

Civil Liability of the Welfare State

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ABSTRACT

Timeliness of the topic: The relevance of the study is caused by the need to develop the concept and content of civil liability of the State, the study of heterogeneity of such legal categories as civil liability and civil liability of the state, civil liability and redress of the damage. In a globalizing world, the states lose their features of welfare states, becoming in fact the defenders of officials' and large corporations' interests. A fusion of big business with government officials takes place. Due to the fact that big businesses seek to govern the state, while pursuing their own narrow goals aimed at profit, man-made and climatic catastrophes occur more frequently. **Goal of research:** To analyze and determine the conditions of the onset of the civil liability of the state, to form the semantic rationale of the scope of redress, to explore the real possibilities of rights defense of the weakest part in the legal relationship in which one party is the State, to formulate the terms of civil liability of the state. **Results of the research:** On the basis of theoretical structure analysis of civil liability of the state this paper elaborates a particular understanding of the liability of the state, sets out the basic criteria for the onset of this liability, its scope and the grounds, defines epistemological essence of the state fault. **Practical significance:** The article materials may be used to develop and improve the tools to protect the weakest party in the legal relationship with the state.

KEYWORDS

Legal liability, civil liability of the state, mens rea, justice, principle of inevitability and scope of liability

ARTICLE HISTORY

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Introduction

One can oblige people to obey the laws through the following legal instruments: persuasion, coercion, fear of the inevitability of liability for their actions, scope of sanctions.

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The course solely to the inevitability of punishment defined by some countries (e.g., Russia and the European countries) today has virtually no impact on the overall level of committed crimes and offenses, including on behalf of the state.

The purpose of civil liability is to compel the subject of civil law relations to suffer adverse consequences in case of violation by this subject of mandatory law provisions or contract terms or as a result of tort.

Civil liability of the state may occur as a result of action (inaction) of state officials or act of state collective or individual subject rendering.

In case of literal interpretation of the Russian Federation Civil Code norms, it is obvious that the legislator separates such rights category as civil liability and damage redress. Civil liability is the sanction for causing damage, and consequently the said liability cannot have compensatory functions that are inherent in the damage redress.

If one is only to realize actual losses under damage to the state; it is unlikely that one can speak of state liability. Damage redress in this case will only be the compensatory duty of the State, aimed at restoring the lost property status of the victim.

In several articles of the current Civil Code of the Russian Federation the legislator indicate the need to respect the principle of justice in civil conflicts resolution (Part 2 of Article 6; Article 421; p. 3 Article 451, p. 2 Article 1101; p. 3 Article 1252 of the Civil Code of the Russian Federation).

Pedaling the principle of justice in the appointment of liability in the civil law of Russia is haphazard; its content does not contain clear and explicit boundaries. In the conditions of corruption growth at this stage one should abandon digital standards allowing the court to set the scope of civil liability at its discretion and reduce its size in its inner sole discretion based on the principle of justice.

Methodological Framework

Research Methods

The following methods were utilized during the research: theoretical (analysis, synthesis, concretization, generalization, analogy method); empirical (study of existing and current judicial practice of civil liability, monitoring); comparative historical (comparative analysis of the Russian and foreign experience of state liability), as well as methods of system, structural-functional and statistical analysis.

Literature Review

Before turning to the question of civil liability of the State it is necessary to determine the prudentiality of the legal liability and its subspecies – the civil liability.

As early as the sages of ancient China, long before the Roman Empire, a period which all lawyers generally associate with introduction of written law - Law of XXII tables, knew and tried to justify epistemological essence of legal liability. Thus philosophers of ancient China investigated the question of how to govern people, by virtue or by fear? Confucius while developing ethical and legal theory of the state, came to the conclusion that the state can develop only on the basis of moral laws, while rules of conduct must prevail over the law (s) (Confucius, 1998). Confucius' doctrine of state control methods was called virtue control theory by his followers. Later, thousands of years later, these ideas were the basis of Marxist-Leninist theory of communist society construction. Unfortunately, both the original and all the subsequent theories of society existence based on morality sublimation, morals and virtue, without legal liability were the fruit of fantasy of individual thinkers and nothing other than a sophism. Today we

are unlikely to find at least one paternalistic state in the world, based on the principles of morality and ethics. As O.G. Danil'yan (2007) rightly pointed out: "This concept of the "noble man" is the prototype of the future "perfect "bureaucrat". Therefore, it is necessary to oblige people to obey the laws not only through persuasion, coercion, fear of the inevitability of liability for their actions, but also through the scope of sanctions. Properly organized citizens informing about their rights and duties also helps law enforcement (Volkova et al., 2015). The principle of inevitability of punishment, stipulated in the Russian state, does not hold back a wave-like growth of corruption among public officials without pedaling the size and scope of the sanctions and therefore the growth of corruption crimes inevitably leads to a decline in the country's economy.

From the point of view of hermeneutics, the inevitability of liability and the scope of legal liability have completely different legal categories, which are independent foundation in legal theory. As the Russian President V.V. Putin repeated more than once in the media, the liability should be inevitable. However, the course only to the inevitability of punishment taken by the state today has virtually no impact on the overall level of crimes and offenses committed. Hereby examples of this are many. In particular, when a government official having abducted billions of rubles from the budget of Russia gets 2-3 years of real or suspended imprisonment by the court as an inevitable punishment, but is released from prison immediately after the trial in connection with parole, in such cases, it can be argued that the principle of inevitability of legal liability is working. Will such negligible liability have preventive value, so that a public official will not re-cross the line of the law? It seems that no.

In civil law the principle of punishment inevitability cannot affect the decrease in the total number of civil offenses either. For example, when in case of violation of a monetary obligation under Article 395 of the Civil Code of the Russian Federation, the court awards interest on the borrowed funds in the amount of refinancing rate and at the same time the level of inflation was much higher than that rate, it is quite unlikely that in such cases one can assert that the damage causer is under liability. The tortfeasor is in much more profitable position to break the monetary obligation, because even if the court subsequently takes a decision to collect the interest at the refinancing rate from the defendant, the latter as a result of economic activity and capital turnover (since he held the money) will make profit greater than the injured party, and get economic effect on interest earned unlikely if the money was taken on credit. Interest in accordance with Article 395 of the Civil Code of the Russian Federation paid to the injured party in connection with this type of inflation turns this inevitable liability in fiction. Not for nothing the punishment was considered the son of the Lord God and the protector of all creatures in the era of Brahmanism in ancient India (mid-I millennium BC). And the state itself was seen as an avenging force of gods by the Brahmanists. Therefore, not only the inevitability of legal liability onset, but also its scope in the aggregate will constitute the essence of legal liability.

Legal liability as a legal category should always be associated with state coercion. Other responsibilities can be distinguished in addition to legal liability, for example, moral, religious, etc. But only legal liability has a normative fixation and should always be a consequence for committing a wrongful act in the past, the determining state coercion. However, an important and significant moment should always be considered: legal liability should be realistic and appropriate to the offense committed (Svirin et al., 2016).

The English philosopher T. Hobbes (1889) in the seventeenth century pointed out that the law should include not only an obligation, but also the punishment for the



violation of this obligation. The thousand-year history of hundreds of countries' existence convincingly demonstrates that without punishment commensurate to the offense it is impossible to induce the subjects of law to law enforcement. As well as a small legislated liability without commensurate scope of legal liability turns it to the declared ought. In this regard, the words of the remarkable Russian writer I.A. Krylov (1989) are recalled: "No matter how attractive the freedom is, not least, it is disastrous for the people, when it is not given in reasonable measure".

In real life the laws of self-destruction and destabilization, as well as the laws of self-preservation and creation act together as a kind of thrust vectors. Hence the subjects' of law freedom existence and right to choose will only be guaranteed if they are of responsible behavior. Only in this case, reasonable and lawful behavior will be provided. F. Nietzsche (2010) on this occasion rightly observed that freedom is a property of the will to self-responsibility. Human freedom is inconceivable without real, just and proportionate legal liability. The very same legal liability is not a formal list of specific duties, but a list of adverse effects that the responsible party must bear.

We can distinguish different types of legal liability, including sectorial responsibility in accordance with the sectorial division of the system of Russian law. Civil law has its proper civil liability. Civil liability is a kind of legal liability. Despite the fact that civil law is the branch of private law, endowing the subjects of civil relations with autonomy of will, the Civil Code of the Russian Federation (part 1 and 2) contains more than 200 articles the text of which refers to a legal category, such as "liability" of civil subjects' legal relations. For example, article 639 of the Civil Code of the Russian Federation is called "The liability for the damage caused to a transport vehicle." Such a multiple set of rules governing the uniform civil code legal relationship allows us to talk about the institute of liability in the civil law. Some authors identify particular liability, depending on the type of obligations violation (in the sphere of consumer rights protection, health services, tourism services, etc.) (Sitdikova et al., 2016; Shilovskaya et al., 2016). From the point of view of hermeneutics not only a philological value of the same term is common to all the rules on liability in the civil law. The civil law system is designed in such a way that almost every branch of law institute provides its individual institutional liability. However, despite the lack of consolidation of the rules on liability in the Civil Code, they have one goal and it is to compel the subject of civil law relations to suffer adverse consequences in case of violation by this subject of mandatory law provisions or contract terms or as a result of tort.

Real offensive material costs for the tortfeasor in excess of actual damage to the victim compensation is to be understood under the adverse effects of civil-legal sense. Solely actual damages should be regarded as a recovery measure aimed only at restoring the disturbed property balance between the subjects of civil law relations. Civil liability of the tortfeasor must advance beyond the real redress. Therefore redress institute and institute of liability in civil law are separate civil-law instruments. To compensate the real damage in the civil law does not mean to be liable.

Professor O.S. Joffe (1975) believed that the actual restoration of the substantive right, even if it is compulsory and cannot be considered a measure of liability, because the obligation to compensation is a consequence of the obligation itself. While pedaling this point of view, we may note that liability cannot be considered within the framework and scope of the real obligations performance, even by force. Under civil liability for the State one should understand adverse consequences for the state as a whole or a public authority in particular over the obligations imposed by law, civil law contract or in tort offensive force. Therefore, obligations and liabilities are also heterogeneous legal categories in the legislation.

Civil liability of the state may occur as a result of action (inaction) of state officials or act of state collective or individual subject rendering.

The institute for damage redress caused by unlawful actions of law enforcement agencies, state agencies, local governments, their officials, was not sufficiently developed and studied in Soviet law. Article 446 of the Civil Code of the RSFSR in 1964 included the liability of state and public organizations, as well as officials for damage caused to citizens by illegal acts of officials in the administration. Article 447 of the Civil Code of the RSFSR reinforced liability for damage caused by unlawful actions of bodies of inquiry officials, preliminary investigation, prosecution and trial. Liability under this norm was assigned to the relevant state authorities, in the cases and within the limits specified by the law. Legal concepts provided by these articles "in the field of administrative management", "in the manner prescribed by the law", "housekeeping" caused difficulties in the practical life of lawyers; therefore most articles were of declarative character and were not applied in practice. Liability of the state was declared without the possibility of its application. In addition, in the above-mentioned rules of law the legislator sent practitioners to a special legal act. However, until 1981 there was only one such legal act - Decision of the Central Executive Committee and Council of People's Commissars of the RSFSR of 16 January 1928 "On the liability for damages caused by unlawful interference of authorities in the activities of cooperative organizations." Thus, the Civil Code of the RSFSR sent us to the non-existent law.

Only in May 1981 the Presidium of the Supreme Council of the USSR adopted the Decree "On the compensation of the damage caused by unlawful actions of state and public organizations and officials." The called Decree approved the Regulation "On the procedure for compensation of damages caused by unlawful actions of bodies of inquiry, preliminary investigation, prosecution and trial." According to the decree, the money spent on legal counsel, as well as salary and other employment income, pensions and benefits, which the accused could get at the main place of work during detention, and property (including money, money deposits and interest on them, bonds and other assets), confiscated or turned into the income of the state court or removed by organs of inquiry or preliminary investigation, as well as property that has been seized, fines and court costs were subject to reimbursement.

Subsequently, Article 127 of the Fundamentals of Civil Legislation of the USSR and the Union Republics dtd. May, 31 1991 conferred the right to damage redress caused by illegal actions of state bodies and officials in their performance of administration in the field of duties. The novella fixed in the fundamentals was the provision of part 2 of Article 127 which provided state compensation for damages caused to citizens as a result of unlawful conviction, unlawful criminal prosecution, unlawful detention or recognizance as preventive measure, unlawful imposition of administrative penalties in the form of arrest or correctional work regardless of the guilt of officials, bodies of inquiry, preliminary investigation, prosecution and trial in accordance with the procedure established by legislative acts. The third part of this provision provided that the damage caused to an individual or entity as a result of other illegal activity of bodies of inquiry, preliminary investigation, prosecution and trial shall be compensated on general grounds. Thus, it was established at the first time that the damage caused to the citizen by the state could be compensated regardless of the fault of the state, but strictly in certain cases.

Adopted in March 1996, the second part of the Civil Code of the Russian Federation not only repeated the conditions of State liability established by Article 127 of Bases of the civil legislation of the USSR, but also significantly expanded them. However, some gaps in the right were left unaddressed.



Currently, the rules on damages redress by the state are contained in the following legal acts: Article 53 of the Constitution, Articles 16, 1069, 1070 of the Civil Code of the Russian Federation.

Article 53 of the Constitution establishes the State's obligation to redress the damage caused by bodies or State officials to persons or legal entities. Article 16 of the Civil Code on developing the above mentioned provision of the Constitution provides for the liability of the state through its agencies and officials. From the point of view of social rule of law development the most interesting is Article 16.1 of the Civil Code, which establishes the State's liability in case of damage by lawful actions (inactions) of state bodies, local authorities or officials.

Civil liability of the state for the damage caused by state bodies, local self-government, officials is also regulated by articles 1069, 1070 of the Civil Code of the Russian Federation.

The dispositions of article 1069 secured, that the damage caused to a citizen or legal entity as a result of illegal actions (inactions) of state bodies, local authorities or officials of these bodies, including by the publication of legal acts not in accordance with the law or other legal acts by the state body or local government is redressable. The damage is redressed at the expense of the treasury of the Russian Federation respectively, treasury of the subject of the Russian Federation or treasury of the municipality. Despite a more detailed regulation of damage redress in comparison with the Civil Code of the RSFSR of 1964 some gaps in the law and in legal practice, requiring their resolution, still remain. In particular, if the damage caused by the state is only realized as real losses, it is unlikely that one can speak of State liability. Redress will only be compensatory duty of the state, aimed solely at restoration of the lost property of the injured party. Legal doctrine of the Soviet period understood coercive measures under state liability (Agarkov 1948; Leist, 1962). But a relevant question has not yet been resolved neither in the early period of the history of the Russian state nor until now: who and to whom will apply the measures of state coercion if the liability lies with the state? Therefore, the scientific literature has rightly proposed to consider civil liability of the State as the quasi-liability (Svirin, 2009).

Let us illustrate the example of the civil liability of the bailiff, who is a civil servant in the Russian Federation. On the one hand the bailiff is an officer in the public service. The liability of the civil servant is provided by the Federal Law of the Russian Federation "On the State Civil Service in the Russian Federation." The bailiff as a public servant is responsible to the government for the proper performance of his duties, but is not responding to the subjects, harmed by actions (inaction) of the bailiff.

A special form of state liability in the enforcement proceedings could be the material liability of the state in the amount of executive document claims not collected from the debtor as a result of guilty or innocent actions (inaction) of the bailiff.

On the one hand, *ipso jure* (lat. by law) claim for damages to the state can be presented in the claim procedure with regard to the provisions of Articles 16, 1064, 1069 of the Civil Code of the Russian Federation. And it is pointed out directly by the Plenum of the Supreme Arbitration Court in the Resolution No. 27 of 16 May 2014, which states that in cases where the bailiff committed acts (inactions), entailing the inability of the judicial act, the claimant has the right to a claim for redress of damage caused by the bailiff at the expense of the State treasury. Moreover, as the highest court pointed out, in case of loss of property transmitted by the bailiff to the custodian for storage, the claimant is also entitled to claim for damages at the expense of the Russian treasury, since it is the bailiff who is liable for the actions of third parties, on which he laid his responsibility for the conservation of the property.

However, *ipso facto* (lat. in view of the obvious fact) it is actually impossible to claim the state, since the claimant has the burden of loss suffering proof by unlawful actions of the bailiff and its size. Here, as the saying goes, the devil is in the details. It is quite difficult for the claimant to prove the exact amount of property loss, and it is even more difficult to establish a causal link between the inaction (action) of the bailiff and the claimant's loss in the form of the amount unclaimed under the executive document. In addition, to date neither the doctrine of Russian law nor any practice contains a single opinion on what should be considered a loss or property losses in the enforcement proceedings. It seems to us, property losses should be considered as a specific sum of money specified in the executive document (or part thereof) not received by the claimant, and if the claim redress is directed at an object, its monetary equivalent determined by market value. While the loss should be recognized as the amount on which the claimant can count in the event of the executive document requirements execution within the period specified in the law.

We believe that, in contrast to the general consideration of claims for damages in this case the guilt of the defendant - the state represented by a bailiff does not have to be proved. Although scientific literature has no consensus on the subject either. For example, S.Yu. Ripinskiy (2002) finds it unacceptable to establish innocent state liability and therefore public servant's innocent liability. If we take this idea for granted, the state represented by the bailiff service, or in the name of the bailiff is not subject to civil liability. A.S. Shevchenko & G.N. Shevchenko (2013) also believe that the liability of the state can only be for actions (inactions). I.A. Zinchenko (2007) believes that fault category in determining of civil liability derives from actions illegality characteristic, i.e. the illegality of actions (or inactions) determines the mandatory establishment of guilt.

To our mind, the opinion of the French lawyer Bruno is more consistent with social orientation of the law and the state, he wrote: "If the risk principle is the basis of the vehicle owner's liability only because he is holding the instrument, dangerous in itself, is on the same principle of risk the authorities must be liable only because they are authority bearers, which is extremely dangerous for the citizens in itself" (Pavlovskiy, 2008). A. Gordon (1887) adheres similar legal positions, basing his theory of justice; he noted that the recognition of state liability without guilt would be more in line with the sense of justice.

From our point of view, the state is a special law subject, an authoritative legal institution; it has all the opportunities and should ensure the realization of these opportunities in the sphere of rights and legitimate interests protection of both citizens and legal entities. The mere fact of non-provision of real opportunities of the above mentioned rights protection is a common fault of the state that should not be proved in each case, when the subject having violated the rules, is a public servant or a public authority. It must be noted that a separate issue is professional liability insurance development for the institute of civil servants (Sitdikova et al., 2016).

The doctrine of the Russian law contains another point of view. Thus L.Yu. Mikheeva (2010) postulates that the redress is not a form of liability for property damage and does not bear composition tort in the basis of its origin.

While investigating the institution of civil liability of the state it is impossible to ignore the principle of justice. Many rights researchers believed it necessary to take into account the principle of justice in establishing liability, including civil type. However, no consensus on this issue has been formed in science so far. Thus V.S. Nersesyants (2005) erected justice to the rank of law principle. On the other hand G. Kelzen (1987) pointed out that justice is a purely moral character and therefore cannot be applied to the points of law.



In several articles of the current Civil Code of the Russian Federation the legislator indicates the need to respect the principle of justice in the resolution of civil conflict (Part 2 of Article 6; Article 421; p. 3 Article 451, p. 2 Article 1101; p. 3 Article 1252 of the Civil Code of the Russian Federation). The mentioned norms in conjunction with Articles 10, 151, 393, 1092 of the Civil Code of the Russian Federation lead to the conclusion that in case of damage redress caused by the state through its bodies or officials, one must take into account the principle of justice, but the justice should be equalizing. No court decision establishing different liabilities for civil servants and all other citizens can be just. Unfortunately, justice has a different meaning and content for state officials, oligarchs and ordinary citizens in Russia today.

Of course, in an objective sense, justice must be understood as compliance with the law, but clearly this is not the reality of today. As noted by A.Ya. Kurbatov (2002), "Civil law mentions justice haphazardly and incorrectly, as a mere mention which is meaningless". For example, in the disposition of paragraph 6 of Article 395 of the Civil Code of the Russian Federation, the legislator establishes the principle of justice upon the occurrence of liability for non-monetary obligation. However, this raises a practical question: in whose interests will the judge appointed by the President of the Russian Federation and dependent on the presidential administration interpret the principle of justice.

It seems to us at this stage it is necessary to abandon digital standards allowing the court to set the scope of civil liability at its discretion and reduce its size in its inner sole discretion based on equitable ghost justice criteria. In turn, the rule of law should be specific, with no alternatives not allowing the possibility for the court to reduce the size of the civil liability in its inner sole discretion.

Results

On the basis of theoretical analysis and generalization of the practice, the authors concluded that the presence of the principle of inevitability of punishment in the jurisprudence cannot affect the decrease in the total number of civil offenses. In addition to the inevitability the scope of sanctions established by a treaty or by the state affects the decline in the level of crime.

Civil liability of the tortfeasor must advance beyond the real redress. Therefore redress institute and institute of liability in civil law are independent civil-legal institutions. To redress the real damage in the civil law does not mean to incur civil liability.

Under civil liability for the State one should understand adverse consequences for the state as a whole or a public authority in particular over the obligations imposed by law, civil law contract or in tort offensive force. Therefore, obligations and liabilities are also heterogeneous legal categories in the law.

Civil liability of the state for failure to fulfill the requirements of executive document is always the loss of property in the form of a specific sum of money in excess of damages in enforcement proceedings. While the loss should be recognized as the amount on which the claimant can count in the event of the executive document requirements execution within the period specified in the law.

The mere fact of non-provision of real opportunities of the above rights protection is a common fault of the state that should not be proved in each case, when the subject having violated the rules, is a public servant or a public authority.

Interpretation of the Civil Code of the Russian Federation leads to the conclusion that in case of damage redress caused by the state through its bodies or officials, one

must take into account the principle of justice, but the justice should be equalizing. No court decision establishing different liabilities for civil servants and all other citizens can be just. Unfortunately, justice has a different meaning and content for state officials, oligarchs and ordinary citizens in Russia today.

Because of judges' appointment to the position by the President of the country, judges are civil servants who are dependent on public authorities. Therefore, claim of the state by the legal is inadmissibility.

The volume and scope of ongoing research have not allowed to more deeply answer all questions and problems in the field of the state civil liability study. New questions and problems in need of decision emerged in the course of the study. It is necessary to continue research on the state liability mechanisms development in the event of improper performance of their duties by civil servants.

Conclusion

The study reached the following conclusions.

One needs to understand real offensive material costs for the tortfeasor in excess of actual damage redress to the injured under the adverse effects of their civil-legal sense. The actual damages redress alone can be regarded solely as a recovery measure aimed at restoring the disturbed property balance between the subjects of civil law relations. Civil liability of the tortfeasor must advance beyond the real redress. Consequently, the institute of redress and the institute of liability in civil law are separate civil-law instruments. To redress real damage within the framework of civil liability does not mean to bear this liability.

The fact of failure to protect real rights of citizens or legal entities by the state is a common fault of the state that should not be proved in each case, when the subject violating the rules is a public servant or a public authority

In Russia today, the principle of justice in the imposition of civil liability on the state and civil servants on the one hand, and ordinary citizens on the other have a different meaning, interpretation and content.

The liability of the state is actually a quasi-liability. This liability is only declared as it is virtually impossible to prove the guilt of the state in the resolution of legal conflict by state employees.

There are no legal mechanisms of civil liability imposing on the state (government officials, civil servants).

A special form of state liability in the enforcement proceedings could be material liability of the state in the amount of claims of the executive document not collected from the debtor as a result of guilty or innocent actions (inactions) of the bailiff.

Recommendations

1. In order to overcome the imbalance in the application of civil liability principle of justice to both the state and its authorities in Russia is necessary to amend the Constitution, securing thereby the principle of judges election and their independence from the government.

2. It is necessary to abandon the digital standards allowing the court to set the amount of civil liability at its discretion and reduce it at its discretion on the basis of ghost criteria of justice.

3. In contrast to the general consideration of claims for damages, one should not prove the guilt of the state while bringing the state to civil liability.



Disclosure statement

No potential conflict of interest was reported by the authors.

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