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Institution of compensation for moral harm in civil law of the countries of the Commonwealth of Independent States

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Abstract. The authors conducted a comparative legal analysis of the current civil legislation of the member states of the Commonwealth of Independent States (CIS) in the field of compensation for moral harm. The need to replace the concept of "moral harm" with the term "mental harm" is argued.

Keywords: harm, tort, tort obligations, legislation of the member states of the Commonwealth of Independent States, moral harm, obligations arising from harm, mental harm.

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Introduction. Recognition of the value of the human person in the countries of the Commonwealth of Independent States calls for the creation of mechanisms to ensure the fastest, most effective and fair restoration of the violated right and compensation for moral harm. Having arisen in civil law under the influence of the rules of foreign legislation, the institution of compensation for moral harm firmly entered the range of remedies for violation of civil rights provided for by the civil legislation of the member states of the Commonwealth of Independent States (CIS). At the same time, we have to acknowledge that the current state of the legal regulation of compensation for moral harm in the post-Soviet space is far from perfect. The institution of compensation for moral harm has not been given pride of place in the legal literature too. Scientific developments available in this field in the entire post-Soviet space are private, fragmentary and far from complete. They focus on only certain aspects of the problem, what is artificially narrowing the object of scientific research. In contrast, foreign legal doctrine has always paid close attention to the issue of compensation for intangible harm [17, P.26; 22; 23, S.16; 25, S.25; 26, S.11; 27, S.87; 28, S.14; 29, P.5; 30, S.119; 32, S.990; 33, S.10; 35 S.10]

The problems and challenges of the legal regulation of the studied area of social relations are related to the lack of common approaches to the solution of a whole range of issues crucial for the improvement of the institution of compensation for moral harm in the scope of the Commonwealth, concerning the development of a clear terminology base reflecting the specifics of this legal phenomenon and developing a unified methodology for determining the amount of monetary compensation. All this highlights the need for further research aimed at improving the current civil legislation of the states of the Commonwealth of Independent States (CIS) in the field of compensation for moral harm.

Methodology. The methodological basis of the research is the conceptual provisions of the dialectical theory of cognition, as well as general scientific and private scientific methods based on it such as system-structural, comparative-legal and formal-legal methods.

Discussion and results. In the Union legislation, the term "moral harm" was legally set forth for the first time in the Law of the USSR "On the Press and the Mass Media" of June 12, 1990 [5], however it did not disclose the content of this concept. Article 39 of this Law provided that moral harm caused to a citizen as a result of information, disseminated by mass media, contradicting the reality, discrediting the honor and dignity of a citizen or causing him/her other non-pecuniary damage is reimbursed under court decision by the media, as well as by guilty officials and citizens.

Further development of the institution of compensation for moral harm was associated with the adoption of the Fundamentals of Civil Legislation of the USSR and the Republics [13] in 1991,

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where Art. 131 disclosed the content of the term "moral harm" as "physical or moral suffering". It should be noted that the provisions of the Fundamentals of compensation for moral harm subsequently found their consolidation in the Civil Code of the Russian Federation [2]. According to Art. 151 of the Civil Code, if a citizen suffers moral harm (physical or moral suffering) by actions that violate his/her personal intangible rights or encroach on other non-material goods owned by the citizen, as well as in other cases provided for by law, the court may impose on the violator the duty of pecuniary compensation for the said harm. As we can see, actions violating the property rights of a citizen but not regulated by law were excluded from the list of actions, the commission of which entails responsibility for causing moral harm, according to the disposition of the said article. It should also be noted that the Fundamentals of Civil Legislation of 1991 allowed for compensation for moral damage only in the presence of the fault of the inflictor of harm, while Art. 1100 of the Civil Code of the Russian Federation contains a list of cases of the incurrence of the obligation to compensate for moral harm regardless of guilt. In addition, according to Art. 131 of the Fundamentals, moral damage was subject to reimbursement, both in monetary and other material form, which contributed to the satisfaction of the interests of the creditor in the event that the debtor lacks money. In turn, clause 1 of Art. 1101 of the Civil Code of the Russian Federation provides for compensation for moral damage in cash only. Thus, we have to state that the adoption of the Civil Code of the Russian Federation made a step back in the development of this important institution of Russian civil legislation, in comparison with the Fundamentals.

It is noteworthy that the definition of the concept of moral harm provided in Art. 151 of the Civil Code of the Russian Federation as a physical or mental suffering is similar to the one set forth in Art. 17 of the Model Civil Code of the CIS [14]. This is not accidental, since the development of these two sources was almost at the same time and the basis for this concept was the provisions of § 847 of the German Civil Code [18]. It should be noted that, since August 1, 2002, Article 847 of the German Civil Code was excluded, and some of its provisions were reflected in § 253 of “Immaterieller Schaden”. Compensation for suffering in German legal doctrine is traditionally called "Schmerzensgeld" [23, S.16; 25, S.25; 26, S.11; 27, S.87; 28, S.14; 30, S.119; 32, S.990; 33, S.10; 35 S.10]. This legal category, at various stages of its historical development, according to some German researchers, has been understood to mean:

- compensation granted solely with regard to the physical pain suffered (net compensation);
- compensation, which includes other non-material damage in addition to physical pain (compensation for pain in a broader sense);

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- compensation, externally associated with non-material damage and in fact is intended to compensate for losses that can not be precisely determined (for pain and suffering in a figurative sense) [24, S.2].

As we can see, the German model for compensation for non-material damage set forth in the German Civil Code differs by extreme flexibility of legal regulation and proximity to modern realities. Nevertheless, with all its merits, the German codified act regulating compensation for harm for suffering (pain) also has its obvious shortcomings. For example, the absence of legally fixed methods and techniques for determining the amount of compensation for suffering caused. Being the versions of the German Civil Code adapted for the post-Soviet space, the provisions of the Model Civil Code for the CIS member states are equal, as are the norms of the Civil Code of the Russian Federation in the field of compensation for moral harm possess all the advantages and disadvantages inherent in the German codified act.

It should be noted that the problems concerning the content of the term "moral damage" and determining the amount of its monetary compensation are typical of the legislation of all CIS countries. This area may be conventionally divided into three fields: 1) CIS countries, whose civil law, like the Model Civil Code of the CIS countries and the Civil Code of the Russian Federation, provides for the term “moral harm”, defining it as physical or moral suffering, and contains rules on the method and amount of its compensation (Art. 152, 970 of the Civil Code of the Republic of Belarus [4], Art. 16 [9], 1028 [8] of the first and second part of the Civil Code of the Kyrgyz Republic, Art. 1422, 1423 of the Civil Code of the Republic of Moldova [31]). 2) the CIS member states, whose civil law does not contain rules on compensation for moral harm or contains, but does not disclose the content of this legal term. For example, the civil codes of Azerbaijan [16], Armenia [19] and Georgia [34] do not contain such a remedy for violation of civil rights as compensation for moral harm. In turn, Art. 11 of the Civil Code of the Republic of Turkmenistan [21] considers compensation for moral harm as one of the methods to protect civil rights, however, the Turkmen legislator does not disclose the concept of "moral harm" in this article. Quit specific, in our opinion, is the position of the Uzbek legislator, which, although it does not disclose the content of the term "moral harm" in Art. 1021 of the Civil Code of the Republic of Uzbekistan [20], but suggests taking into account the nature of the physical and moral suffering inflicted on the victim in determining the amount of its monetary compensation, in accordance with Art. 1022 of this Code. 3) the CIS member states, whose civil legislation provides for their original approaches to the definition of the concept of "moral harm". According to clause 1 of Art. 951 of the Civil Code of the Republic of Kazakhstan [1], moral harm is a violation, impairment or

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deprivation of personal non-property goods and rights of individuals and legal entities, including moral or physical suffering (humiliation, irritation, depression, anger, shame, despair, physical pain, discomfort, etc.) experienced (suffered) by the victim as a result of an offense committed against him/her.

In determining the amount of moral damage, according to Art. 952 of the Civil Code of the Republic of Kazakhstan, a subjective evaluation by the victim, or, in case of his/her death, by his/her close relatives or spouse, of gravity of moral damages caused to the victim, and objective data, which are the evidence of the degree of moral and physical suffering of the victim, or, in case of his/her death, of his/her close relatives or spouse: the vital importance of the benefits, which is the former object of abuse (life, health, honor, dignity, freedom, inviolability of home etc.), severity of the offense (the murder of close relatives, bodily injury that resulted in disability, imprisonment, loss of job or home, etc.), the nature and scope of dissemination of false information, defamatory, the living conditions of the victim (service, family, household, financial, health, age, etc.), and other relevant circumstances.

We consider the definition given in clause 2 of Art. 23 of the Civil Code of Ukraine [3] to be well elaborated, according to which the moral damage consists of: physical pain and suffering that an individual has undergone in connection with an injury or other damage to health; mental suffering that an individual has undergone in connection with unlawful conduct towards himself, members of his family or close relatives; mental suffering, which an individual has undergone in connection with the destruction or damage to his property; the humiliation of honor, dignity, as well as the business reputation of an individual or legal entity.

The positive aspects of the Ukrainian legislation include the fact that according to clause 3 of Art. 23 of the Civil Code of Ukraine, moral damage can be compensated both in money and in other property or in another way. The amount of monetary compensation for moral harm is determined by the court depending on the nature of the offense, the degree of physical and mental suffering, the impairment in the abilities of the victim or the deprivation of possibility to realize them, the degree of guilt of the person who caused moral harm, if the guilt is the basis for compensation, as well as considering other circumstances that are of significant importance. In determining the amount of reimbursement, the requirements of reasonableness and fairness are taken into account.

The analysis of the provisions of the codified acts of the countries of the Commonwealth of Independent States in the field of compensation for moral harm shows the lack of a uniform approach throughout the post-Soviet space to this legal phenomenon. In the entire post-Soviet

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space only the term "moral harm" remains unshakable. It should be noted that most researchers, both in Russia and abroad, proceeding from a literal interpretation of the name of this concept, consider it unsuccessful [7, P.11; 11, P.103; 12, C.50; 15, C.13]. Sharing a similar point of view, we should note that accentuation of the legislator's attention on the word "moral" is absolutely wrong, since such a name predetermines that harm is caused to the "moral principles" of the person. Moral principles are an integral part of the spiritual life of the individual and mean a set of ideas about the ideal, good and evil, justice and injustice. Relationships from harm are regulated through legal norms and are of legal nature. Thus, the concept of "moral harm", set forth in the civil legislation of the countries of the Commonwealth of Independent States, erases the line between law and morality. The term "suffering", which both Russian and foreign legislator prefer using, predetermines that wrongful acts of a delict must necessarily cause a certain psychological reaction of the victim. However, in order to respond to psychogenic effects, a person must first of all understand the meaning of the event and its possible consequences [10, P.118.]. In turn, the process of the reflection of the objective world by the subject in scientific literature is treated as a normal mental state of a person [6, P.265.]. Awareness of the victim's incoming information from the outside about the undue diminution of the good hinders the normal biological functioning of his/her psyche and causes mental discomfort. In other words, the state considered above is the psychic reaction of the victim to a wrongful deed committed against him. The scientific literature points to two types of manifestations of human's mental reactions to the depreciation of one or another of his/her good. The first kind is an instinctive reaction, manifested in the form of emotions, without which the normal mental activity of a person is impossible. Lack or inadequacy of emotions indicates a painful change in the human psyche [10, P.127.].

The inability of a person to master a process, to adapt to a changed situation, causes deeper consequences on the mental level, which manifest themselves as neuroses and neurotic reactions constituting the second type of psychic experiences [10, P.127.]. These consequences represent a disorder of mental activity, which is a mental harm, while the resulting suffering from deepened sensations of social and physical inferiority is only a consequence of mental harm. Since the legal phenomenon, which in the entire post-Soviet legal space is called 'moral harm', actually finds its expression precisely in the negative changes in the mental activity of the victim, it would be more correct to call it "mental harm". Confirmation of this argument comes from the existence of similar legal frameworks in Australia, England, the United States, etc., whose legislation contains different variations of the definition of mental harm: "psychological injury" [17, P.26.] (Psychic harm), "psychiatric injury" [29, P.5.] (Psychiatric harm), "nervous shock" [22]. It should be noted

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that such an abundance of terms used to characterize the mental harm reflects not so much different doctrinal approaches of the foreign legislator to this legal phenomenon as huge practical experience in applying similar legal institutions over many years.

Summary. Today, the CIS member countries pay more attention to one of the main methods of protecting the non-property benefits of the individual - the institution of compensation for moral harm. The institution of compensation for moral harm in the legislation of each individual state has its own characteristics reflecting the unique conditions of life of its citizens, their culture and centuries-old traditions. However, despite a significant step forward, the current state of this institution leaves much to be desired. The use of the concept of "moral harm" in the codified acts of the countries of the Commonwealth of Independent States is a bit unsuitable both in theoretical and in practical aspects. Since physical and moral suffering is expressed in the negative psychological reactions of the victim, it would be more correct to use the term "mental harm". In support of this argument, it is possible to cite the long-term existence of various variations of this concept in the countries with the Anglo-Saxon (precedent) system of law.

We believe that the term "mental harm" should be set forth in Art. 17 of the Model Civil Code of the CIS member states, which is the basis for all national codification acts in the entire post-Soviet space.

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