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Compensation for Moral Harm in Foreign Law and Order

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Abstract

The authors of the paper conducted a comparative law research of the current civil legislation governing compensation for moral harm in foreign countries. The article defines the basic terms used in foreign

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law which are analogues of the institute of "compensation for moral harm" existing in Russia and neighboring countries.

Keywords: Harm, Delict, Delictual obligations, Moral harm, Non-pecuniary damage, Liability for harm, Psychiatric injury.

Compensación por daños morales en la ley y el orden extranjeros

Resumen

Los autores del artículo realizaron una investigación de derecho comparado de la legislación civil vigente que rige la indemnización por daños morales en países extranjeros. El artículo define los términos básicos utilizados en el derecho extranjero que son análogos del instituto de "compensación por daños morales" existente en Rusia y los países vecinos.

Palabras clave: Daño, Delito, Obligaciones delictivas, Daño moral, Daño inmaterial, Responsabilidad por daños, Daño psiquiátrico.

1. INTRODUCTION

The history of the development of mankind show that the acquisition of rights and freedoms by man and citizen is inextricably linked with the obligation of the state to create an effective legal protection system. The constitutions of foreign countries pro-vide for the possibility of men to protect their rights and freedoms by all means which are not prohibited by law. One of such methods in the Russian Federation is compen-sation for moral damage. Foreign law orders

have similar legal institutions. Despite the significant period of existence, the civil regulation of compensation for the pain and suffering is far from being perfect in all developed world law order. Problems of compensation for harm caused by suffering cause a logical interest in Russian (GATSKY M. A., 2006.; KARNOMAZOV A.I., 2010; KLOCHKOV A.V. 2004; MIKHNO EA., 1998; REDKO E.P., 2009; SMIRENSKAYA E.V., 2000; SHICHANIN A.V., 1995; ERDELEVSKY A. M., 2007) and foreign specialists in civil law (BARTON W., 1990; Lieberwirth Ralf. Das Schmerzensgeld., 1965; MULLANY, NICHOLAS J. 1999) whose work is aimed at improving this legal phenomenon, identifying its positive and negative sides. All this points out the necessity of further theoretical research concerning these problems.

2. METHODOLOGY

The methodological basis of the study is general scientific, specific scientific and special research methods in their organic combination. The dialectical and system approaches, the method of analysis and synthesis made it possible to study the various approaches of domestic and foreign legislators to civil regulation of public relations in the field of compensation for moral harm.

The interdisciplinary method and the method of interpretation of law made it possible to determine the content of the rules governing compensation for moral harm from the standpoint of civil legal

science. The comparative legal method made it possible to conduct a comparative legal analysis of Russian and foreign legislation governing compensation for moral harm.

3. RESULTS and DISCUSSION

Article 151 of the Civil Code of the Russian Federation states: "If a citizen has suffered moral harm (physical or moral suffering) from the actions that violate personal non-property rights or encroach on the intangible property belonging to the citizen, as well as in other cases provided for by law, the court may obligate a violator to compensate for the specified damage (Civil Code of the Russian Federation (Part One) of November 30, 1994).

Unlike Russian civil legislation, where the institution of compensation for moral harm is only at its nascent stage, there is a rather extensive practice of its application in foreign system of justice. It is noteworthy that in foreign law and order, the legal category we are studying is defined along with the well-known concept of "moral harm" (the Republic of Belarus, the Republic of Kazakhstan, the Republic of Moldova, Ukraine) also as: "Schmerzensgeld" (Germany), "psychological injury" (USA, Australia), "psychiatric injury" (England), "nervous shock" (England, USA, Canada).

One of the countries the civil legislation of which is similarly to Russian one al-lows for the term "moral harm" defining it as physical or mental suffering, is the Re-public of Belarus. As well as in the

Russian Federation, compensation for moral dam-age in most cases is associated with a violation of the intangible benefits of citizens the list of which is envisaged in Article 151 of the Civil Code of the Republic of Belarus (Civil Code of the Republic of Belarus of December 7, 1998). In special cases stipulated for in certain legislative acts of the Republic of Belarus, non-pecuniary damage may also be compensated for violation of property rights of citizens.

These include: Article 28 of the Housing Code of the Republic of Belarus, which enshrines the right to compensation for non-pecuniary damage for violation of the rights and legitimate interests of citizens in the field of housing relations; Article 246 of the Labor Code of the Republic of Belarus, providing for compensation for non-pecuniary damage for violation of labor rights of citizens in the Republic of Belarus; Clause 5 Article 22 of the Law of the Republic of Belarus "On the Protection of the Rights of Consumers of Housing and Communal Services", establishing civil liability in the form of compensation for moral damage for violation of the rights of consumers of housing and communal services; Clause 1, Article 18 of the Law of the Republic of Belarus "On Protection of Consumer Rights", which provides for com-pension for moral damage in the Republic of Belarus for violation of consumer rights; Clause 4 Article 3 of the Law of the Republic of Belarus "On Personal Subsidiary Plots of Citizens", which establishes such a measure of responsibility as compensation for non-pecuniary damage for violation of the rights of citizens to maintain personal subsidiary plots; part 2 clause 14 of the Law of the Republic of Belarus "On Environmental Protection", which

provides the victim with the right to resort to such a method of protecting civil rights as compensation for non-pecuniary damage for violation of human rights to a favorable environment. As we see, the current civil legislation of the Republic of Belarus provides for a rather wide range of property rights of citizens, for violation of which compensation for moral damage is provided.

The Kazakh legislator defines the notion "moral harm" in Paragraph 1 of Article 951 of the Civil Code of the Republic of Kazakhstan (Civil Code of the Republic of Kazakhstan (Special Part) dated July 1, 1999) in different terms: violation, derogation or deprivation of personal non-property benefits and rights of individuals, including moral or physical suffering (humiliation, irritation, depression, anger, shame, despair, physical pain, inferiority, discomfort, etc.) experienced (suffered, endured) by the victim as a result of an offense committed against them, and in the event of their death as a result of such an offense, by their close relatives, husband (wife). In accordance with Paragraph 4 of Article 951 of the Civil Code of the Republic of Kazakhstan, moral damage caused by actions (inaction) that violate the property rights of a citizen is not subject to compensation, except in cases provided for by legislative acts. Currently, only the Law of the Republic of Kazakhstan "On Protection of Consumer Rights", Article 21 of which states that: moral harm caused to a consumer as a result of a violation by a seller (manufacturer, clerk) of their rights and legitimate interests provided for by the legislation of the Republic of Kazakhstan on the protection of consumer rights, shall be compensated if the seller (manufacturer,

clerk) in the amount determined by the court, unless otherwise provided by the laws of the Republic of Kazakhstan.

In turn, according to Article 1422 of the Civil Code of the Republic of Moldova (Civil Code of the Republic of Moldova dated June 6, 2002), in the case of causing a person moral harm (moral or physical suffering) through the acts infringing their personal non-property rights, as well as in other cases provided for by law, the judicial authority has the right to oblige the person responsible for the harm to reimburse it in monetary terms. It should be noted that the Moldovan legislator has recently been trying to modernize its civil legislation, bringing it in line with European requirements, as evidenced by the latest changes that entered into force on March 1, 2019.

According to Article 23 of the Civil Code of Ukraine(Civil Code of Ukraine of January, 16, 2003), a person (physical or legal) has the right to be compensated for moral harm caused as a result of violation of their rights, which is expressed:

- In physical pain and suffering that an individual has experienced in connection with a severe injury or other damage to health;

- In mental suffering that an individual has experienced in connection with wrongful behavior with regard to oneself, one's family members or close relatives;

- In mental suffering that an individual has experienced in connection with the destruction or damage to one's property;

- In denigration of honor and dignity of an individual, as well as the business reputation of an individual or legal entity.

It should be noted that moral damage in Ukraine is compensated for by money, other property, or in another way. In addition to the Civil Code of Ukraine, the law of compensation for non-pecuniary damage are enshrined in a number of other regulatory legal acts, in particular: 34 of the Law of Ukraine "On Compulsory State Social Insurance against Occupational Accident and Occupational Disease that Caused Disability" of September 23, 1999; Article 17 of the Law of Ukraine "On the Protection of Rights of Indication of Origin of Goods" of June 16, 1999; Article 42 of the Law of Ukraine "On Waste" of March 9, 1998; Article 25 of the Law of Ukraine "On Citizen Appeals" of October 2, 1996; Article 15 of the Law of Ukraine "On Prevention of Corruption" of October 5, 1995; Article 8 of the Law of Ukraine "On Implementation of Drug and Psychotropic Medication Trafficking Measures and Abuse Deterrence" of February 15, 1995; Article 1 of the Law of Ukraine "On Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of the Inquiry, Preliminary Investigation, Prosecutor's Office and Court" of December 1, 1994; Article 37 of the Law of Ukraine "On Television and Radio Broadcasting" of December 21, 1993; and many others.

It is noteworthy that in addition to the Civil Code of Ukraine, a definition of the term "moral harm" is also added in Article 1 of the Law of Ukraine "On Foreign Economic Activity" of April 16, 1991, which is proposed to be understood as the harm caused to personal non-property rights of the subjects of foreign economic activity that

has led or could lead to losses that have material expression. It should be noted that the Ukrainian legislation on compensation for moral harm is equally applied to both physical and legal entities. So, for example, in paragraph 1 of the Explanation of the Supreme Economic Court of Ukraine of February 29, 1996, it is stated that the moral damage of a legal entity should be understood as the damage caused to the organization by violation of its legal non-property rights, an infringement of which could entail the following negative consequences: derogation of public reputation, formation of a negative assessment of it as a subject of civil legal relations, and, as a result, decrease in number of counter-agents, consumers, etc., and, consequently, property loss.

As you can see, Ukrainian civil law provides for compensation for moral harm not only to citizens, but also to legal entities, both for violation of their property and non-property rights.

Compensation for non-financial losses for pain and suffering in German law is traditionally referred to as Schmerzensgeld. Such compensation is assigned for: physical pain suffered (net compensation); other non-material damage in addition to physical pain (compensation for pain in a broader sense); caused indirect non-material damage (for pain and suffering in a figurative sense) (CATHER, C.; GREENE, E. & DURHAM, R. 1996). It should be noted that Schmerzensgeld is used only for claims arising from § 823 BGB. Compensation for pain and suffering in German law performs restorative, compensatory and preventive functions (CATHER, C.; GREENE, E. & DURHAM, R., 1996). When assessing

Schmerzensgeld, German courts take into account an extent of guilt of a person who caused pain and suffering. German civil law traditionally distinguishes two forms of guilt, intent and negligence, the latter is divided into: ordinary and gross (Civil Code of the Republic of Belarus of December 7, 1998, P.615). The notion of negligence is defined in § 276 of BGB. It should be noted that already "ordinary negligence" is enough to take responsibility for infliction of pain and suffering. Assessment of pain and suffer-ing compensation amount in Germany is the prerogative of the court. The following criteria are taken into account: form of guilt of the person responsible for damage; time period during which the victim suffered pain and suffering; time during which the creditor was under medical treatment; individual characteristics of the victim; property status of the tortfeasor (DEUTSCH, E., 1993)It should be noted that the German legal doctrine has no single precisely formed methodology for taking into account all the criteria necessary for assessment of damages for pain and suffering. It is written the following in German civilian literature on this point: "since the size of the pain and suffering suffered cannot be felt, assessed and calculated, all that is left to do is only to empathize. In this regard, the Law cannot establish any standards. And only the judge can decide how much pain and suffering cost" (KERN, B.R., 1991).

Therefore, determination of Schmerzensgeld in each case is at the discretion of the court. In their work, judges in assessing damages for pain and suffering are usually guided by Summary Tables. The content of such tables is composed of court decisions on specific

categories of cases with earlier determined quantum of non-pecuniary damages for pain and suffering (Susanne Hacks, Ameli Ring, and Peter Böhm: Schmerzensgeld-Beträge., 2012).

As you can see, the German model of compensation for pain and suffering is extremely flexible in legal regulation, but it also has its drawbacks which include the lack of a unified legislatively fixed methodology for determining the size of Schmerzensgeld.

In the countries of the Anglo-Saxon precedent system, there are various variaions of the legal phenomenon under consideration, referred to as: "psychological in-jury" (psychological damage), "psychiatric injury" (psychiatric harm), "nervous shock".

Psychological injury in the United States is a diagnosed injury that affects thinking, emotional state and human behavior (BARTON W. 1990, P.117). Such harm is directly related to stress which accelerates psychopathological disorders. According to individual scholars, stressful events are part of everyday life, and only certain groups of people have pathologies caused by stress, revealing the biological basis of individual differences in stress vulnerability or resistance to stress and coping strategies (MUSIELAK, H.J., 1982). It is the stresses caused by violation of the rights of the victim are considered in the United States the most "common mental disorder" and represent psychological injury.

Compensation for Psychological injury in Australia is fundamentally different from the American approach which determines the right of every person to protect their peace of mind, followed by the right to recover from careless infliction of emotional

stress. To be compensated in accordance with the Law on Safety, Rehabilitation and Compensation of 1988 (SRC Law) for mental trauma, the plaintiff must prove that one is in a border-line state of a mental affection. Thus, an Australian plaintiff who cannot affirmatively prove that one has a mental disorder (injury) is not entitled to such compensation. At the same time, Australian law differentiates mental trauma from mental illness, the latter falling under the category of harm to health (Gummow and Kirby JJ in Tame v New South Wales., 2002).Australian Judges are assisted in distinguishing mental disorder from mental illness in practice by the American Psychiatric Association's Guide to the Diagnosis and Statistics of Mental Disorders.

Nervous Shock (a mental disorder caused by a short-term traumatic factor), which is subject to compensation in England, Canada and the USA, is also referred to a borderline state that is not a mental illness. The demand for compensation for nerve shock can only be satisfied in cases where it is the result of a "sudden mental disorder" from being a witness or participator in a particular individual event. In cases of cumulative prolonged influence of adverse factors over human psyche, one loses the right to compensate for nervous shock (AHMAD, TABREZ & JAMIL, HARIS & DASGUPTA, and PAPIYA. 2009)

If a psycho-traumatic factor affects a person over a longer period, then in this case compensation is made for "psychiatric injury" (MULLANY, NICHOLAS J. 1993). In Anglo-Saxon law this type of harm is manifested in the form of: psychiatric trauma that prevents a

per-son from expressing his thoughts; negative human memories of a violation of one's rights that are obsessive; the presence of various kinds of phobias; increased excitability and fear susceptibility. It is noteworthy that such compensation is awarded on condition that the victim did not have inherited psychiatric diseases (TEFF, HARVEY., 1998)

As you can see, the institution of compensation for moral harm that currently exists in Russia has its own analogues in developed foreign law and order, the practice of which has been formed over many years.

4. CONCLUSION

Today, developed foreign law and order are paying more and more attention to one of the main ways of protecting the moral rights of individuals – mental suffering compensation. In each country, the studied legal phenomenon has its own specifics, which is expressed in: the presence of special legal terminology; a certain legal awareness; subordinate to the law behavior of both the victim and the inflictor of harm; legislation meeting the needs of the state and society that compensate for damages for mental suffering. However, despite its progressive movement, the current state of this institution in all law and order still leaves much to be desired. We believe that civil jurisprudence should develop such postulates and methods in the field of civil regulation of compensation for pain and suffering that could be

applicable to all major modern legal systems and ensure their uniform application.

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