Good faith in civil law and its subsumption in criminal law

Mariam Ghachava

Georgian-American University (GAU), Tbilisi, Georgia, 0160.

Email: mariamghachava@gmail.com

Abstract: Thus, in the presented scientific article, we have tried to analyze the principle of good faith, on the example of some norms of both civil and criminal law [1; 2; 7; 8]. The method of comparative analysis helped us to suppress good faith from civil law to criminal law with norms such as: voluntary surrender of a crime, sincere and affective repentance. Good faith as a social-psychological and moral phenomenon is often criticized if its doctrinal explanation is based on the etymology of good faith. It is based on its basic notion of conscience, which is directly related to the material world. The legislature does not provide a definition of good faith in any article of the Civil Code, which in our opinion is also a legislative gap. Furthermore the paper discusses some of the legislative recommendations and innovative approaches by the author to the definition of good faith in the norm of voluntary surrender of a crime.

Key words: conscientiousness, subsumption, responsibility.

Main Text

In civil-legal relations, good faith as a socio-psychological and moral phenomenon is often criticized if its doctrinal explanation is derived from the etymology of good faith. It is based on its basic concept - conscience, which is directly related to the material world. Based on it, a new concept of honesty was put on the agenda as a moral quality characterized by a person's attitude towards his own behavior, in which his objective actions (actions) are carried out by the mechanism of moral self-control. to take into account the rights and legal interests of its counterparties.

In the legal civil literature, there are many works devoted to good faith, its essence and meaning, but its subsuming character in a unified context is less studied. Good faith, with its legal and social essence, is a multifaceted institution, both in civil law and in other branches of law. It is always, in specific legal relations, largely subjective and, of course, in any action, behavior, or decision-making by a person, it derives from his awareness and consciousness, material and spiritual values, intentionally or suddenly arising from objective situations-situations. The purpose of our report,

based on the method of comparative analysis, first of all, at least in general, is to make a civil-legal characterization of good faith, and secondly, its essence and meaning in a specific norm of criminal law. In both cases, depending on the current state of the legislation, we will definitely see how good faith, which has the basic and common psychological features, or features that good faith has in civil law, is transformed in criminal law.

Back in 1997, in the Civil Code of Georgia, the terms: conscience, kindness, well-being, useful, objective activity, value of the welfare of the counterparties, etc. took an important place in the conscientious behavior of the participants in civil-legal relations. Honesty is definitely preceded by a person's sincerity, or sincerity, which is especially important in establishing and strengthening trust between contractors in business activities. "Honest business practice – means compliance with the principle of honesty and is essentially an objective factor notes Professor Nino Khunashvili. It is manifested, for example, in the obligation to properly consider the interests of the other party. Good faith is assumed, so the party who claims that the other party does not follow the principles of good faith and honest business practices must convince the court in this matter [3]. Most likely, he/she may not have sufficient proof(s) or will not be able to show good faith. On the other hand, such demonstrated good faith must be legally, if not socially, established and reinforced prior to trial.

Conscientiousness, as a philosophical category, is an algorithmic phenomenon, the primary and important criteria of which are morals and ethics. At the same time, the category of integrity, both in civil science and in practice, is traditionally considered either as a subjective state of a person or, at least, in a moral sense. Therefore, in a person's consciousness, both of the above-mentioned components, during a dispute or situation arising in specific civil legal relations, play a great role in the formation of conscientious behavior in order to avoid dishonest actions from one or another party.

The very concept of "good conscience," which is used in various ways, does not always have a legal meaning. Moreover, it can acquire such a meaning only when it is mentioned by the legislator in a specific norm of the Civil Code. Otherwise, such conscience cannot be considered as a mandatory rule of conduct. However, contrary to this rule (again, Again, it will be allowed by the legislator "without comment") in civil-judicial practice, in the case of a desire or expression of good faith on the part of any person, towards a conscientious entity.

The distribution of liability relief or other legal relief is unconditional. Therefore, such a civil-legal reality in relation to good faith harms civil turnover more than it benefits. As the Russian scientist L.I. Petrazhitsky notes: "A pedantically conscientious and cautious person... for an ordinary person

with any too insignificant reason to doubt the right to his property...is forced to look for information that can give sufficient grounds that the thing really does not belong to him ...And then he will act as a model, as an alleged real and active owner, then wherever he lives, he will inform this gentleman about the circumstances of the case, demand him to report the evidence of his ownership, give relevant instructions to ease his assertion, etc. Here is an example of the most unscrupulous "unscrupulous" owner." [4]

At the same time, it should be noted that the legislator does not provide a definition of good faith in any article of the Civil Code, which in our opinion is a legislative flaw, but in general, Article 98 of the Civil Code of Georgia directly indicates the importance of good faith in the occurrence of any condition: Paragraph 1: "If the establishment of condition was dishonesty prevented by the other party, for whom the establishment of the condition is not favorable, the condition shall be considered fulfilled. In accordance with the paragraph 2 of the same article:" If the establishment of the condition was dishonestly facilitated by the other party, for whom the establishment of the condition is favorable, the condition shall not be considered to have been established." And according to Article 104 of the same code, it indicates the results of the transaction when representing the addressee. Therefore, according to paragraph 1 of this article: "with the transaction that the representative enters into within the scope of his authority and on behalf of the person he represents, the rights and obligations arise only from the person represented. In accordance to the paragraph 2: "If the transaction is concluded on behalf of another person, the absence of the right of representation cannot be used by the other party to the transaction, if the represented party created such circumstances that the other party to the transaction believed in good faith that such authority existed."

Integrity is closely related to justice. Such a connection between them is revealed when considering legal facts. As O.A. According to the view based on Krasavchikov: "The fault does not belong to the event of the material world, which means that it does not constitute a legal fact, but is included in the legal fact as an invalid action"[5]. In our opinion, such an ambiguous approach to the fault leads to more misunderstanding, uncertainty, Legal chaos is thus more likely to be violated and the right to a thing (property) is violated due to the conscientious attitude of a conscientious person.

In criminal law, let's consider the subsuming character and nature of good faith on the examples of criminal law institutions, such as: voluntary involvement in a crime (Article 21 of the Civil Code), effective and sincere repentance.

According to Article 21, Clause 1 of the Criminal Code: "A person shall not be held criminally liable if he has voluntarily and finally committed the crime." Therefore, the voluntary participation in the crime does not have a voluntary character, if there is no way to prevent the crime, even if only the subject in imagination and not in reality. The voluntary nature of committing a crime is influenced by the motive that guided the subject at the time of decision-making. Indeed, this motive can be (and still is) both moral (sincere repentance, awareness of the injustice of one's actions, guilt of the victim, guilty conscience, religious factor, etc.) and non-moral (fear, disclosure of crime in the future, etc.). Based on the above, first of all, the inside of the person is obvious the psychological factor, the mental attitude, which in a person's consciousness, becomes the good faith of his action, if the determining factor of the behavior is to take a crime. Indeed, in judicial practice, such expression of morally "good will" excludes criminal liability against a person, if there is no other sign of crime in his action. Therefore, in criminal law, in contrast to civil law, the subject of a potential crime has the full right with this motivation, on the one hand, to make a decision not to transform the potential victim into a victim, and on the other hand, the law renews such disclosure and exempts him from criminal liability.

In complicity in crime, there is a peculiarity of criminal liability, in which if one accomplice voluntarily takes part in the crime and convinces another accomplice to commit the crime, it will be considered as complicity in the crime and all of them are exempted from responsibility. Therefore, in complicity, good faith, which originates from even one of the complicit and will persuade the other complicit, is formed so-called. A "group good faith" whose basis is again morality encouraged by the legislator.

Based on this small but principled comparison, the civil law lacks the practice of such incentives and it can be said that the legislator considers the dishonest behavior or action as a delict of small importance, that in fact, on the one hand, there is no real and conscientious attitude on the part of the legislator to radically protect the conscientious behavior of a person’s legal interests. On the other hand, the subject of the arising civil-legal dispute, in fact, remains without a legal response. In general, as noted by the Russian scientist Savigny F. K. "Incorporating the principle of moral rectitude into the legal formulation to support it, does not necessarily imply the imperative of civil law. Moral behavior cannot become the content of the subjectivity of civil law or the content of legal obligation, although it is one of the conditions for the realization of their social conditions” [6].

Therefore, it is desirable for the legislator to show the same principled approach in civil law, which has the above-mentioned norms of criminal law, in order to exclude expected "unwanted"

court decisions, etc. In addition, it should be noted that the legislator in criminal law is not characterized by such an approach in relation to sincere and effective repentance, because despite the person's sincere or effective repentance and the taking of all measures by him, the criminal result was still carried out, first of all, we will not have a voluntary hand in the crime, and secondly, based on it, there will be an exemption from criminal liability or mitigation of punishment.

Thus, the principle of good faith, with its essence and meaning, plays a great role in the development of law in general, because in civil law it obliges the parties to fulfill their obligations openly and on the basis of trust, to protect the interests of the parties, and each of them must treat the other party in the same way as he would treat his own interest and implementation. This principle can protect justice, but it requires more explanation and a more radical approach on the part of the legislator, so that the good faith shown before the trial should be legally, if not socially established and reinforced. For this reason, it is desirable that the legislator uses the similar method used in criminal law in civil law, so that the interests of the parties, especially the conscientious party, will be more legally protected and guaranteed.

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კეთილსინდისიერება სამოქალაქო სამართალში და მისი სუბსუმცია სისხლის სამართალში

მარიამ ღაჭავა

ქართულ-ამერიკული უნივერსიტეტი, თბილისი, 0160.

mariamghachava@gmail.com

აბსტრაქტი: წარმოდგენილ სამეცნიერო სტატიაში შევეცადეთ ანალიზი მოგვეხდინა კეთილსინდისიერების პრინციპზე, როგორც სამოქალაქო, ისე სისხლის სამართალის ზოგიერთი ნორმის მაგალითზე. შედარებითი ანალიზის მეთოდი დაგვეხმარა მოგვეხდინა კეთილსინდისიერების სუბსუმცირება სამოქალაქო სამართლიდან სისხლის სამართალში ისეთ ნორმებთან, როგორიცაა: დანაშაულზე ნებაყოფლობით ხელის აღება, გულწრფელი და ქმედითიმონანიება. კეთილსინდისიერება, როგორც სოციალურ-ფსიქოლოგიური და მორალური მოვლენა, ხშირად, კრიტიკის საგანი ხდება ხოლმე, რამეთუ, მისი დოქტრინალური ახსნა-განმარტება გამომდინარეობს კეთილსინდისიერების ეტიმოლოგიიდან. ის ეფუძნება სინდისის ძირითად ცნებას, რომელიც პირდაპირ კავშირშია მატერიალურ სამყაროსთან. კანონმდებელი სამოქალაქო კოდექსის არცერთ მუხლში არ იძლევა კეთილსინდისიერების განმარტებას, რაც, ჩვენი აზრით, ასევე, საკანონმდებლო ხარვეზია. გარდა ამისა, ნაშრომში განხილულია ავტორის ზოგიერთი საკანონმდებლო რეკომენდაცია და ინოვაციური მიდგომა დანაშაულის ნებაყოფლობით ხელის აღების ნორმის კეთილსინდისიერების განმარტებასთან დაკავშირებით.

საკვანძო სიტყვები: კეთილსინდისიერება, სუბსუმცია, პასუხისმგებლობა.