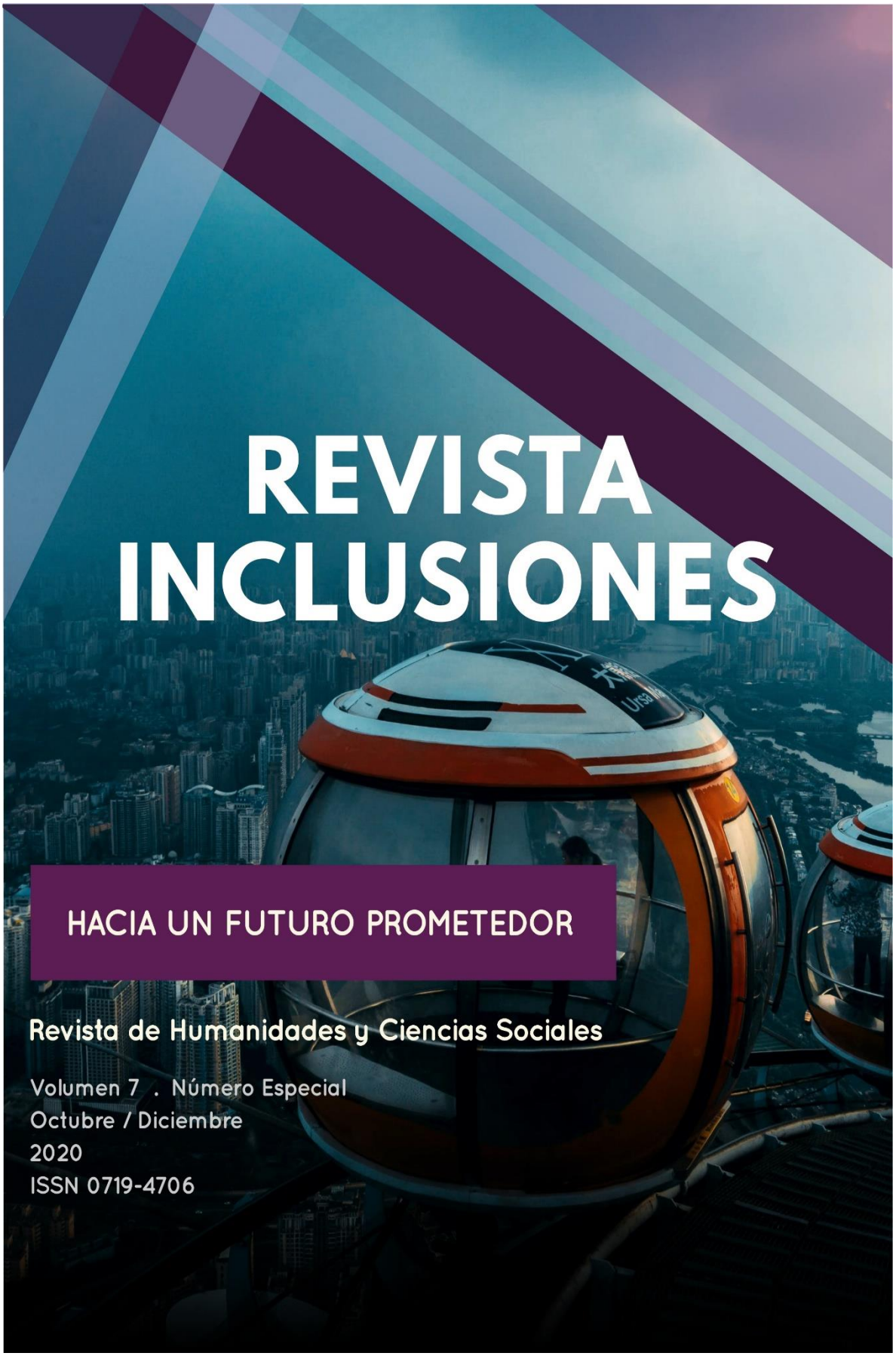

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# SOME FEATURES OF THE LAW RELATIONSHIP OF CIVIL LIABILITY OF PUBLIC ENTITIES AND INSTITUTIONS

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## Abstract

The article deals with the civil law liability of public entities and institutions as a special kind of civil law relationship. There are analyzed features of this law relationship in comparison with the general theoretical understanding of civil law relationship of liability, which is not complicated by the peculiarities of the law status of a public legal entity. Along with the established notions of law liability, it is proposed to consider liability as a special mental attitude of the offender to the actions he performs, or to his inactivity. Depending on this circumstance, the extent of the fault and the amount of liability to compensate the losses can be determined. In its nature liability is considered a special kind of law relationship. Civil law liability is a special protective law relationship, which allows not only to restore the violated civil rights, but also serves as a deterrent, ensuring the stability of civil turnover through the formation of internal mental attitudes to the lawful behavior of the obliged persons (parties).

## Keywords

Law liability – Sanction – Law relationship of liability – Civil liability – Agency – Offender

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## Introduction

The article describes the theoretical principles of civil liability and the implementation of these theoretical principles in Russian law. In contrast, there is given a glance on civil liability in countries of common law, where civil law liability does not receive a general theoretical justification. The article appears to be cognitive for practicing lawyers in Common Law system of law. The knowledge of general theoretical propositions worked out by the Russian law science will make it possible to transfer some of them into law enforcement practice of Common Law countries.

## General Theoretical Provisions of Civil Liability

It is generally accepted that civil liability is a type of law liability. Like any other law liability, civil liability, is intended to serve the strengthening of law order, ensuring stability of civil turnover. Mainly, civil law liability must ensure law and order in the sphere of private life. At the same time, in Russian literature there is no clearly expressed unambiguous understanding of the law essence of civil law liability. O.S. Ioffe saw civil liability as a sanction for failure to fulfill obligations.[1] N.S. Malein meant civil liability to be a particular law relationship, which is expressed in negative consequences for the offender of property.[2] V.A. Tarkhov objected to the definition, given by N.S. Malein. However, he did not formulate his own clear definition of civil liability. At the same time, he underlined a number of features of civil liability, pointing out that the general features are the next: a consolidation of the measures of liability in law acts; only a person who possesses such subjective right by virtue of a law or a contract can demand a to be on duty in liability; special for civil liability is that this liability is in front of the other side of the relationship (the other party) and that liability shall be correlated with the size of the harm caused by the offending party.[3] I.e. V.A. Tarkhov could not escape the legal connection between the offender and the victim of the civil offence. In this regard, his understanding of civil liability is neared to the understanding of liability as a law relationship.

O.A. Krasavchikov characterized the liability as a property impact on the offender, characterized by the deprivation of rights and encharging of additional duties on the offender.[4] F.I. Gavzee didn't give a definition of liability, saying only about the signs of liability and determining that liability is a consequence of the breach of the obligation, characterized by the application of sanctions to the offender.[5]

A.A. Lukyantsev gives a clear definition of civil liability: "Civil liability is a law relationship that arises in connection with the offense, and expressed in unfavorable for the offender's property or personal-moral implications along with the application of sanctions to him".[6] Usually, personal moral (immaterial) consequences are not identified as signs of civil liability. For example, V.P. Gribanov pointed at the unfavorable property

[1] O. S. Ioffe, Liability law (Legal literature, 1975).
[2] N. S. Malein, Property liability in economic relations (Nauka, 1968).
[3] V. A. Tarhov, Civil law. A common part. A course of lectures (Cheboksary: Detection sensitivity. Vol. Publishing House, 1997).
[4] O. A. Krasavchikov, Liability, protection measures and sanctions in the Soviet civil law. In: The problems of civil liability and protection of civil rights (Sverdlovsk, 1973. Vol. 27) 260 - 264.
[5] F. I. Gavzee, Law of Obligations (General Provisions) (Minsk: Because BSU them. V.I. Lenin, 1968).
[6] A. A. Lukyantsev, Liability in business activities in the Russian civil law theory and judicial practice (Doctors thesis, Rostov State University, 2006).

(material) nature of the civil liability. Also V.P. Gribanov pointed out that civil liability is a form of state coercion.[7]

From these points of view it follows that liability is understood either as a sanction for an offense, or as a special law relationship, or as a special form of state coercion.

There is also to be added that liability can be understood as a special mental attitude of the offender to the actions he performs, or doesn't perform. In accordance with this understanding, there is determined the extent of the fault (guilty) and the amount of liability to compensate the losses incurred. All of the above-mentioned essential notions of civil liability have a varied nature. But at the same time, there there can not be denied, that there exists a certain interconnection between them.

Sanction is a structural element of the law rule and establishes the consequences of the realization or, conversely, the absence of realization of the disposition of the law rule. Generally, the structure of the law rule is subordinated to a unified formula: "if" means the "hypothesis", which happens, then "something is regulated" means "disposition", and "if something else, which is not a hypothesis" and (or) "not a disposition" happens, then "sanction" is enacted.

Depending on the branches of law, the wording of the elements of the structure of the law rule and their location in law acts (articles) may differ. In essence, a logical chain can be represented in a simplified scheme: if hypothesis happens, then a disposition or a sanction is enacted. In such a simplified scheme, disposition and sanction of the law rule are merged. A supporter of such a simplified scheme was N.M. Korkunoff.[8]

The availability of a disposition or sanction depends on the law branch and law rule itself. The two-tiered simplified structure of the law rule is characterized by the fact that it does not indicate the quality of the consequences (negative, positive or neutral) of occurrence of the hypothesis. So, if one condition is met, positive or neutral consequences for parties of law and participants of social relations can occur, which will be regulated by a disposition, if some other (unlawful) behavior is realized, then unfavorable (negative) consequences occur, which are regulated (protected) by sanctions. In other words, disposition and sanction are identical consequences of the realization of the hypothesis. However, their sense in contradictory.

The three-tiered structure of the law rule is characterized by an additional indication of the attitude of the state (law-maker) to the behavior that is being realized. If the behavior is favorable, then it is regulated by disposition, if it is malevolent, then it is regulated (protected) by the sanction. There is also an opinion in Russian literature that the hypothesis and disposition are addressed directly to the participants of social relations and sanction is more addressed to the State (government).[9] This point of view may be accepted, if the sanction of the law rule is realized only with the help of the state apparatus (governmental coercion), however, as it is known, this is not always the only case. In particular, civil-law sanctions can be enforced by parties of civil law relations independently without the aid of state coercion based on a court decision.

[7] V. P. Gribanov, Implementation and protection of civil rights (Statut, 2001).
[8] N. M. Korkunoff, Lectures on the general theory of law (Russian Political Encyclopedia, 2010).
[9] E. A. Petrov, "Basic approaches to the structure of the rule of law in different legal traditions", Lex Russica num 1 (2015): 84-95.

The presence of textual formulations of dispositions and sanctions depends on the law rule itself. So sanctions are clearly traced in protective law rules, in which hypotheses establish a prohibited behavior. In the case of the realization of this behavior, there is applied a sanction provided by the law rule. In this case the disposition will not be absent, but it will be assumed - it will come into force in all other cases that are not established by the hypothesis of the protective law rule.

In the Anglo-Saxon law family the formulation of the rule of law in a separate court decision is not formulated in direct text language: the disposition is often assumed.[10]

For example, the prohibitive nature of criminal law presupposes that the behavior, which is not directly prohibited by law rules of criminal law, is permitted, nevertheless, it is not directly written in law rules. In civil law, the contrary principle of building of a system of law is implemented - if the behavior is not prohibited, then it is supposed allowed.

In the regulatory rules of law, the hypothesis will point to the legal facts that lead to the disposition. As for the non-fulfillment of the hypothesis, it will lead to a sanction only in case there is such a sanction in the law. This is due to the fact that the regulatory branch of law, in particular civil law, has as the fundamental principle the principle that everything that is not prohibited by law is allowed. Therefore, in some cases, failure to comply with what is provided by the hypothesis of a particular law rule can lead both to law neutral behavior, and to behavior, regulated by the disposition of another law rule.

In general theory of law, there are highlighted negative and positive sanctions. A distinctive feature of the sanction is that, in addition to determining the consequences for unlawful behavior, it shows the negative attitude of the legislator to the prohibited behavior, thereby playing a preventive role. In extremely rare cases, there are logically contrary situations - when the consequences of certain behavior are encouraged by the state (law). Such kind of inducements are called positive sanctions, the consequences of which are similar to the consequences given by disposition and negative sanction. However, unlike negative sanctions, positive sanctions show a positive attitude of the legislator to the behavior that is being carried out. Positive sanctions are hardly ever met in Russian law, so it can be concluded that a positive sanction is not a mandatory element of the structure of the rule of law.[11]

On the other hand, negative sanctions should be recognized as an mandatory element of law rules, for the reason that they ensure compulsory execution of the requirements of dispositions of law rules, as well as the impossibility of the hypotheses of protective (forbidding) rules of law.

On the basis of the division into positive and negative sanctions, a positive and a negative liability is delineated. As it clearly appears, positive liability is not represented in Russian law. So law liability is realized only in a negative sense. With regard to civil law, it can be stated with certainty that liability is only negative, since it is addressed to the offender and entails negative consequences for him.

In its legal nature, liability is a special kind of law relationship. As it was said before, the elements of the law rule characterize the internal system of the rule of law.

[10] W. Burnham, Introduction to the Law and Legal System of the United States (St. Paul, 2011).
[11] N. I. Matuzov y A. V. Malko, Theory of State and Law: Textbook (Yurist, 2004).

Like the rule of law, its elements represent a model of due or possible behavior (this concerns, respectively, the protective and regulatory rules of law). But due and possible behavior, regulated by the rule of law, is not the behavior itself. Only if there is a certain behavior exhibited by a certain party under the influence of the rules of law can we talk about law relationship, because the law relationship is the behavior of the participants, which has been, is or will be affected by the rule of law. Law relationship is the dialectical unity of the abstract law rule (its element) and the specific behavior of the subject of legal regulation. In this case, the impact of the rules of law on the behavior and the impact of the behavior on the rules of law is reciprocal. Both phenomena mutually influence each other.

Achieving of the dialectical unity of the abstract legal form and concrete social behavior is possible exclusively in the psyche of the parties. It is for this reason, a law relationship is an intelligible psychic phenomenon and does not represent anything real.[12] Proceeding from this position, the view on the liability only as a sanction, which is put forward by O.S. Ioffe, does not allow us to disclose the whole essence of civil liability and is reduced solely to the analysis of law rules, and even to the sanctions of rules of law. This position is not entirely consistent with the view of V. Mozolin, which, on the one hand, points out that the civil liability is a sanction for the offense, and on the other, shows the autonomy of civil liability within civil law relationships.[13]

It seems to us that civil-law liability is a special protective law relationship that allows not only to restore the violated subjective civil rights, but also to serve as a deterrent, ensuring the stability of civil turnover through the formation of internal mental attitudes to the lawful behavior of the obliged persons.

It is necessary to determine the place of this law relationship in the system of civil law relationships. There are two points of view on this matter. The first of them is forwarded by S.N. Bratus', and it is not based on a specific location of this law relationship in the system of civil relations, but is based on a special method of influencing on the behavior of the participants, in particular on the use of state coercion to the offender, and this law relationship itself is understood as an enforcement of unfulfilled duty.[14]

Another view[15] ased on the fact that the relationship of liability - is something else than an unfulfilled duty. The liability is precisely the imposition of additional duties on the offender, what forms a new law relationship and, therefore, denotes an independent place of civil liability in the system of civil law relationships. This position of A.A. Lukyantsev seems more acceptable to us, since it allows us to identify the specifics of civil liability and to separate it from a law relationship, which contains only regulatory obligations.

In addition, this view is fully consistent with the understanding of the law liability as a sanction. The sanction establishes an independent rule of conduct for both parties and the state apparatus. It would be strange to believe that the sanction would duplicate what was already laid down in other law rules or structural elements of the law rule.

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[12] V. P. Kamyshanskii y V. E. Karnushin, Civil relations: socio-psychological aspect: monograph (Statut, 2016).

[13] V. P. Mozolin, "Civil liability in the system of Russian law", Journal of the Russian law, num 1 (2012): 33-40.

[14] S. N. Bratus, Law liability and legality (theory essay) (Legal literature, 2001).

[15] A. A. Lukyantsev, Liability in business activities in the Russian civil law theory and judicial practice (Doctors thesis, Rostov State University, 2006).

For example, if one considers civil law liability to be exclusively a form of state coercion, it would appear that the liability is just an unfulfilled disposition of the law rule, enforced by state coercion. The point of view of S.N. Bratus' is reduced to such conclusions. However, this can not be considered true, because, in such a case, civil liability would be understood to be identical with the understanding of civil-law defense.

Although, it is more logical and more appropriate to single out civil liability as a separate protective law relationship with a special duty of the offender, which arises as a consequence of an offense, which is represented in non-performance, or improper performance of duties, or which is the result of causing harm.

It should be recognized that understanding of liability as a law relationship is not typical for modern civil law. The legislator shifts the emphasis to the terms of liability, its types, the parties of liability, i.e. it is said not about the very relationship of liability, but about the elements and prerequisites of the law relationship of liability.

Having determined civil liability as a law relationship, there should be, first, made a stop at the essential characteristics of this relationship. First of all, From the point of view of the method of determining the parties of this law relationship this relationship must be considered relative with exactly defined parties, who have rights and duties.

Legal content of law liability is characterized by the presence of the subjective right on one side and the corresponding to these subjective right duty on the other side.[16] So, the legislator constructs civil liability through the duty of the liable person.

If we stick to the concept of E.A. Sukhanov, that the object of law relationships is a social relation about tangible and intangible benefits or their creation process,[17] the relationship of liability gets an extra feature – material (property) character. Relationship of liability is a material law relationship, containing the process of movement of wealth (money) from the offender (tortfeasor) to a bona fide participant of civil turnover (the victim).

Civil law relationship of liability is characterized exactly by its material nature. The object of this relationship is the property, usually money, performing the equivalent of unearned or foregone income within the transaction or losses due to damage to life, health or property.

Prerequisites of civil law liability are law rules (sanctions of law rules), the legal facts (offenses), as well as the authority and capacity of subjects of law.

Sanctions of law rules prohibiting certain behavior are elements of protective law rules, since they are designed to prevent a certain type of behavior (action or inaction) and to protect the existing regulatory relationships, containing certain subjective civil rights as their elements. Thus the civil law relationship of liability is always a protective relationship.

Legal fact giving rise to the onset of civil liability, will be the offense, understood not only as a tort that violates the absolute rights and (or) legitimate interests, but also as a

[16] S. S. Alekseev, General Theory of Law. T.2 (Legal literature, 1982).
[17] Russian civil law: the textbook: in 2 v. / V.S. Em, I.A. Zenin, N.V. Kozlova et al.; Ed. E.A. Sukhanov. 2nd ed., A stereotype (Statut, 2011). T. 1.

violation (non-fulfillment) of duties in the obligatory law relationship (as a rule, contractual relationship).

Legal capacity is determined by the general provisions of the Civil Code of Russian Federation. These provisions relate namely to the capacity of a liable subject. Legal capacity means the ability to act as a subject of law liability, i.e. to bear the duty in law liability. Legal capacity to act according to one's will (this is not just a legal capacity according to Russian legal doctrine) means the ability to perform the duties by one's own actions within the framework of law liability. Both prerequisites can be called protective legal capacity.

Other features, such as the equivalence subjects, principle of full reparation of harm, willful nature of the relationship and compensatory character of the relationship arise from the method of civil law regulation.

Having described the main features of law liability, there should be focused on understanding the nature of civil liability as a form of state coercion. This sense of liability is allocated because it is assumed that the sanction of the rule of law is addressed not only to the parties, but also the state. State applies negative consequences to the offender with a help of his coercive apparatus.

It should be noted that, with respect to civil law relationship of liability state coercion can occur both in the direct and immediate form, and in the indirect manner by a mental image of state coercion in one's mind in if civil law relationship of liability is not realized voluntarily.

So, there are two forms of the existence of civil law liability: jurisdictional and not jurisdictional. The first one means the assistance of a public authority in the relationship of liability. The second one means such an existence of law relationship of liability when the State is not involved. In the latter case, state coercion is not directly expressed. It has only an indirect effect on the psychological consciousness of the subject of liability through the understanding of the principle of inevitable punishment.

The understanding of law relationship as a mental influence of state coercion on the conduct of subjects of civil turnover is closely linked to another understanding of civil liability as a special mental attitude to unfavorable effects of one's illegal conduct and to one's misconduct itself. Civil liability in this case, involves an honest and conscientious attitude to one's fulfillment of duties and exercision of one's subjective rights. This liability to a greater extent promotes normal circulation of civil turnover, economic growth and social activity in general. However, such civil liability involves a certain level of law consciousness and law culture in society, the formation of which should be the direct liability of the state, carried out with the active participation of civil society and its institutions. Rules of law, firstly, should be directed to form and cultivate a responsible attitude towards the content of relations in the minds of parties of civil turnover, where they participate, the full performance of taken duties.

Civil liability across a variety of different approaches to the understanding of its essence, ultimately comes down to its understanding as a protective law relationship, in which one way or another, directly or indirectly the state is present on behalf of certain bodies and public entities, including its presence as an independent subject of civil law. In

this regard there should be clarified civil law liability arising between public entities and other subjects of civil law.

## Features of civil liability of public entities - Russian Experience

The specificity of liability is shown when considering the most important element of law relationship - of its parties. Currently public entities are recognized as subjects of civil law - article 124 of the Civil Code of Russian Federation. The participation of public entities in civil law relationships through their bodies is often regarded as the ratio of participation of the system in the whole and of its parts in civil law.[18] The state is considered as a whole, and its public entities (including itself) and the organs of public entities are, respectively, considered as parts.

The argument in favor of the fact that only public entities themselves participate in civil law relationships is the fact that public authorities always act on behalf of a public entity. Meanwhile, this approach, while being consistent with the general theoretical construction of civil law, does not reflect the peculiarities of law relationships with the participation of state (Russian Federation), its regions and municipalities.

Features of law liability lies in the fact that the state and its regions and municipalities are involved in civil law relationships through their representatives (agents) - the bodies of governmental power and administration. However, a feature of this agency is that a representative and a represented public entity are not different and independent from each other. Public entity and its bodies relate to each other as a whole thing relates to its parts.

Separation of public entities on public entity itself and its bodies is important for the public law. In private law there is no reason not to recognize a public authority(body) as a subject of rights and duties and to oppose a public entity as a system (the whole thing) to their bodies (parts of the system). Of course, the capacity of this public authority is largely curtailed and specialized, but in general they should be recognized as parties (subjects) of rights and duties, even though they have a relative independence within the prescribed limits.

The civil law capacity of the state or municipal body (authority) in the field of civil liability is absent, since all the duties are imposed only on public entity itself – on the state or the municipality. The only possible explanation of the legal capacity of a public authority is that the public authority is associated with a public entity with an organizational relationship. In this regard, one can recognize the specific organizational capacity of the public authorities. Thus, it is necessary to make a clause, that this capacity will not be civil law capacity and usage of the term “capacity” is hardly appropriate, since in essence it is a public law competence, that is in the sphere of administrative law. In civil law, the usage of the term “organizational civil law capacity” for the public authorities is only an indicator of the public law competence of the public authority, which is fixed in administrative law. A. Gordon pointed out that with the help of agency a law relationship becomes complicated and abstract.[19] And this opinion is best suitable for any law relationship where a state or another public entity participates.

[18] M. V. Zhabreev, Public entity and their organs: the civil status and participate in civil matters. In: Civil law notes: Interuniversity collection of scientific works (Statute, 2001).

[19] A. Gordon, Agency in Civil Law. Journal of civil and criminal law: January, February (Edition of the St. Petersburg Law Society, Printing Governing Senate, 1879).

Public entity, recognized by positive law as a subject of rights and duties, has a very limited legal capacity. The state has a treasury (which determines state ownership), the state has its own apparatus (the state is in a law relationship with their representative bodies), etp. With regard to State liability, it must be assumed that the state may have a duty, but this duty cannot be executed by the state itself. None of the subjective civil right or duty is executed by public entity directly. The only law relationship in which the state participates is a relationship of agency, based on law act. Therefore, the law relationship of liability of a public entity will always be complex. Under this law relationship a public entity will always acquire duties through their bodies.

Relatively to a legal capacity of a public entity, there should be noted, that a public entity may have those rights that are specifically provided by law. Such a settlement is laid down in the state constitutionalism. The state has limited itself in its rights, by adopting the constitution and laws. Civil law provides a public entity with most of all rights as compared to branches of public law. In this sense, civil law capacity of a public entity can be recognized as general. The realization of this general capacity is made through a special legal capacity of bodies and authorities of the state. A special case of liability of the state is a case of going beyond the special capacity of bodies of the state. There can be highlighted another feature of liability of a public entity. Law relationship of liability arises when a state or municipal authority (officials) acts not in accordance with their special capacity.

However, liability may arise in fulfilling of rights and duties which is not beyond the special capacity of bodies of governmental power and administration, for example, this is a case of all kinds of breaches of contracts.

Special capacity of the public authorities, as a prerequisite, has a close connection with the following prerequisite of the law relationship - a legal fact. Legal fact is an offense, the offense involves not only the illegal activities of a public authority (not corresponding to its special legal capacity), but, above all, a violation of rights and lawful interests of other persons or dereliction of a duty for another person. That is why the new article 16.1 of the Civil Code of Russian Federation though mentions of the legitimate actions of the public authorities, however, also speaks of the offense, because any harm to another person is an offense, except for the harm which is caused in accordance with a law act (this is called a concept of general tort in Russian law).

The offense is the main prerequisite of civil liability. In the field of protective law relationship of liability of public entity there should be assumed that an offense will also be specifip. For instance, going beyond its competence, as a rule, entails the appearance of not only the civil law liability, but also the liability, which is regulated by other branches of law. For example, it may be even a felony of some official, who is just an offender in civil law, but a criminal in criminal law. As for offenses, which are not going beyond the special law capacity, they will be purely of civil law nature, the consequences of which would be a civil law relationship of liability.

Another feature of the law liability of public entity is the scope of such offenses. This is the realm of administration of governmental power of the public authority, i.e. this is administrative and governmental area of public activity. It should be noted that this feature cannot be traced, if the state is a party of contractual relationships. In this case, the failure to fulfill obligations, made by the state, would be no different from the failure of any other subject of the civil law.

There is another one feature of law relationship of liability – that is the specifics of the guilt, which connects a subject of liability with the offence (tort or contact breach). There is such a point of view in literature, that the guilt of a public entity is merged with unlawful deed.[20] This is due to the impersonal status of the state. The only persons who can have the guilt are public officials. However, the official, having commited an offence and being guilty in an offence, remains outside the law relationship of liability, because this relationship connects only a public entity and a victim. It is yet another feature of the law liability of public entities: the offender is not a party to the law relationship of liability. A public entity in the face of specially authorized bodies is responsible for the actions of its officials. Moreover, this rule applies to a contractual relationship. The reason for this non-participation of the direct offender or a lawbreaker of civil rights and legitimate interests is the general rule, enshrined in civil law, that any official is not a subject civil rights and duties.

There was previously mentioned a special jurisdictional form of civil liability relationship. With the participation of the state, this form of existence of the law relationship of liability is a prior and is the only possible in practice. With the participation of the state the jurisdictional form of law liability has a particular property: the state applies rules of law to himself and uses its own apparatus of coercion against itself. This paradox is only possible in the proper operating of the system of separation of public powers, which are balanced by each other. In this case, the jurisdictional authority (the court) must be at the highest extent independent from the executive and representative (legislative) branches of power, which are usually subjects of civil law liability.

However, the lack of budget funds and spread of legal nihilism of the public authorities with regard to their participation in civil law relationships, an exaggerated idea of the priority of public interests over private interests substantially reduce the effectiveness of civil law liability of public entities. This fact has a negative impact on the investment attractiveness of the Russian economics, including foreign investors, especially in high-tech industries.

As for the mental component of liability, there should be noted that first of all it is applied to physical persons and indirectly to legal (moral) persons. When talking about public entities, civil liability will not carry such a mental nature, as officials performing certain public functions do not feel any risks for failure of civil law duties or for torts which only entail civil liability of the state (public entity) as a consequence.

It would be very useful, from this point of view, to recognize officials as parties of civil law (subjects of civil rights and duties). It would be useful as well to settle law rules establishing civil law liability of the officials. Unfortunately, now they cannot be subjects of civil law liability because of the reasons, mentioned above.

From this viewpoint, a law relationship of liability of public entity, on the one hand, will always be complexed by the relationship of agency, and, on the other hand, it will be narrowed for the reason that the civil-law liability of the state cannot have the same properties as civil law liability with participation of other subjects of civil law, i.e. physical and moral persons, who appear to be independent parties of civil turnover.

[20] O. V. Mikhaylenko, Property liability for harm caused by exercise of public authority: theoretical aspects and problems of its realization in practice (Wolters Kluwer, 2007).

## Approaches to understanding of the civil law liability of public entities in the common law systems

It is interesting to have a look on the example of the countries of Anglo-Saxon law system. It is quite different either from Russian law system, or any other system of continental law. The fact is that English and American approaches differ from civil law systems because there is no much attention on doctrinal elaboration of the structure of system of law.

With regard to liability, this means that one cannot find such a developed institute of civil law as an institute of civil law liability, which would be applicable to all other institutions of civil law and would contain the general protective rules of law (sanctions).

Even specific cases of liability are closely connected with the procedural peculiarities of proving of facts in a trial, i.e. it is not possible to hold the doctrinal distinction between procedural law and substantive law.

Civil liability in common law countries is being developed in two parallel angles - as a part of contract law (liability from the contracts), and as a completely independent phenomenon in the form of tort law, although it should be noted that some authors still try to reduce some measure of liability to universal measures applicable both to contract law and law of torts.[21]

Contractual liability in England can hardly claim to independence in relation to any other contractual duty. That is because there is no development of the division of law relationships into regulatory and protective in England. The contract is just an agreement, which is just a set of promises, where promises of liability are located as well. The key point of any contractual liability in England is, firstly, the fact that it has the pecuniary nature, and secondly, that even the impossibility of performance does not release the debtor from the liability.[22]

The law of torts differs with its casuistry and is developed from the case-law and from the laws governing a particular sphere of social life. There are no general provisions.

There is no the principle of so-called general tort, the essence of which is that every wrongful harm must be compensated, in English law. There are no general rules of law and theoretical positions on the topic of a civil offence itself.

On the contrary, there is a principle of a singular tort, where each tort is continuously evolved from the judicial practice without any general theoretical provisions.

There are lists of nominate torts and a plurality of innominate torts.[23] Innominate torts received their separation in specific cases, but have not received a special name. There is also a separate group of so-called, statutory torts.

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[21] V. S. Belykh, “The concept of contractual liability under English law and Russian”, Lawyer, num 19 (2013): 37-43.

[22] R. O. Khalfina, The contract in the English civil law (Publishing house of the Academy of Sciences, 1959).

[23] A. K. Romanov, “Legal entities - parties of tort liability in English law”, Civil law, num 1 (2016): 28-30.

This kind of torts is provided by a law act. For example, The Occupiers Liability Act (1957) provides the liability for accidents at work at a certain employer. The doctrine of the liability of public entity gets its development in several ways. For example, the law liability of the UK Government is generally considered along with its political liability and other types of social liability.[24] Political liability is a liability of the Government in front of the Parliament that is called constitutional law liability in Russia. Law liability is a liability for violations of public officials which is mainly reduced to civil law liability.

Like in the Russian doctrine in common law systems there is established a rule that an official will be released from liability. There is also the same redemption from liability of commissioners, attorneys, sending public functions. Instead of the liability of officials, there will be responsible an appropriate public entity. But at the same time for the improper performance of public duties, commissioners, other officials can be liable. So, there is such a truncated liability of officials. Liability arises because there had been committed a violation of the rules establishing a competence of an officer. Governmental power conferred by the law to an official cannot be used to harm the life or health of the citizens. At the same time, there are some lofty moral provisions. A public official may accept liability in order to avoid additional expenditure of public funds.[25] It is permitted to lay down a liability on officials if they have guilt.

In modern Britain one of the main acts regulating the liability of officials is the Crown Proceeding Act, 1947.[26] The second section of the Act is devoted to the substantive law. It introduces individual liability of officers, as well as those connected with the Crown by means of civil contracts (agents). The Crown refers to Her Majesty. The Crown is responsible for torts, for breaches of duties committed by her officers or agents, as well as for violations of ownership, possession and control of the property.

The US has a similar in scope Federal Tort Claims Act (1946), which also applies to issues of torts of public officials. The act is quite voluminous and is the whole instruction of procedure in cases against public servants. It settles questions of liability of states and the US in general, the applicable substantive law, attorney's fees, limited to 20 and 25 %.

US is the only proper defendant in the cases from delicts of federal civil servants. The legislative act has a list of other regulations that protect the position of civil servants and impose the guilt on the state itself.

§ 2674 says, The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. Tortfeasor (offender) - is always a federal public servant, performing his official federal functions (28 USC §§ 1346 (b) (1), 2675, 2672 and 2679). The law act settles those offenses for which the state is responsible for its employee.[27]

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[24] A. Tomkins, The Struggle to Delimit Executive Power in Britain. The executive and public law: power and accountability in comparative perspective. Ed. by P. Craig, A. Tomkins (New York and Oxford: Oxford University Press, 2006).

[25] C. G. Addison, The Law of torts (Boston: 1872).

[26] M. A. Egorova; V. G. Krylov y A. K. Romanov, Tort liability and tort liability in English, German and French law: Textbook / Ed. Ed. M.A. Egorova (Yustitsinform: 2017).

[27] Personal Liability Tort Litigation Against Federal Employees Paul Michael Brown Senior Counsel Constitutional Torts Staff Torts Branch, Civil Division. United States Attorneys 'Bulletin, November 2010, Volume 58 Number 6, p.2.

They can be summarized in three groups of offenses: violations of the US Constitution,[28] violation of a federal law[29] and violations of state law of torts.[30]

The offenses themselves are reduced to causing financial losses (money damages), injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (28 USCA § 1346 (b)) It should be noted that this kind of casuistry is not familiar to the Russian law. Moreover, the Russian law doesn't use the rule about the liability of public servants at all, as it was said above.

## Conclusion

In conclusion, it should be noted that neither the British, nor the Russian legislative and law enforcement practices do not stand in the position of liability of the officials, what in the conditions of economic crisis has a negative effect on the public sector of the economics. This is due to the sanctions, establishing civil liability of public entities. In this regard, in practice, there is an opposite trend - not to apply sanctions against the property of public entities at all. The key to apply these rules of law is the imposition of liability on public officials and servants.

## References

Addison, C.G. The Law of torts. Second edition. Boston. 1872.

Alekseev, S. S. General Theory of Law. Volume 2. Moscow: Legal literature. 1982.

Belykh, V. S. "The concept of contractual liability under English law and Russian". Lawyer, num 19 (2013): 37-43.

Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 US 388. 1971 (Fourth Amendment).

Brown v. Nationsbank Corp., 188 F.3d 579 (5th Cir. 1999). Racketeer Influenced and Corrupt Organizations Act (RICO).

Bratus, S. N. Law liability and legality (theory essay). Moscow: Legal literature. 2001.

Burnham, W. Introduction to the Law and Legal System of the United States. St. Paul. 2011.

Egorova, M. A.; Krylov, V. G. y Romanov, A. K. Tort liability and tort liability in English, German and French law: Textbook. Ed. Ed. M.A. Egorova. Moscow: Yustitsinform. 2017.

[28] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 US 388 (1971) (Fourth Amendment).

[29] Brown v. Nationsbank Corp., 188 F.3d 579 (5 th Cir. 1999) (Racketeer Influenced and Corrupt Organizations Act (RICO)).

[30] United States v. Smith, 499 US 163 (1991) (medical malpractice).

Gavzee, F. I. Law of Obligations (General Provisions). Minsk: Because BSU them. Lenin. 1968.

Gordon, A. Agency in Civil Law. Journal of civil and criminal law: January, February. Edition of the St. Petersburg Law Society. Vol. 1 Sankt-Petersburg: Printing Governing Senate. 1879.

Gribanov, V. P. Implementation and protection of civil rights. Moscow: Statut. 2001.

Ioffe, O.S. (1975) Liability law. Moscow: Legal literature, 97.

Kamyshanskii, V. P. y Karnushin, V. E. Civil relations: socio-psychological aspect: monograph. Moscow: Statut. 2016.

Khalfina, R. O. The contract in the English civil law. Moscow: Publishing house of Academy of Sciences of the USSR. 1959.

Korkunov, N. M. Lectures on the general theory of law. Sankt-Petersburg: Legal Press center. 2003.

Krasavchikov, O. A. Liability, protection measures and sanctions in the Soviet civil law. In: The problems of civil liability and protection of civil rights. Sverdlovsk, Vol: 27 (1973): 260-264.

Lukyantsev, A. A. Liability in business activities in the Russian civil law theory and judicial practice: the dissertation of the doctors of jurisprudence. Rostov state university, Rostov-on-Don.

Malein, N. S. Property liability in economic relations. Moscow: Science. 1968.

Matuzov, N. I. y Malko, A. V. Theory of State and Law: Textbook. Moscow: Yurist. 2004.

Mikhaylenko, O. V. Property liability for harm caused by exercise of public authority: theoretical aspects and problems of its realization in practice. Moscow: Wolters Kluwer. 2007.

Mozolin, V. P. “Civil liability in the system of Russian law”. Magazine of Russian law. Num 1 (2012): 33-40.

Personal Liability Tort Litigation Against Federal Employees Paul Michael Brown Senior Counsel Constitutional Torts Staff Torts Branch, Civil Division. United States Attorneys Bulletin, num 58 (2010).

Petrov, E. A. “Basic approaches to the structure of the rule of law in different legal traditions”. Lex russica num 1 (2015): 84-95.

Romanov, A. K. “Legal entities - parties of tort liability in English law”. Civil law. Num 1 (2016): 28-30.

Russian civil law: the textbook: in 2 v. Vol.1. Ed. V.S. Em, I.A. Zenin, N.V. Kozlova et al; 2nd ed. Moscow: Statut.

Tarhov, V. A. Civil law. A common part. A course of lectures. Cheboksary: Chuvash book publishing house. 1997.

Tomkins, A. The Struggle to Delimit Executive Power in Britain. The executive and public law: power and accountability in comparative perspective / Ed. by P. Craig, A. Tomkins. New York and Oxford: Oxford University Press. 2006.

United States v. Smith, 499 US 163 (medical malpractice). 1991.

Zhabreev, M. V. Public entity and their organs: the civil status and participate in civil matters. civil law notes: Hi. Sat. Sci. tr. Moscow: Statute. 2001.

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