Debt Release in the Context of Philosophical and Economic Aspects of Legal Regulation

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ABSTRACT

The reform of the rules on debt release (article 415 of the Civil Code of the Russian Federation) in 2015 raised the question of whether this novelty changed the fundamental principles of civil law. Amendments to the article do not require the consent of the debtor to forgive the debt. Is this a step to the rule that it is not required the consent of the donee in the donation? The author analyzes these amendments on the base of philosophical studies of S. S. Alekseev and assesses its role in the development of civil law.

Keywords: donation, debt release, consent, unilateral transaction

Is the consent of a person required for a benefit in his favor?

In the context of the Russian legislation, this issue may seem irrelevant. The most common legal concept that mediates a benefit by one person to another is a donation agreement. The law establishes the contractual structure of the legal relationship. This means that the consent of the donee to the benefit in his favor is necessary. Thus, the law in its legal constructions reflects the value in the rule of law of the basic principle of personal autonomy — imposed beneficence is unacceptable.[1]

At the same time, not all Soviet jurists agreed with this qualification of the donation relationship. B.B. Cherepakhin believed that the contractual structure of the donation is a fiction that covers the essence of the donation relationship, which should be qualified as a unilateral deal.[2] However, this position is not given here for historical reference. Despite the fact that the law regarding the regulation of gift relations remains unchanged, the reason to raise this issue at the present stage of development of civil law still arose. The reform of the Civil Code of the Russian Federation in 2015 has changed article 415 of the Civil Code of the Russian Federation addressed to the debt release. Even without addressing the details of the problem of differentiating the donation arrangements and debt release, it is difficult to deny that debt release as well as donation mediates the relationship of benevolence. However, as a result of the reform, the need to obtain the debtor's consent for the debt release was called into question. Clause 2 of article 415 of the Civil Code of the Russian Federation is formulated as follows:

"The obligation is considered terminated **upon receipt by the debtor of the creditor's notice of debt forgiveness**, ***unless*** **the debtor within a reasonable time sends the creditor an objection** to debt forgiveness."

The debtor does not have to express its consent but can send an objection to the debt forgiveness. In the doctrine, this innovation is interpreted in different ways. The position is expressed that debt forgiveness is a unilateral transaction.[3] A number of authors continue to see the debt forgiveness transaction as bilateral, but with a presumed acceptance of the debtor.[4] In any case the attitude to the will of the debtor in the new construction changes. The will of the debtor is either not needed or is presumed. These fine-tuning of the debt forgiveness institution is backed by civil law principles and theoretical foundations of legal regulation. A localized change in the rule on one of the grounds for termination of obligations can raise a question of the degree of implementation of the principle of individualism and autonomy of will in the national law.

Maybe the principle of autonomy of will ceases to be an indisputable value of the civil law?

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[1] Alekseev S. S. Legal Constructions — a Key Link in Law (in the Manner of Statement of the Problem) [Yuridicheskie konstruktsii — klyuchevoe zveno prava. (v poryadke postanovki problemy)] // Civilistic Notes: Interuniversity Collection of Scientific Papers [Tsivilisticheskie zapiski: Mezhvuzovskii sbornik nauchnykh trudov]. M., 2001. P. 7. (In rus)

[2] Cherepakhin B. B. Donation under the Civil Code R.S.F.S.R. Civil Law Works. Book Four [Darenie po Grazhdanskomu kodeksu R.S.F.S.R. Trudy po grazhdanskomu pravu. Kniga chetvertaya]. M., 1923. P. 47. (In rus)

[3] Contractual and Law of Obligations (General Part): Article-by-Article Commentary on articles 307–453 of the Civil Code of the Russian Federation [Dogovornoe i obyazatel'stvennoe pravo (obshchaya chast'): postateinyi kommentarii k st. 307–453 Grazhdanskogo kodeksa Rossiiskoi Federatsii] / V. V. Baibak, R. S. Bevzenko, O. A. Belyaeva [and others]; ed.-in-chief A. G. Karapetov. M., 2017. P. 796. (In rus)

[4] See ibid.

In support of the new approach of the legislator to debt forgiveness the following argument may be offered. How many debtors will refuse to have their debt forgiven? Such debtors, of course, will exist, but they are in the minority. Civil law should meet interests of the majority not the majority. What is more common should be the general rule. If most debtors would accept debt forgiveness, why set the default rule to require consent? Such regulation requires additional costs for the coordination of wills and, therefore, is economically inefficient.

Economic analysis of law versus the philosophy of law

It is clear from the institutions of donation and debt forgiveness that the legal regulation may have different bases. Such foundations include, in particular, the economic analysis of law and the philosophy of law. In the science of economic analysis of law, the concept of majoritarian default rule (majority dispositive rule) is formulated. This is a dispositive rule that corresponds to the will of the majority.[5] Such approach to the formulation of dispositive rules reduces the transaction costs of agreeing terms and conditions of an agreement other than the dispositive rule.[6] And saving transaction costs, in turn, leads to increased economic efficiency, which is one of the goals of the legal regulation. If you follow the logic of economic analysis, you can reduce costs by using a model that does not require the expression of the will of the donee to receive a donation and the will of the debtor to forgive the debt. If the majority of persons, in whose favor the act of benefiting is performed, agree to the same, the rules that mediate such a good act should be constructed according to a unilateral transaction model.

Thus, the possible justification for making amendments to article 415 of the Civil Code of the Russian Federation consists in the choice of the economic basis of legal regulation by the legislator. At the same time the donation remains a contractual structure. What can be the basis of this legal regulation of the donation institution?

The philosophy of law formulates the following principle: "No one can impose an unsolicited benefit on another." This principle was clearly manifested in the Roman law, in which there was a "alteristi pulari nemo protest" maxim.[7] It meant that everyone can acquire what they are interested in only on their own. It is on the basis of this maxim such institutions as representation and contracts in favor of a third person were disclaimed in Roman law.[8] The formulation of this principle is related to the philosophical context of the extreme individualism of Roman jurisprudence.

However, in continental law with the development of institutions of representation and contracts in favor of a third party this Roman maxim was revised. The dogmatic principle has given way to the needs of the economy.[9] Is there a chance that the same fate awaits the donation agreement, which is transformed into a unilateral transaction based on the economic analysis of law? Or are the needs of the economy not always able to replace approaches of law and order based on the black letter law and the philosophy of law?

Economic analysis and philosophy of law: together or separately

The sociological understanding of law is of particular importance in the context of the philosophy of law. S. S. Alekseev noted that the law has the ability to respond to changing conditions of public life[10]. The law not only mediates social relations but is also a product of social interaction. It turns out that the law is something that is actually encountered in public relations, is widespread therein and is in demand. And then we come back to the idea of the law as the right of the majority. The rule constructed by the legislator should be a generalization of the practice of social interaction. And therefore, such a rule should be a majoritarian default rule — a majority dispositive rule, i.e., the rule, which corresponds to the prevailing social model of behavior. However, the basis of the majoritarian default rule here is not the principle of economic efficiency but the sociological understanding of the law.

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[5] Karapetov A. G. Economic Analysis of Law [Ehkonomicheskii analiz prava]. M., 2016. P. 429 (In rus)

[6] Posner R. A. Economic Analysis of Law. 8th ed. New York: Aspen Publishers, 2010. P. 119.

[7] D. 45.1.38.17.

[8] See: Bibikova E. V. Contract in Favour of a Third Party in Russian and European Private Law: A Comparative Account [Dogovor v pol'zu tret'ego litsa v rossiiskom i evropeiskom chastnom prave (sravnitel'no-pravovoi obzor)] // Contracts and Obligations: a Collection of Works of Graduates of the Russian Chamber of Public Law [Dogovory i obyazatel'stva: sbornik rabot vypusknikov RSHCHP]. Vol. I. PP. 77–78 (In rus)

[9] See ibid. PP. 93–94.

[10] Alekseev S. S. The Social Value of Law in Soviet Society [Sotsial'naya tsennost' prava v sovetskom obshchestve]. M., 1971. P. 126.

An interesting metamorphosis is also demonstrated by the approach of B. B. Cherepakhin. He deduces the donation construction as a unilateral transaction dogmatically, based on narratives of a legally significant will.[11]

It turns out that both the philosophy of law and the economic analysis of law may lead to the same results and are not necessarily in irreconcilable contradiction. It follows from the above arguments that both economic analysis and legal philosophy can justify the unilateral nature of transactions that mediate an act of benefiting.

At the same time it should be noted that the sociological approach to the law does not always preclude the choice of a legal regulation model.

S.S. Alekseev believed that the task of the philosophy of law was to explain the essence and purpose of law through the world view of the society, from the perspective of social values.[12] He called the philosophy of law the integration of philosophical ideas and legal data.[13] In his research the scientist noted that the private law is based on the philosophical ideas of equality, personal freedom and autonomy of will.[14]

The principle of autonomy of the will is revealed in essays by M. M. Agarkov. The scientist believes that if a person's name is used in a positive context, for example, some heroic actions are attributed to him, he still has the right to protect his name.[15] Otherwise, it would violate his right to be himself. The name in its legal meaning, according to M. M. Agarkov, is a separation of individualization, and its philosophical basis is the moral property of an individual.[16] This example shows the importance of the value and independence of the human person in determining their non-property and property status, even if someone wants to improve this situation.

It is difficult to deny that the principle of personal freedom and autonomy of the will is the philosophical basis of private law today, either. These values form the free autonomous person as a subject of law, which itself has the right to make a decision whether it wants to receive a benefit or not. It follows that the values existing in society do not allow economic analysis to determine the choice of normative legal structures.

At the same time when choosing the philosophy of law as the basis of the legal regulation, an interesting metamorphosis arises once again. S.S. Alekseev notes that the fundamental value of freedom is first of all of economic importance. It is the value of freedom that underlies the principles of freedom of competition and freedom of contract, i.e. the underlying principles of the market economy that determine the economic efficiency of exchange.[17] Thus, the construction of the legal regulation based on dogmatic principles makes it possible to achieve the goals set by the economic analysis of the law. In the context of the problem of imposed benevolence the principle of freedom of the individual does not allow establishing unilateral character of transactions mediating the act of benefiting as a general rule.

Based on these arguments we can conclude that the economic analysis of the law and the philosophy of the law are not conflicting prerequisites for legal regulation construction. Any legal rule may be based on a philosophical value and at the same time ensure achievement of economic efficiency. The choice of a specific model of the legal regulation should be determined by a balanced ratio of philosophical and economic values for the long run.

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[11] Cherepakhin B. B. Op. cit. PP. 46–48.

[12] Alekseev S. S. Philosophy of Law [Filosofiya prava]. M., 1997. P. 2 (In rus)

[13] See ibid. P.12.

[14] Alekseev S. S. Ascent to the Law. Searches and Solutions [Voskhozhdenie k pravu. Poiski i resheniya]. M., 2001. PP. 161, 729. (In rus)

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[16] See ibid.

[17] Alekseev S. S. Ascent to the Law. Searches and Solutions [Voskhozhdenie k pravu. Poiski i resheniya]. M., 2001. PP. 728–730. (In rus)

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