientiousness, it was suggested to assess the behavior of the offender in a protective relationship. This innovation gave rise to the problem of competition of unconscientiousness with such a condition of civil liability as the guilt of the offender. The solution to this problem is seen in the identification of the true meaning of the category of “conscientiousness” as a requirement: it is an objective criterion for assessing a person’s behavior as “right”, approved by law, and unconscientiousness is seen as violating the “moral spirit”, the meaning of laws, and not their letter, “wrong”, not approved by law. The presumption of conscientiousness, enshrined in Article 10 of the Civil Code, means the assumption of “correctness” of the person’s behavior in terms of morality. The presumption of guilt, enshrined in Article 401 of the Civil Code of the Russian Federation, means that if the person’s moral behavior is proven to be “wrong”, it is considered guilty until the opposite is proven.

Keywords: conscientiousness, unconscientiousness, wrongfulness, guilt, presumption.

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The doctrinal concept of guilt

One of the traditional categories of civil law is the category of guilt that organizes the sphere of civil liability. It happens to be:

first of all, one of its conditions in various types of civil protection relations, namely contractual, tort, corporate, intellectual relations

(Clause 3, Article 28 of the Civil Code of the Russian Federation, Article 53.1 of the Civil Code of the Russian Federation, Article 401, Article 538, Clause 2, Article 547, Clause 1 of Article 777 of the Civil Code of the Russian Federation, Clause 2 of Article 1064, Clause 1 of Article 1073, Article 1074, Article 1076 of the Russian

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Federation Civil Code, Clause 3 of Article 1250, Article 1253.1 of the Civil Code of the Russian Federation, Article 61.11 of the Federal Law from October 26, 2002 No. 127-FZ “On Insolvency (Bankruptcy)¹ (hereinafter – the Federal Law “On Insolvency (Bankruptcy)”);

secondly, a circumstance affecting the amount of responsibility of the offender (Article 151, Clause 4 of Article 401, 1101 of the Civil Code of the Russian Federation).

The legal significance of guilt is quite definitely expressed in the law, it does not cause any controversy in the doctrine, except for the ongoing discussion about the validity of the guilt principle and the expediency of replacing it with the principle of causing², is perceived by law enforcement practice, which cannot be said about its concept.

There are two main concepts of guilt that are widely discussed in the doctrine: “psychological” and “behavioral.” The first theory is psychological, which is obviously priority in the doctrine. It assumes that guilt is defined as the mental attitude of the offender to his unlawful behavior and its consequences³. Opponents of this understanding of guilt perceive it as a deadlock, alien to the sphere of civil legal relations, continuing in inertia the implementation of the criminal law approach “to the concept of guilt as one of the grounds (subjective side) of the crime”.⁴ The main reproaches are reduced to the hypothetical nature of this “mental” attitude, the unachievability of this approach in resolving civil disputes in court because of the practical impossibility of identifying mental experiences (“awareness”, “foresight”, “understanding”); problematic “mental” understanding of guilt in relation to such an offender as a legal entity⁵. Critics of this theory note its uselessness, as “neither a person whose rights and interests are violated, nor a jurisdictional body that will have to consider the claim is interested in the mental attitude

of the debtor to his actions”⁶, what some of its supporters are forced to partially agree with, with the proviso that “the subjective internal relation of a person to one’s own unlawful behavior has no practical value in contract law.”⁷

Therefore, it is quite understandable to be dissatisfied with this approach and to desire to develop another, purely civilistic, practically applicable, referring to all types of persons and types of responsibility (contractual and extra-contractual) concept of guilt. The behavioral theory of guilt, the essence of which is an objective assessment of the offender’s behavior serve the purpose of implementing these tasks: the guilt lies in the failure of the “offender to take all possible measures to prevent the adverse consequences of his behavior”⁸, to prevent violations if there is a real possibility for proper fulfillment of the obligation⁹. An essential shortcoming of this definition of guilt is the concurrence of the concept of guilt and wrongfulness (“guilt dissolves in unlawful behavior”¹⁰), the impossibility from the position of “non-taking measures” to determine the presence of intent, and, accordingly, to distinguish between intent and negligence¹¹.

The concept of guilt in civil law and law enforcement practice

Despite the predominantly negative attitude to the behavioral theory of guilt in the doctrine of civil law, it was precisely that theory that was implemented in civil law. For the first time a legal approach to the meaningful definition of the concept of guilt was proposed in the Fundamentals of Civil Legislation of the USSR and the Union Republics, ratified by the Supreme Council of the USSR on 31.05.1991 No. 2211-1¹² (hereinafter – the Fundamentals). In 1964 the Civil Code of the RSFSR that had been functioning until then in Article 222 “Guilt as a condition of liability for breach of obligation” and in Article 444 “The general grounds for

liability for causing harm” normatively fixed the significance of guilt as a condition of civil liability for violation of the obligation and for the application of tort liability, the presumption of guilt, and for the scope of contractual liability it designated two forms of guilt (intent and imprudence) without any definition. Article 71 of the Fundamentals of the “Basis of liability for breach of obligation” proposed a formula for determining the innocence of the debtor, which is the antithesis of his guilt: “the debtor ... has taken all measures that depend on him for the proper discharge of the obligation.” The same approach was implemented in Article 401 of the current Civil Code of the Russian Federation “Basis of liability for breach of obligation”, but with some differences:

– the legislator specified the criteria for determining the composition of “all measures”, the adoption of which indicates the innocence of the debtor: based on the degree of care and diligence required of the debtor in terms of the nature of the obligation and the terms of the transaction;

– from the definition of the concept of innocence, the words “dependent on him” were excluded, i.e. an indication of the need to take into account the individual characteristics of the debtor.

It seems that the changes noted, indeed, indicate the shift of the legislator from the use of a subjective criterion based on the individual characteristics of the offender (“taking into account the subjective capabilities of a particular person”, “did everything that depended on him”) and the transition to objectifying the debtor’s guilt criteria: the due degree of care and prudence is determined from the position of the ordinary, average person, the “reasonable master,” acting in conditions that he is presented by civil transactions¹³, the standard of conduct of a reasonable and prudent merchant¹⁴. This

understanding of guilt, which is abstracted from the person’s individual capabilities, indicates a strengthening of responsibility and bringing it “to the innocent one, while retaining the guilt (though only from a formal point of view) as a condition of responsibility.”¹⁵

Thus, the legislation and jurisprudence follows the behavioral theory of guilt: assessing the defendant’s arguments about his innocence, it is based on an analysis of his behavior, not addressing 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 offender not only in contractual, but also in tort legal relations. Thus, the Supreme Court of the Republic of Dagestan in the appeal of 16.07.2015 in case No. 33-2838 assesses the respondent’s arguments in favor of her innocence in inflicting harm caused by damage to the communication cable during unauthorized excavation (the respondent referred to the ignorance of the route of the communication line, remoteness of the earthworks from the cable route) as follows. According to the court, the defendant’s fault lies in the fact that she did not take any measures to prevent harm: she did not coordinate the work with the local administration, the residents of nearby houses, if she had done that, she would have learned about the route of the communication cable.

**Use of the category
of unconscientiousness (conscientiousness)
in the regulation of protective
relations**

As it turned out, one more rival category that is the category of unconscientiousness (conscientiousness) is used in the system of legal regulation of protection relations simultaneously with the category of guilt (innocence). It is traditionally applied in regulating vindication relations (Article 302 of the Civil Code of the

Russian Federation – “bona fide purchaser”); in the updated version of the Civil Code of the Russian Federation, conscientiousness penetrated into the norms on the protection of rights to non-documentary securities (Article 149³ of the Civil Code – “bona fide purchaser”). In these cases, the conscientiousness of the other party is one of the conditions for refusal to protect the right holder (the owner, the former holder of uncertificated securities) and is understood identically: “the person did not know and should not have known” about certain circumstances (that he acquired property from a person, not having the right to alienate it). Accordingly, the unconscientiousness of the “enemy” allows the right holder to get protection. For an unconscious party, this results in property losses in the form of seizure of a thing, return of uncertificated securities.

Unconscious behavior is declared a condition for bringing in the form of compensation for losses caused by the conduct and interruption of negotiations (Clause 2 of Article 434.1 of the Civil Code of the Russian Federation). Under unconscientiousness, the law proposes to understand entering negotiations or negotiating with the deliberate absence of intention to reach an agreement with the other party. The Plenum of the Supreme Court of the Russian Federation in Resolution No. 17 of March 24, 2016 “On the Application by the Courts of Certain Provisions of the Civil Code of the Russian Federation on Liability for Violation of Obligations” (as amended on 07.02.2017)¹⁶ clarified that unconscious behavior in the conduct of negotiations may manifest in the fact that the person enters into negotiations “with the aim of causing harm to the plaintiff, for example, trying to obtain commercial information from the plaintiff or to prevent the conclusion of a contract between the plaintiff and a third party”. Such unconscientiousness requires evidence, as, according to the general rule, “it is assumed that each of the parties to the

negotiations acts in conscientiousness, while the termination of negotiations without specifying the reasons for the refusal does not indicate the unconscientiousness of the party concerned” (Clause 19). However, Article 434.1 of The Civil Code of the Russian Federation indicates the circumstances, the presence of which changes the presumption of conscientiousness to the presumption of unconscientiousness.

Conscientiousness is attached importance in the sphere of bringing the head of a legal entity and other persons specified in the law to responsibility before a legal entity (Article 53.1 of the Civil Code of the Russian Federation); head and other persons supervising a debtor-bankrupt before his creditors (Clause 10, Article 61.11.11 of the Federal Law “On Insolvency (Bankruptcy)”), members of credit cooperative-bankrupt organizations before its creditors (Article 189.6 of the Federal Law “On Insolvency (Bankruptcy)”). In all these cases, along with the use of such an evaluation category as conscientiousness (without defining its concept and substance), the guilt of the persons liable to prosecution is also mentioned, while Clause 10 of Article 61.11 establishes the presumption of guilt of the controlling person and determines the attributes of innocence that must be proved: “if they acted “according to the usual conditions of civil transactions, in conscientiousness and reasonably “, and Clause 2 of Article 189.6, on the contrary, determines the signs of guilt: their decisions or actions “did not meet the principles of conscientiousness and reasonableness established by civil law, the charter of the cooperative, the customs of the business conduct.” Article 53.1 of the Civil Code of the Russian Federation uses the third approach: without linking this with guilt or innocence verbally, without directly defining the presumption of guilt, the legislator fixes the rule on liability, “if it is proved that, in exercising their rights and performing their

duties, the person acted in an unconscientious or unreasonable way, including, if their actions (inaction) did not conform to the usual conditions of civil transactions or normal entrepreneurial risk”, i.e. the presumption of conscientiousness is secured. It would seem that guilt here is defined as unconscientiousness. Accordingly, conscientious behavior is understood as innocent. It is this interpretation that has become quite widespread in the doctrine: “in such cases, irrationality and unconscientiousness in the actions of the head of an organization mean his guilt”.¹⁷ And courts as criteria of unconscientiousness often use the assessment of the behavior of a legal entity body’s members on the same grounds as when assessing guilt: the exercise of care and diligence, the adoption of all necessary measures for the proper discharge of their duties¹⁸.

But, firstly, there is a question that concerns using two different terms (guilt and unconscientiousness) to designate the same phenomenon. Secondly, there is an inexplicably contradictory solution to the question of presumption. The combination of innocence and conscientiousness (guilt and unconscientiousness) causes, among other things, the problem of applying the opposite presumptions: presumption of conscientiousness and presumption of guilt. Thirdly, this conclusion disconcerts the provisions of Clause 53.1 of the Civil Code of the Russian Federation and, in particular, Clause 4 of Article 61.10, which uses the following phrase: “illegal or dishonest behavior”. In this context, unconscious behavior cannot be regarded as guilty behavior.

The concept of conscientiousness in Russian civil law

The revealed inwardly uncoordinated legislative solution of the issue of the correlation of guilt and unconscientiousness in the norms of liability is caused by the general uncertainty of the concept of conscientiousness, the variety

of existing approaches to establishing the legal meaning of these categories, including the category of conscientiousness.

Thus, the so-called “subjective” approach, which involves the use of the category of conscientiousness as an analogue of the category of innocence, is widespread in the doctrine, including the state of a person, his ignorance of facts, circumstances, “subjective state, excusable ignorance of certain facts”¹⁹, “apologetic error”²⁰, the factual error²¹, the lack of awareness and direction of the person’s behavior²². A variation of this understanding of conscientiousness is the categories of “conscientious acquirer”, “conscientious pledgee”, which means a pledgee who “did not know and should not have known” that the person who transferred the thing as a pledge was not authorized to dispose of it (Clause 2 of Article 335 of the Civil Code of the Russian Federation); the acquirer of property encumbered with a pledge that did not know and should not have known about the existence of this encumbrance (Subclause 2 of Clause 1 of Article 352 of the Civil Code of the Russian Federation), which the judicial practice calls “a bona fide purchaser” (Definition of the Supreme Court of the Russian Federation of May 24, 2016 No. 4-KG16-11, the definition of the Supreme Court of the Russian Federation from 01.11.2016 No. 307-ES16-14216, etc.). The methods for the implementation of the judicial interpretation of the category of conscientiousness for such cases are telling: “By resolving the issue of conscientiousness (unconscientiousness) of the purchaser of a dwelling, it is necessary to take into account the awareness of the purchaser of a dwelling of the existence of an entry in the Unified State Register of Rights to Immovable Property and transactions with it, of the right of ownership of the alienator property, as well as taking reasonable steps to clarify the seller’s authority to alienate the dwelling. ... whether the

citizen showed reasonable circumspection at the conclusion of the transaction, what measures were taken by him for clarifying the rights of the person alienating this property, etc.”²³

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

There is also a second approach known as “moral” or objective. It was reflected in the Concept of Civil Law Development, which noted that the normative consolidation of the principle of conscientiousness is aimed at strengthening the moral principles of civil law regulation. In this case, moral categories such as honesty (“honest conduct of business”)²⁴, compliance with the requirements of integrity, harmonizing one’s behavior “with the ideas of society about morality, ... about good and evil”²⁵, “knowledge of the other, about his interests ... the development of one’s own interest with strangers’, the establishment of certain boundaries for the manifestation of selfishness, recognition of the interests of society.”²⁶ The same idea was partially implemented in the updated version of the Civil Code of the Russian Federation, although not in general provisions, but in the general part of the obligation law, where the description of conscientious behavior of the parties was proposed in establishing, fulfilling the obligation: “... considering the rights and legitimate interests of each other, mutually providing the necessary assistance to achieve the goal of the obligation, and also providing each other with the necessary information “(Article 30.3, Clause 3). The Supreme Court of the Russian Federation attached general importance of the evaluation of good conduct to this definition, in the establishment, implementation and protection of civil rights and in the performance of civil duties: the behavior expected of any participant in civil transactions, taking into account the rights and legitimate

interests of the other party, contributing to it, including in obtaining necessary information (Clause 1 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015 No. 25 “On the application of certain provisions of Section I of Part One of the Civil Code of the Russian Federation by courts”)²⁷.

With this understanding of the requirement of conscientiousness, it becomes an independent, objective criterion for evaluating a person’s behavior as correct, appropriate, along with specific legal criteria fixed in the law. Paraphrasing the provisions of Clause 4 of Article 1 of the Civil Code of the Russian Federation, this requirement can be formulated as follows: “to act legally and in conscientiously”. “Legally” means that a person must comply with specific requirements of the law, and “conscientiously” means that a person must act conscientiously, conduct business honestly, observing a balance of interests. Thus, conscientiousness is perceived as a kind of “supra-legal” 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 person’s attitude to his behavior. The antipode of the person’s prohibited behavior is “illegal or unconscious” behavior. “Illegal” means that a person does not comply with the specific requirements of the law, and “unconscious” means such behavior when a person does not violate the requirements of certain moral imperatives without violating the specific requirements of the law. It is this understanding of conscientiousness (unconscientiousness) that appears to be expressed in the rules on transactions (Clause 3 of Article 157 of the Civil Code of the Russian Federation), on invalid transactions (Clause 5 of Article 166, Clause 2 of Article 431.1 of the Civil Code), on the expected behavior of participants of the obligation at its establishment, execution and

after its termination (Clause 3 of Article 307 of the Civil Code of the Russian Federation); on the rules for negotiating the conclusion of a contract (Article 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 (Article 53.1 of the Civil Code); head and other supervisory debtor-bankrupt persons (Clause 10 of Article 61.11.11 of the Federal Law “On Insolvency (Bankruptcy)”) of members of credit cooperative-bankruptcy bodies (Article 189.6 of the Federal Law “On Insolvency (Bankruptcy)”).

Unfair behavior, as well as illegal behavior, can be realized, directed, or, in the words of the legislator himself, “knowingly unscrupulous” (Clause 1 of Article 10 of the Civil Code of the Russian Federation) or not be such. With this understanding, conscientiousness is characterized not by the absence of guilt, but the legitimacy of a person’s behavior. This is also evidenced by the legislative enshrinement of the importance of the requirement for honesty: “Participants of civil legal relations must act in conscientiousness” (Clause 3 of Article 1 of the Civil Code of the Russian Federation). It seems obvious that the law did not mean to make a claim: “act innocently”.

Thus, the civil legislation of the Russian Federation lacks a universal understanding of conscientiousness. For different spheres of legal regulation, either a subjective approach (“the person did not know and should not have known” about obstacles to the acquisition of the right, etc.) or an objective one is used – the person observes not only the requirements of specific regulatory requirements, the letters of the law, but also requirements of morality, honest

conduct of affairs, balance of interests, etc. An attempt to combine these approaches and the proposal of a universal definition of the concept of conscientiousness²⁸ seems to be incorrect: conscientiousness in legal relationship can be either an external objective measure of a person’s behavior or characterize his subjective attitude to his behavior. It cannot be both at the same time, as well as “wrongfulness” and “guilt” cannot unite in one concept.

Main conclusions

The implementation of two different approaches to understanding conscientiousness (unconscientiousness) in the Russian civil law necessitates its delimitation from the related 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 the person’s behavior, namely, his innocence, and is determined by the methods established for innocence: the presence of the due degree of diligence and discretion in the discovery of certain information, for example, concerning the fact that the alienator of property did not have the right to alienate it, or that property in pledge was acquired, etc. is identified;

- conscientiousness in the objective sense (“a person acts as he should, i.e. observing the requirements of fair conduct of business”) does not compete and does not replace the category of innocence, as characterizes the objective side of the person’s behavior, namely, his legitimacy. For such cases, the presumption of conscientiousness must be applied.

¹ Russian Federation Code (2002). No. 43. Art. 4190.

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- ⁴ Braginskii, M.I., Vitrianskii, V.V. (1997). *Contract law: General provisions* [Dogovornoe parvo: Obshchie polozeniia]. Moscow, Statut, 582-583.
- ⁵ For an overview of opinions, see: M.I. Braginskii, V.V. Vitrianskii. Op. cit. 583-623.
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- ¹³ This, in particular, drew the attention of K.V. Nam. See: Nam, K.V. (2006). *Osnovaniia vzyiskaniia ubytkov, vznikshikh vsledstvie narusheniia dogovornykh obiazatel'stv (sravnitel'no-pravovoi analiz)* [Grounds for recovery of losses arising as a result of breach of contractual obligations (comparative legal analysis)], In *Ubytki i praktika ikh vozmeshcheniia. Sb. st.* [Losses and the practice of their reimbursement. Collection of articles]. Ed. by M.A. Rozhkova. Moscow, Statut. Available at: SPS Konsul'tant Plius [Consultant Plus computer-based legal research system].
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Соотношение категорий «вина» и «недобросовестность» в российском гражданском праве

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Последнее десятилетие ознаменовалось масштабным внедрением в российскую правовую систему категорий «добросовестность» и «недобросовестность». Используемая ранее исключительно в институтах приобретения и защиты вещных прав, где добросовестность понималась как незнание о некоторых обстоятельствах поступления вещи в незаконное владение лица («не знал и не должен был знать», находился в состоянии так называемого извинительного заблуждения), указанная категория приобрела характер основного начала гражданского законодательства в виде общего требования, обращенного к субъектам всех гражданских правоотношений: действовать добросовестно при установлении, осуществлении и защите субъективных гражданских прав и при исполнении гражданских обязанностей (п. 3 ст. 1 ГК РФ). В частности, с позиции добросовестности было предложено оценивать поведение нарушителя в охранительных отношениях. Данное нововведение породило проблему конкуренции недобросовестности с таким условием гражданско-правовой ответственности, как вина нарушителя. Решение этой проблемы усматривается в выявлении истинного значения категории добросовестности в качестве требования: она представляется объективным критерием оценки поведения лица как «правильного», одобряемого правом, а недобросовестность – в качестве нарушившего «нравственный дух», смысл законов, а не их букву, «неправильного», не одобряемого правом. Презумпция добросовестности, закрепленная в ст. 10 ГК РФ, означает предположение о «правильности» поведения лица с точки зрения нравственности. Презумпция виновности, закрепленная в ст. 401 ГК РФ, означает, что при доказанности «неправильного» поведения лица с точки зрения нравственности, оно считается виновным, пока не доказано обратное.

Ключевые слова: добросовестность, недобросовестность, противоправность, вина, презумпция.

Научная специальность: 12.00.00 – юридические науки.
