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THE JUDICIAL PRACTICE OF THE EUROPEAN COURT IN THE SPHERE OF NON-MATERIAL REPUTATIONAL HARM

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Abstract: The authors of this article analyze the judicial practice of the European Court of Human Rights on forming of the intangible reputational harm. The perspectives of the introduction to the Russian legislation of such method as the protection of the intangible non-material rights of the legal entities have been analyzed. The finding of the article is that the introduction of such method will corresponds to the character and the specifics of the protected right – business reputation of the legal entities, that will positively influence on the uniform judicial practice on the national level meets the viewpoint of the European Court of Human Rights.

Keywords: Non-material benefits, non-property rights, reputational harm, goodwill, legal entities.

INTRODUCTION

Introduce the Problem

According to the article 15 of the Constitution of the Russian Federation the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. The part of these norms is the Convention for the Protection of Human Rights and Fundamental Freedoms. The practice of the European Court of Human Rights to a certain extent influences the Russian legal system.

The Convention and also the judgments of the European Court of Human Rights, when they interpret the content of the Convention provisions including the right to access to justice and the right for the fair trial, are the part of the Russian legal system and should be considered both by the legislator while regulating social relations and by the law enforcement bodies while applying legal norms in practice that has also been stated by the Constitutional Court in its Decision on the 5th of February 2007.

The Importance of the Problem

While administering of justice the existence of intrastate legal norms, which sanction the action of the norms of the international law in Russian legal system, not simply allows but obliged the judicial authorities to rely upon the universally-recognized norms of international law. The application of these norms in necessary cases allows to defend the violated rights of the applicants not only in Russian courts, but also on the international level.

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The research on the problem is made in the dissertations of Arzumanian A.B. "Non-material benefits as the objects of the civil law", 2008; Vorobjeva I.V. Protection of non-material benefits as the institute of Russian civil law, 2006; Dubko E.G. Non-material benefits and the private non-property rights of persons and legal entities: theoretical and practical problems of their protection, 2015; Orlov O.V. Non-material benefits of the persons convicted to imprisonment, and its protection in civil law, 2012; Timerkhanov A.A. The goodwill of legal entity, 2013; Timeshov R.P. Non-material benefits in civil law and its protection, 2010; Trofimova T.V. Non-material as the objects of civil-legal regulation, 2004; Erdelevsky A.M. The problems of compensating for the infliction of suffering in Russian and foreign law, 2000.

Particular aspects of the problem are raised in the following articles: Blinov A.G. The right for health in the light of Russian and international standards, 2003; Gavrilov E.V. The compensation of non-material reputational harm to individual entrepreneurs in court-arbitrage practice if the Russian Federation, 2011; "The Medical Law as an Independent Branch of Law" (Sitdikova et. al., 2015); Trakhov A. Life and health needs more strict protection. Comparative analysis of Russian and foreign legislation, 2011.

Hypotheses and Their Correspondence to Research Design

1. In aims of uniformity of Russian and European judicial practice the suggestion on the improvement of Russian legislation by fixing the method for the protection of broken non-property rights of the legal entities with the help of compensation of the non-material reputational harm was formulated.
2. The unacceptability of the differentiated approach when making the decision on the moral harm compensation to the individual persons and legal entities was found during the research.

METHOD

During the study the authors relied upon general and private methods of cognition: historical, legal, formal-legal, comparative legal, sociological and others. The main method is a comparative legal which helped to analyze the practice of the European Court of Human Rights in forming of the intangible (non-material) reputational harm.

Formal legal method made it possible to analyze legal rules governing of the intangible (non-material) reputational harm and its protection by the European Court of Human Rights.

Systemic-structural method gave the authors the opportunity to suggest the ways of the controversies solution between the national and international law.

RESULTS

During the research it has been found that the judicial authorities of the Russian Federation in its activities should take the practice (decisions) of the European Court of Human Rights into account while carrying out their activities when making the decisions, both concerning the Russian Federation, and other states.

During the research it has been found that the Convention for the Protection of Human Rights and Fundamental Freedoms should be interpreted and applied on the territory of the Russian Federation in this way to guarantee practical and effective rights without the differentiated approach towards the individual persons and legal entities.

During the research it has been found that the moral harm may include objective and subjective criteria: the company's reputation, uncertainty in decision-making, disunity in company's management, anxiety and inconvenience, caused to the company's members and management.

During the research it has been found that the right to assemble peacefully and the right to association cannot be limited except those which are not prohibited by the law and are necessary in democratic society in favor of the national security and the social order in order to prevent the riots and crimes, for the protection of health and morality or for the protection of rights and freedoms of other persons.

It has been found that the legal entity's reputation, that was broken by the action and inaction of the state, may cause moral harm. For example, non-material harm should be compensated to the legal entity due to the protracted non-enforcement of court decisions.

It has been found that on the territory of the Russian Federation the legal entity cannot receive fair compensation intangible (non-material) reputational harm in the context of article 150 of the Civil Code of the Russian Federation. The practice of the European Court of Human Rights evidence of the inability of state bodies (particularly – courts) to provide the most full restoration of the broken rights of the legal entities in their countries. Along with that the priority of the international law legal norms over the national ones allows to realize this right.

The suggestions were made to resolve the contradictions among the norms of Russian and international law by fixing in Russia of such way of protection of the broken non-material rights of the legal entities as the compensation of non-material reputational harm. This will correspond to the character and specifics of the protected right – the goodwill of the legal entities, and will positively influence on the formation of a uniform judicial practice at national level, corresponding to the positions of the European court of human rights.

DISCUSSION

The named problem is discussed in such research papers of different authors as "Non-material benefits in civil law and its protection" (Timeshov, 2010), "The goodwill of legal entity"(Timerkhanov, 2013); "Non-material benefits and private non-property rights of persons and legal entities: theoretical and practical problems of their protection" (Dubko, 2015); "Non-material benefits as the objects of civil law" (Arzumanian, 2008); "Protection of non-material benefits as the institute of Russian civil law" (Vorobjeva, 2006); "Non-material as the objects of civil-legal regulation" (Trofimova, 2004); "The problems of compensating for the infliction of suffering in Russian and foreign law" (Erdelevsky, 2000).

Some aspects of non-material and reputational harm have been analyzed in the following works: **"**The compensation of non-material reputational harm to individual entrepreneurs in court-arbitrage practice in the Russian Federation" (Gavrilov, 2011); "Non-material benefits of the persons convicted to imprisonment, and its protection in civil law" (Orlov, 2012); "The right for health in the light of Russian and international standards" (Blinov, 2003); "Life and health need more strict protection. Comparative analysis of Russian and foreign legislation" (Trakhov, 2001).

The most important source of the European law is the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, which was opened for signature in Rome on 4 November 1950. On the 30th of March 1998 Russia ratified this Convention with the changes, that were included by the Protocols # 3, 5, 8 and amendments in Protocol #2, also the Protocols # 1, 4, 7, 9, 10, 11. From this time the Convention the Protection of Human Rights and Fundamental Freedoms and Protocols became obligatory for the enforcement on the territory of the Russian Federation.

One should note that the structure of the Convention for the Protection of Human Rights and Fundamental Freedoms includes preamble and 59 articles, united into three sections. The first section concerns the legal regulation of the rights and freedoms and consists of 17 articles, and fixes the fundamental rights and freedoms of a person and its possible limitations. The second section of the Convention (articles from 19 to 51) establishes the order of set up and functioning of the European Court of Human Rights, and criteria for the submission of the applications. The third section consists of 8 articles and contains the common rules and final provisions. The largest amount of rights, fixed in the Convention can be applied both to individuals and to legal entities (except for the articles of the Convention, protecting the right to life and prohibition of torture).

The list of rights and freedoms included in the first section of the Convention was expanded by the protocols, which were annexed to the Convention in the form of separate agreements, and have equal legal force. Currently, there are protocols

No. 1 of 20 March 1952, No. 4 of 16 September 1963, No. 6 of 28 April 1983 No. 7 of 22 April 1984. The Russian Federation is a party to the mentioned protocols except the sixth one, which prohibits the use of the death penalty (the death penalty except in time of war).

In recent years, the Convention for the Protection of Human Rights and Fundamental Freedoms has been supplemented by two protocols, which the Russian Federation has not ratified Protocol No. 12 dated 04 November 2000 providing for a General prohibition of discrimination; Protocol No. 13 dated 03 may 2002, which prohibits the death penalty, including in time of war.

Protocol No. 14 of 13 may 2004, is aimed at reforming the control mechanism of the Convention – the European court of human rights. Therefore, for entry into force it requires ratification by all 47 States parties to the Convention. The Russian Federation ratified the Protocol, which entered into force on 1 June 2010.

An important feature of this international Treaty on human rights and freedoms is that to ensure the observance of the engagements undertaken by the Convention and the Protocols the High Contracting Parties set up a European Court of Human Rights (hereinafter – ECHR), whither the complaint on the violation of rights and freedoms may be filed.

Thus, in the whole of Europe, including Russia, the European court of human rights has become the ultimate guarantor of fundamental rights of the individual (personal and political rights, property rights), as well as of organizations.

The judicial practice of the European court of human rights, turning into positive rules of conduct of the relevant subjects of legal relations is an essential addition both to the Convention and to the legal systems of countries that have ratified it, as the European Court has traditionally exercised broad interpretation of Convention rights, freedoms and guarantees. This right is enshrined in article 32 of the Convention, empowering the European Court not only to apply the Convention, but also to interpret it. States-parties to the Convention for the Protection of Human Rights and Fundamental Freedoms have assumed the obligation to guarantee the rights and freedoms enshrined in the Convention.

The judicial authorities of European countries, including Russia, have committed itself to take the decisions of the European Court into account in making their decisions. It is the Federal law on ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (and its Protocols) of 1998 which obliges the Russian courts to apply the Convention. The article 1 of the named Federal law contains the provision according to which the Russian Federation in accordance with article 46 of the Convention recognizes ipso facto (by fact) and without special agreement the compulsory jurisdiction of the ECHR in the interpretation and application of the Convention and the Protocols thereto. This rule is applied in cases of alleged violations by the Russian Federation of

provisions of these treaty acts when the alleged violation occurred after their entry into force towards the Russian Federation. This means that the authorities of the Russian Federation in their activities need to take into account the practice of the ECHR in the implementation of its activities. In this case we have in mind not only the decisions made in respect of the Russian Federation, but also the ruling of the ECHR against other States.

So, in the Resolution of Plenum of the Supreme Court of the Russian Federation "About court practice on cases on protection of honor and dignity of citizens and also business reputation of citizens and legal persons" of 2005 the attention of the courts was drawn to the fact that in resolving disputes on protection of honor and dignity and business reputation the courts should be guided not only by article 152 of the Civil Code, but also by virtue of the article 1 of the aforementioned Federal law, they should consider the legal view of the ECHR, expressed in its resolutions and concerning the questions of interpretation and application of the Convention. The obligation in question is also defined in the decree of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003 No. 5 paragraph 4 of the Resolution of Plenum of the Supreme Court of 19 December 2003 No. 23 "On court decision" n. 2.1. Decisions of the constitutional Court of the Russian Federation from 05 February 2007 No. 2-P.

One of the precedent court decisions on the problem on the possibility of recovery of moral harm in favor of legal entities was the above mentioned case on the claim "Company Comingersoll S. A." vs. Portugal", in which the European Court has recognized the legal person is entitled to compensation of moral harm. It is necessary to consider it in more detail.

The case was initiated by complaint of the company "Comingersoll S. A." against the Portuguese Republic on the long-term trial on her civil suit. The company had alleged a violation of point 1 of article 6 of the Convention, according to which "in the determination of his civil rights and obligations..., everyone is entitled to a ... public hearing within a reasonable time by [a]...Tribunal...".

Herewith the arguments of the applicant company were explained by the fact that due to the elapsed time the return of the debt would be virtually impossible. According to the company opinion the right to a public trial within a reasonable time is universal by its nature, and therefore there is no reason for a difference in approach to physical and legal person. The applicant company affirmed that the appropriate conclusions should be made regarding the damages caused by violation of this right for the equal protection to both individuals and legal entities.

The European court of human rights, solving the case, noted that, despite the fact that it is difficult to identify a specific rule that is common to all member States of the Council of Europe, the jurisprudence of some States indicates that the possibility of awarding the compensation for non-material harm cannot be ruled out.

In the light of its own case law and its practice, the European court, thus, cannot exclude the possibility of awarding compensation for moral harm to the commercial organization. The ECHR recalled that the Convention on the protection of human rights and fundamental freedoms should be interpreted and applied in such a way as to guarantee practical and effective rights.

Consequently, since the main form of compensation which the European court of human rights may prescribe is financial compensation, then it should be entitled in order to provide effective respect of the right under article 6 of the Convention, also award financial compensation for non-pecuniary damage to commercial companies. The non-pecuniary damage incurred by the companies can include items that are more or less "objective" or "subjective" (Shilovskaya et. al., 2016; Kirillova et. al., 2016). Among them one should take into account such as the company's reputation, uncertainty in decision-making, the split in the leadership of the company (for which there is no accurate way of calculating the consequences) and lastly, though not to a lesser degree, anxiety and inconvenience caused to the members and management of the company (Sitdikova et. al., 2016; Kuzakhmetova et. al., 2016; Vinogradova et. al., 2016).

Finally, the European court on the case ruled that the respondent state is to pay the applicant company 1.500.000 (one million five hundred thousand) escudos as compensation for non-pecuniary damage.

In the same Judgment the European Court referred to its resolution on the case "The Party of freedom and democracy (ESDEP) against Turkey" from 08 December 1999. In this case the Party of freedom and democracy (ESDEP) appealed to the European Commission. It argued that the articles 9 and 11 and 14 of the Convention had been violated.

The representative of the Party of freedom and democracy argued the fact, that the Party was dissolved, and that it was forbidden for the leaders of it to take the same positions in any other political party, has violated their right to freedom of Association guaranteed by article 11 of the Convention, which establishes the rule, according to which everyone has the right to freedom of peaceful assembly and to freedom of Association with others, including the right to form trade unions and join to protect their interests.

The exercise of these rights shall not be subject to any restrictions except those provided by law and necessary in a democratic society in the interests of national security and public order to prevent disorder and crime (Sitdikova & Shilovskaya, 2015), for the protection of health or morals or the protection of the rights and freedoms of others (Volkova et. al., 2015). The Cited article does not prevent the imposition of lawful restrictions on the exercise of these rights by persons belonging to the armed forces, police or administrative authorities of the state.

By the results of consideration of the complaint, the European court of human rights expressed the view that the dissolution of the Party of freedom and democracy should have greatly disappointed its founders and members. As compensation of moral damage incurred by the founders and members of the party-applicant, the ECHR found the amount was 30000 French francs, payable to Mevlut Ilico, the representative of the Party of freedom and democracy in the proceedings before the European court of human rights.

Judge H. Rozakis, expressing his opinion concurring the majority opinion accompanying the judgment, that was adopted on 06 April 2000 in the case of "Company Comingersoll S. A." vs. Portugal, said that he sees no reason why the European court should retreat, even partially in the issues of compensation, from such an approach and why it would be impossible to accept it without any reservations, of hint or other method, that the company may incur moral harm not only due to the fact that it, as a legal entity, works in society, but also due to the fact that it has traits such as his own reputation, which the state can harm by its action or inaction.

The possibility of compensation for non-pecuniary harm to legal entities is stipulated also in the Ruling of the ECHR of June 14, 2005 which satisfied the suit No. 61651/00, filed on the April 20, 2000 by the "OOO Rusatommet" vs. the Russian Federation due to the long failure to execute the decision of arbitration court of Moscow of 10 April 2002, in part repayment of acquired bonds of the internal state currency loan.

The European court of human rights while deciding on the claim, not only found a violation of article 1 of Protocol No. 1 to the Convention, but also awarded OOO "Rusatommet" 2,000 Euros as compensation for moral damage.

Another case held in favor of a legal entity and compensation of moral damage to it, is the case on the complaint of the Russian public Association Sutyajnik vs. Russian Federation (Decision of the European court of human rights of 23 July 2009). While deciding on the claim, the court noted that the reason for the cancellation decisions of the lower courts was the fact that the dispute between the Association, the applicant and the office did not belong to the jurisdiction of arbitration courts. Thus, the European court of human rights was convinced that the court's decision of 17 June 1999, as upheld on 18 October 1999, is legitimate. The consequences of the decision of 17 June 1999 had the limited character: they concerned only the parties involved in the case, and were not in conflict with any other judicial decision.

The judgment was quashed primarily for the sake of legal populism, and not with the purpose of eliminating errors, which are essential for the judicial system. Thus, in the circumstances of the present case, the cancellation of the decision of 17 June 1999, as upheld on 18 October 1999, was a disproportionate measure,

and respect for the principle of legal certainty should prevail. In this regard, the ECHR in this case concluded that there was violation of section 1 of article 6 of the Convention and decided to award 500 Euros to the association-applicant as compensation for moral damage.

Thus, the practice of the ECHR meets the requirements of the organizations (commercial and non-commercial) about the compensation in their favor-pecuniary damage caused by violation of intangible rights. These examples from the practice of the ECHR also demonstrate the inability in some cases of the public authorities (through its courts) to provide the most complete restoration of the violated rights of the legal entities in their own country, ascertain the priority of international law over the domestic law and are fixed in the positive law, created by court, binding for the states-parties to the Convention.

Article 13 of the Convention stipulates that everyone whose rights and freedoms recognized in the Convention are violated shall have an effective remedy before a national authority even if the violation has been committed by persons acting in an official capacity. It appears that this right means nothing, as the state's obligation to ensure effective remedies and reparation in cases of wrongful infringement of rights.

Is it possible to ensure it in Russia given the recent changes to the Russian Civil Code, affecting the protection of the rights of a legal entity on the business reputation? It seems not. Since, as already repeatedly mentioned, the new version of article 152 of the Civil Code fully excludes the right of a legal entity in the event of a breach to receive a fair compensation for the non-material reputational harm (in the context of the article 150 of the Civil Code). Thus, the practice of application of the Convention originates from the compensation of both material and immaterial (moral) damage to legal persons.

The amendments of the 2013 year to the Civil Code have excluded the possibility of the legal entity to demand recovery of non-material damage in Russian courts in case of violation of its rights. This fact suggests that the existing methods of protection of violated moral rights of legal entities in Russia are not simply insufficient and do not allow to fully implementing the undertaken international legal obligations arising from the Convention for the Protection of Human Rights and Fundamental Freedoms, but also come into conflict with the Convention.

In order to overcome the identified contradictions it is necessary to amend the Civil Code by incorporating of the method of protection of the violated moral rights of the legal entities as the compensation for the intangible reputational damage. The inclusion of this method of protection of the violated moral rights of the legal entities will be the fulfillment of the obligations undertaken by the Russian Federation on ensuring the rights and legitimate interests of citizens and legal persons in accordance with the Convention. And it will also create legal basis for protection of rights of legal entities of possible violations at the level of the

national civil law, and ultimately help to avoid possible complaints to the ECHR from legal persons and individual entrepreneurs.

Thus, the introduction of such way of protection of moral rights of legal persons, as compensation for the intangible reputational harm in Russian civil legislation, will be proportionate to the nature and specifics of the protected right – of business reputation of legal entities, will have a positive impact on the formation of a uniform judicial practice at the national level, corresponding to the positions of the European court of human rights.

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