

**THE ROLE OF "SECURITY" CATEGORY IN THE DEVELOPMENT OF A GENERAL CONCEPT OF INTANGIBLE BENEFITS IN CIVIL LAW**

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**Annotation.** The study of the intersectoral phenomenon of security increasingly evokes the professional interest of the scientific legal community in recent times. The provision of national security is unquestionably the function of any state today. It is due to the fact that, in fact, the only tool of a modern democratic state to achieve its goals is the right, where the relevant references to security issues should be present. If we talk about the public law, then this issue is resolved to some extent at the level of constitutional regulation through direct or indirect references, but mainly at the level of administrative and criminal law. The issue on reflection of the security category in private law is different. It is possible to find relevant examples of the impact of security phenomenon on the regulation of labor relations, however, the role of security is often implied (where the norms relating to sensitive legal relations, security of consumer goods or even the general security principle of trade are the examples) in the case of civil legal turnover, but in fact it is exhibited extremely rare, while its presence is felt intuitively. The purpose of this study is to study the influence of "security" phenomenon on the relations arising in respect of intangible benefits.

**Key words:** safety, intangible benefits, moral damage, civil law, compensation.

## 1. INTRODUCTION

A research team, with the participation of one of the co-authors of this work, already introduced a position in science according to which the security could be regarded as an independent intangible benefit [Rybakov V.A., Iroshnikov D.V. 2017], and, therefore, be protected with the use of all legal means acceptable for this type of legal remedy objects. In this regard, we put forward a point of view that it was permissible to include "personal security" in the list of phenomena recognized by civil legislation as intangible benefits. Although this approach is interesting and there are cases of security recognition as an intangible benefit in the judicial practice, it gives rise to certain contradictions at this stage. Nevertheless, the importance of the security category for the field of intangible benefits should not be underestimated, since it is appropriate to regard the emergence of a threat to the security of intangible objects as a condition for their violation, which allows filing a claim for compensation for the moral damage.

The starting point for research can be the category of the "object of civil rights". E.A. Sukhanov understands under it various tangible (including material) and intangible (ideal) benefits or the process of their creation, which is the activity subject of the subjects of civil law [Russian Civil Law: 2011]. Based on the above definition, it is difficult to talk about personal intangible benefits, because they belong to a person due to the fact of existence, which excludes the possibility of their creation, and it is hardly possible to talk about an integrated form of activity in their relation (which is reduced only to their protection, if we adhere to the concept of impossibility of their commercialization). At the same time, Art. 128 of the Civil Code of the Russian Federation explicitly stipulates such a category as "intangible benefits", the definition of which, based on the experience of Russian and foreign lawmakers, is most often absent in the legislation. Thus, Art. 150 of the Civil Code of the Russian Federation provides only an indicative list of intangible benefits. Art. 23 of the Polish Civil Code also only names health, freedom, honor, freedom of conscience, surname or pseudonym, image, privacy of correspondence, inviolability of housing, scientific, artistic, inventive and rationalizing creativity among the personal benefits of a person. Art. 9 of the French Civil Code says that everyone has the right to

respect for his private life, from which the doctrine and practice derive all intangible benefits.

We can take the viewpoint of M.N. Maleina, who understands under the intangible benefit "the object of a subjective personal non-material right, possessing individual and social spiritual value, not having standard parameters, inseparable from the individual during his life" [Maleina M.N. 2014.].

## 2. METHODS

In the process of study, we used a dialectical method of scientific cognition within the framework of philosophical interpretation of law and security in their interrelation. The system method allowed to comprehensively study the system of intangible benefits in the aggregate and the integrity of its elements; the functional method allowed identifying the functions of civil law in ensuring the security of the individual; the formal-legal method was aimed at studying and interpreting the normative material, analyzing the law-enforcement practice. The comparative method allowed comparing the norms of the current Russian civil legislation with similar norms of Polish and French law with the aim of borrowing positive experience.

## 3. RESULTS AND DISCUSSION

It seems obvious that the category of intangible benefits is directly correlated with the category of human rights, as evidenced by the similarity of the objects contained in them - "life", "health", etc. However, the differences between them are easily recognizable: if the Human Rights Institute is the basis for restoring the rights and freedoms of an individual [Piet Hein van Kempfen, 2013] violated by the holders of public authority, fixed at the international level as being its properties [Myriam Feinberg, 2015, Rhoda Howard-Hassmann, 2012], and therefore protected at the constitutional level, then the institute of intangible benefits is an exclusively national private law mechanism of compensation for moral damage when it is caused by one subject of civil law to another. It is important to note that, for example, in cases of making damage to life and health (Art. 1084-1085 of the Civil Code of the Russian Federation), the right to compensation arises not in connection with the violation of intangible benefit, but because of the very fact of a particular situation, causing material damage, while moral damage, that is,

physical or moral suffering, is subject to compensation irrespective of it (P. 3 Art. 1099 of the Civil Code of the Russian Federation) in accordance with Art. 151 of the Civil Code of the Russian Federation. The compensation mechanism in the system that applies the Human Rights Institute, is based on the violation of the law itself, that is, the violation should relate to the real right stipulated by the actually closed list of human rights, that is, fixed in the international documents, or, at least, derived from them. Whereas moral damage arises when the intangible benefit is violated, provided that the existence of the latter is proven. Compensation in the human rights system is based on the principles of justice; all principles of restoring the damage caused are applied to moral damage in accordance with the guiding principles of civil law.

The development of civil legislation follows the path of democratization and humanization of law, [Mozolin V.P. 2005] which makes a comprehensive influence on the entire national system of law of each individual state, the appearance of the relevant human rights in the international law, leads to their consolidation in the country's constitution [Ludmila J. Grudtsina, Alexander A. Galushkin, 2013

], from which they can then fall into the sphere of private law in the form of personal benefits. However, this process takes place selectively, and depends on whether a particular human right can pass the barrier of a kind of constitutional "filter". It seems that the role of the latter can be perfectly played by the principle of public interest.

A.M. Erdelevsky assumes [Erdelevsky A.M. 2015] that the public interest should be understood as the interest of a general public, a society as a whole or a public legal formation, subject to protection by implication of law. The very same generic term "interest" can be understood from three perspectives: axiological - which is interesting, because it is a value in a given system of coordinates [V. VanDyke, Values and Interests //1962]; with a view to perspective of needs - if the subject needs something, which is of its interest [R. Flathman, 1966, V. Held, 1970]; with a view to teleological perspective - when the goal achievement is more significant for the subject as compared to "participation in the distribution of available benefits in a certain group" [J. Mucha, 1975.]. Proceeding from the trinity of the "interest" concept, following Yu.A. Tikhomirov, public interest should be understood as the interest of

social community recognized by the state and granted with the right, the satisfaction of which serves as a condition and a guarantee of its existence and development [Tikhomirov Yu.A.1995].

The issue is whether the security refers to those human rights that, depending on public interest, are drawn up solely as an object of criminal or administrative protection, or because of the presence of private interest; this phenomenon can also be shaped as an intangible benefit protected by the protection of subjective personal law.

Security is most often perceived as a state of no threat to the functioning of a particular object [Abramov V.V. 2013.], but the achievement of such a state is impossible. Then it is necessary to perceive security in the context of correlating the plausibility of the negative result of manifestation of certain events or actions and subjective perception of the possibility of their occurrence, provided that the sense of fatality of the significance of their occurrence is felt [Security a new framework for analysis /1998]. Given the latter, safety should be understood in the context of the state and/or process. In Western literature, the most complete definition of security is reduced to its understanding as a complex phenomenon, which ensures the guarantee of the inviolability of the actual preservation of functional and structural integrity of the object, while preserving a sufficient degree of freedom in which the object can continue to develop independently, and the development has signs of a sustainable one [Understanding international relations / 2005, Jerzy Stańczyk, Współczesne pojmowanie bezpieczeństwa. 1996]. In the context of the previously considered phenomena, security is perceived as a category that relates to or constitutes an element of public interest [Frei Daniel: Sicherheit - Grundfragen der Weltpolitik. 2013], that is, is a "filter" that transforms and classifies individual human rights in accordance with domestic purposes, as a subject of criminal or administrative protection, and/or as a tangible benefit.

At the same time, in order to talk about the human right to security, this phenomenon should be considered independently as a certain value [Isita V. Muskhanova, Angelina V. Zyryanova, Vladimir I. Kurdyumov, Anna S. Pugacheva, Albina R. Shaidullina, 2016]. This approach is also found in the literature [Hofreiter Ladislav, 2012], or in Art. 3 of the Universal Declaration of Human Rights of 1948, which refers to personal security. However,

the commentary to this document [The Universal Declaration of Human Rights: A Common Standard of Achievement 1999] emphasizes that it should be interpreted in the context of the entire document, as well as the ideas that have been originally laid in its development. The security in it was perceived as personal inviolability from the arbitrariness of the state bodies in case of detention, arrest and imprisonment of a person.

As the civil legislation stipulates a mechanism of the liability for damage caused by illegal actions of law enforcement agencies, that is, for the stipulated actions that can cause moral damage, it should be compensated regardless of the presence of guilt, according to Art. 1100 of the Civil Code of the Russian Federation, without the need to prove a violation of personal intangible rights, or encroaching on the intangible benefits belonging to a citizen in accordance with Art. 151 of the Civil Code of the Russian Federation. Thus, the inclusion of security directly in the list of intangible benefits would create competition of grounds for making claims for compensation for the moral damage.

If we recognize the presence of all the necessary qualities under the "security" concept that enable it to be considered an intangible benefit, we will get a similar effect, because the definition itself implies its continuing nature, which enables it to be correlated with all other benefits (primarily life and health), because the absence of a state of security for life or health causes damage to these intangible benefits. Thus, the possibility of filing a claim for compensation for the moral damage resulting from a breach of security of a particular intangible benefit would bring together all the grounds for filing a claim for the protection of intangible benefits. In addition, the victim's duty would be to prove the damage made to the security of this intangible benefit, and not the benefit itself, which is impossible to distinguish (as can be seen from the example of judicial practice where security is mentioned as a non-material benefit), because of the previously mentioned issue of security nature.

For comparison, such a mechanism would not be meaningless in the countries of the Anglo-Saxon system, because it is necessary first of all to prove the person's duty who caused damage, to observe the necessary caution in relation to the victim, as well as the appearance of damage due to violation of this duty [Erdelevsky A.M. 2007].

It is also necessary to take into account the restorative nature of civil legal liability. Causing

damage to the object's security is possible only in the presence of a threat, that is, the very existence of a threat already causes damage to this object, however, actual damage has not been caused, because there is no causal relationship between the interaction of this threat on the security of a particular object. Thus, the claim for compensation for the moral damage would not be reduced to compensation for the violated right, but to compensation for the possibility of its violation, that is, not for the wrongful act as such, but for attempting to the wrongful act, which is contrary to the principles of private law.

#### **4.CONCLUSIONS**

To date, it is too early to speak of the need to supplement the list of intangible benefits with another category - "personal security", since this would give rise to too many difficulties for the entire private law system, the overcoming of which is seen as a principled rejection of the classical division of the domestic law into a private and public, which is not inherent in the continental law and order.

#### **5.SUMMARY**

The security is important for the entire legal system, which speaks of the need to consolidate its orientation in the constitutional acts, and also as an industrial principle of civil law, implying that the violation of intangible benefit should involve a breach of its security, that is, it is proposed to refuse the subjective category of "suffering" in favor of an objective basis - security breach, eliminating the extra subjective factor from the chain of proof of the moral damage caused. In this case, when considering such categories of cases before a court, the following issues should be faced: whether it is really possible to speak about the category of such non-material benefit, which is claimed by the victim; whether it is possible to consider an action that has made damage by the threat to the security of this benefit in the context of a causal relationship between damage and action, as well as an assessment of the subjective value of the required compensation in comparison with the amount of damage.

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