

## COMPENSATION FOR MORAL HARM IN VIOLATION OF THE RIGHT TO DISRESPECT FOR KINSHIP AND FAMILY TIES

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**Introduction.** The admissibility of a wider application of compensation for moral harm in violation of family rights in the science of family law is assessed ambiguously. The law provides for such an opportunity only in art. 30 of the Family Code for a conscientious spouse when the marriage is declared invalid.

It is necessary to take into account the specifics of family relations, as deeply personal, and the fact that art. 8 of the Family Code does not limit the protection of family rights in the ways specified in the legal norms, allowing the use of other methods. At the same time, in accordance with the provisions of art. 4 of the Family Code, the application of civil legislation to family relations is allowed, if it does not contradict the essence of family relations, which leads to refusals in a claim for compensation for moral harm due to the presence of obstacles to relatives from one of the parents in communicating with the child, due to the fact that the provisions of the current civil and family legislation do not provide for the possibility of his penalties.

One of the most important reasons for the negative attitude of the courts to the fundamental permissibility of a wider application of the above-mentioned measure of responsibility in violation of family rights is seen in the absence of developed conditions for an offense that would be the basis for the application of compensation for moral harm, given that such conditions, taking into account the specifics of family relations, differ significantly from the usual conditions of civil liability.

**Goal.** Identification of the criteria of private and family life applied by the European Court of Human Rights, as well as the study of the fundamental possibility of filing a claim for compensation for moral harm caused by the refusal of a parent to provide an opportunity to communicate with a child and participate in his upbringing to a separate parent.

**Methodology.** In the course of the research, methods of generalization, description, analysis, synthesis, formal legal method were used.

**Results.** The necessity of expanding the subject of proof in such a dispute with the inclusion of the following circumstances is justified. The presence of objective obstacles to communication, which can be associated with both the child (illness, unwillingness of the child to communicate with the parent), and with the personality of the parent living separately, communication with which can negatively affect the child. It is necessary to take into account the opinion and interests of the child. It is also necessary to take into account the actions of the parent himself, demanding compensation for moral harm, so if he evades the duties of maintaining his child, we assume the possibility of refusing the claim. Making a decision on compensation for moral harm involves taking into account the fault of the causer and his motives, which should not correspond to the interests of the child.

## 1. Introduction.

The monetary compensation for non-pecuniary damage (moral harm) resulting from human rights violations is actively awarded by the courts. The Resolution of the Plenum of the Supreme Court dated «On the practice of application by courts of norms on compensation for moral harm»<sup>1</sup> reflected the modern positions of law enforcement practice, some of which do not have direct regulatory support, but are derived by interpreting the provisions of civil legislation.

The possibility of applying compensation for moral damage as a measure of responsibility in case of violation of family rights has become the subject of multiple scientific papers. The legislator expressly provided for such a possibility only in Family Code of Russian Federation (Art. 30)<sup>2</sup> for a conscientious spouse when declaring a marriage invalid<sup>3</sup>.

The positions of scientists regarding the possibility of compensation for moral damage in other family relationships differ significantly, which is due to the following reasoning.

The specific features of family relations, as deeply personal, presuppose such possibility, furthermore the Art. 8 of the Family Code does not limit the protection of family rights in the ways specified in its norms, allowing the use of other methods. That entails a wider range of grounds for applying compensation for moral damage in violation of family rights, including in connection with perceived obstacles in communicating with children [1, pp. 97-98; 2, p.160].

At the same time, in accordance with the

provisions of Art. 4 of the Family Code, the application of civil legislation to family relations is allowed, if it does not contradict the essence of family relations, which leads to refusals in a claim for compensation for moral damage in connection with the obstacles created to relatives by one of the parents in communicating with the child, due to the fact that those provisions do not provide by the current civil and family legislation<sup>4</sup>. It has been repeatedly argued in the literature on family law that this restriction do not based on the law [3, pp.82-83; 4, pp. 105-106].

Based on the universality of compensation for moral damage as a measure of responsibility in case of violation of family rights, scientists have repeatedly noted the need to include such provisions in the Family Code to provide the fundamental permissibility of using this method of protection in family relations [5, pp. 38-41; 6, p. 20].

T.V. Shershen on the base of the Supreme Court's position remarked that the absence in a legislative act of a direct indication of the possibility of compensation for moral or physical harm caused in specific legal relationships does not always mean that the victim does not have the right to compensation for moral harm<sup>5</sup>. The author rightly notes that "the legislator, having fixed in Art. 151 of the Civil Code of the Russian Federation the general principle of compensation for moral harm, has not established restrictions on the grounds for such compensation", which leads to the conclusion that there are no legally established obstacles to the application of the above-mentioned method of protection to family legal relations [7, p.332].

One of the most important reasons for the negative attitude of the courts with respect the

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<sup>1</sup> Resolution of the Plenum of the Supreme Court dated 11/15/2022 № 33 «On the practice of application by courts of norms on compensation for moral damage». Bulletin of the Supreme Court of the Russian Federation. 2023. No. 2.

<sup>2</sup> The Family Code of the Russian Federation of Dec., 29, 1995 No. 223-FZ. Collection of legislation of the Russian Federation. 1996. No. 1. P. 16.

<sup>3</sup> For example: paragraph 18 of the Review of judicial practice in cases of annulment of marriage: approved by the Presidium of the Supreme Court of the Russian Federation dated December 14, 2022. Bulletin of the Supreme Court of the Russian Federation. 2023. No. 3.

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<sup>4</sup> Ruling of the Supreme Court of the Russian Federation dated 08.04.2014 No. 45-KG13-22. Legal reference system "ConsultantPlus".

<sup>5</sup> Ruling of the Supreme Court of the Russian Federation dated October 1, 2013 No. 5-KG13-77. Legal reference system "ConsultantPlus"; Cassation ruling of the Judicial Chamber for Administrative Cases of the Supreme Court of the Russian Federation dated April 28, 2021 No. 12-KAD21-1-K6. Legal reference system "ConsultantPlus".

fundamental permissibility of a wider application of this measure of responsibility in violation of family rights is seen in the absence of developed conditions for an offense that would be the basis for applying compensation for moral damage. It is necessary to bear in mind that such conditions need always to include the specifics of family relations, as opposed to usual conditions of civil liability.

The resolution of the Plenum of the Supreme Court of the Russian Federation No. 33 "On the practice of applying the norms on compensation for moral damage by courts" created the prerequisites for changing the existing law enforcement practice. In accordance with it, moral or physical suffering can be caused by actions (inaction) that encroach on intangible benefits belonging to a citizen from birth or by virtue of the law or violate his personal non-property rights - personal and family secrets, the right to respect kinship and family ties.

## **2. The right to respect for kinship and family ties as an object of legal protection.**

The subject of this study is kinship and family ties, the disrespect of which may be the basis for compensation for moral damage. It is necessary to clarify beforehand some uncertainty in the terminology of the above-mentioned Resolution.

Respect for kinship and family ties presupposes taking these ties into account, respectful attitude, which allows us to believe here a private manifestation of the constitutional principle – respect for traditional family values [8, p.1023].

In relation to kinship and family ties, the range of subjects is also unclear. Family ties can be either confirmed by the relevant act of civil status, or actual. There is a choice between law and fact. The word "and" can mean both meanings of word. The next question is: what does it mean - the family relations?

The absence of even an approximate definition of the concept of "family" and "family member" in the Family Code has repeatedly been the subject of discussion [9, p. 231; 10, p. 108] in legal science. Thus, N.N. Tarusina notes the need for a legal definition of the concept of "family", and

the presence of "an emerging tendency to accept such a normative legal task in the theory of family law and expert project activities" [11, p.39]. Courts identify signs of family relations more often in relation to housing, social security and other relationships, depending on the specific purpose. Undoubtedly, the dynamics of social changes and emerging new challenges suggest the need to assess the prospects for using such a method of protection as compensation for moral harm in family relations. This requires, at a minimum, to identify the content of the concept of "family" by including its legal definition in the family legislation.

It should be borne in mind that the potential for the application of compensation for moral damage is quite wide, which implies the need to develop the boundaries of the admissibility of the application of this sanction. Personal non-property relations form the basis of family relations, and few people can provide relatives and spouses with as many negative experiences as family members. Thus, in the case of deprivation of parental rights as a result of ill-treatment of a child, moral harm is inevitably caused to the latter, especially if there is harm to health, mental development, and such harm may be incorrigible, irreparable, however, even in these cases, claims for compensation for moral harm are casuistic.

O.E. Repeteva sees prospects for compensation for moral harm in connection with the indifferent behavior of one of the spouses in marriage, "when the other carries the whole burden of problems both in household chores and in caring for children, which cannot but cause physical and moral suffering"[12, p.93]. Thus, the issues of limiting the application of the above-mentioned liability measure also need to be resolved.

Current law enforcement is related to the balance of private and public relations, for example, in connection with the administrative expulsion of a person<sup>6</sup>, with compensation for moral damage in connection with harm to the life and health of a family member, including the parent of an unborn

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<sup>6</sup> Cassation ruling of the Judicial Chamber for Administrative Cases of the Supreme Court of the Russian Federation dated April 28, 2021 No. 12-KAD21-1-K6. Legal reference system "ConsultantPlus".

child<sup>7</sup>, with the right to receive payments in connection with the death of a serviceman<sup>8</sup>, etc.

Among the abundance of possibilities for applying compensation for moral damage in family relations, let's consider the question of the limits of its admissibility in the case of restrictions on the right to communicate with a child of a separate parent.

### **3. Respect for private and family life and respect for kinship and family ties: the relation of concepts.**

In accordance with Article 8 of the ECHR, a person has the right to respect for private and family life, in Resolution No. 33 "On the practice of application by courts of norms on compensation for moral damage" dated 11/15/2022, it was noted that the right to respect for kinship and family ties is subject to judicial protection. In order to identify the grounds for the differentiation of the above-mentioned concepts, it is advisable to identify the criteria of private and family life applied by the ECHR. The European Court, deciding whether there is a violation of family life, proceeds from the following premises.

The presence or absence of a "family life" is a matter of fact, depending on the close personal ties that actually exist, for example, the presence of an obvious interest and devotion of the father to the child both before birth and after it<sup>9</sup>. To establish the fact of family life, one should not be limited to relationships based on marriage, it can cover other *de facto* "family" ties when the parties live together outside of marriage. A child born as a result of such a relationship is *ipso jure* part of this "family" from

the moment and by virtue of the very fact of his birth<sup>10</sup>.

It is necessary to take into account whether there are family relationships, close personal ties between people. Important indicators of such relationships are cohabitation so that family relations can develop normally ("Marx v. Belgium"). Equally important is the fact of communication with each other, which is a fundamental element of family life, even if the relationship between the parents has ceased. By itself, the fact of biological kinship without the presence of personal relationships (in the absence of Artificially created obstacles) is insufficient to conclude that there is a family life.

When considering the issue of violation of the right to respect for family life, it is necessary, first of all, to take into account the best interests of the child. The processing of the parent's claims should never be the cause of harming the health or development of the child ("Elsholz v. Germany", "K.M. v. Great Britain"). It is necessary to take into account the opinion of the child, if he does not want to communicate with the parent, coercion to meetings can disrupt the emotional and psychological state of the minor ("Sommerfeld v. Germany"), especially since over time it is possible to resolve this issue, given the growing up of the child, the manifestation of greater independence in assessing the actions of others, the growth of psychological stability.

Close, intimate relationships that do not meet the criteria of "family life" may fall under the concept of "personal life" ("Znamenskaya v. Russia") [13, p. 14; 14, p. 60].

The authors of the commentary to the Convention for the Protection of Human Rights and Fundamental Freedoms offer a broad understanding of respect for private life, including such elements as: physical, psychological integrity; social identity of the individual; individuality, personal development, the right to establish and develop relationships with people and with the outside world; personal name;

<sup>7</sup> The ruling of the Constitutional Court of the Russian Federation dated March 2, 2023 N 7-P "In the case of checking the constitutionality of paragraph 2 of Article 17 of the Civil Code of the Russian Federation in connection with the complaint of citizen M.V. Grigorieva". Collection of legislation of the Russian Federation. 2023. March. No. 11. P. 1868.

<sup>8</sup> Determination of the IC on Civil Cases of the Supreme Court of the Russian Federation dated October 28, 2019 No. 25-KG19-9. Legal reference system "ConsultantPlus".

<sup>9</sup> The ruling of the European Court in the case "L. v. the Netherlands" (L. v. Netherlands), complaint No. 45582/99, § 35, ECHR 2004-IV.

<sup>10</sup> Uzbyakov v. the Russian Federation: ECHR Ruling of 05.05.2020 (complaint No. 71160/13) // Bulletin of the European Court of Human Rights. Russian edition. 2021. № 2.

marital status; definition of legal status the regime between a child and his parents (guardians); gender and ethnicity, sexual orientation; personal information about beliefs, health, and reputation[15, pp. 131, 137].

Thus, the concept of private life is used as the broadest, including all manifestations of close personal ties that do not fall under family life.

The terms "life" and "connections" are used as directly interrelated and interdependent.

Therefore, it can be concluded the proximity of semantic fields and the illusory criteria for distinguishing the above-mentioned concepts. It was previously noted that family life is a matter of fact, but with regard to kinship and family ties, it is not determined whether actual or legal relations are meant (for example, in the case of established paternity). Given the need to prove a violation of the law, this issue will certainly arise when the court considers the dispute.

However, when deciding on the possibility of applying the ECHR's approaches to the concepts of private and family life, it is necessary to take into account the specifics of the tasks solved by the court. The European Court considers cases against States, which implies a public law aspect, it identifies legal norms that violate human rights and freedoms, identifies systemic problems of law enforcement practice, interpreting the Convention.

In the case when a private legal conflict is resolved related to disrespect for kinship and family ties, it is insufficient to establish the facts of the existence of this connection and the creation of obstacles to communication and other manifestations of family life. It is necessary to take into account other elements, which leads to the need to identify the conditions of responsibility for the committed family law tort. E. Vorozheikin defined family relations as special social relations built on a personal-trust relationship between their subjects [16, p.45], therefore, a balanced approach is required when determining the grounds for compensation for moral damage in case of their violation.

#### **4. Conditions of family legal liability in case of violation of the right to respect for family ties in a case of separate parent restriction in**

#### **communication with a child.**

One of the obvious difficulties in identifying the conditions of family responsibility in connection with disrespect for family ties is the teleological orientation of the right to communicate to protect the rights and best interests of the child. Granting the right to communicate should proceed from the desire to ensure his well-being and development. N.S. Sherstneva notes that sanctions in family law are, first of all, the way to ensure the protection of the rights and interests of children [17, p.54].

Accordingly, when deciding on the possibility of compensation for moral harm to a parent who is limited in the ability to communicate with a child, it is necessary not to establish the fact of violation of the parent's right to communicate (illegality of action (inaction), but to identify violations of the child's rights by a parent living with him. It is necessary to take into account the attachment of the child, the desire to communicate with a separate parent, the absence of objective factors preventing communication (classes, sport activities, illness of the child). There may be grounds for temporarily restricting communication with a parent. There may also be signs of abuse of parental rights, the qualification of which relates to the discretion of the court [18, pp.671-672]

It should also be borne in mind that the collection of monetary compensation for moral damage will inevitably affect the property status of the second parent and, as a result, the child, which requires taking into account the property status of the violator, as well as the fact of proper performance of duties by the potential recoverer, including the obligation to maintain the child.

Thus, the assessment of illegality should take place not from the point of view of the rights of the parent who is prevented from communicating with the child, but from the point of view of the rights and best interests of the minor himself, based on the priority of children's rights.

The lawful behavior of a parent restricting the child's right to communicate, if the latter causes psychological harm to the child, including in connection with irregular rare meetings [19, p. 93], should prevent the satisfaction of the claim for compensation for moral harm.

When evaluating the actions of a parent living

with a child, the following factors must be taken into account:

- the absence of valid circumstances preventing the communication of a separate parent or relative with a child. If the guardianship and guardianship authority or the court has decided to temporarily restrict communication, illegality will occur from the moment the court decision on the abolition of restrictions enters into force (if challenged);

- the behavior of a parent who insists on communication should be taken into account: whether he fulfills the duties of maintaining the child, how he behaved in the family.

- it is impossible to apply measures of responsibility towards a parent living with a child if the child himself is negatively disposed, does not know the other parent, perhaps in this case a psychological and pedagogical examination will be required.

We will leave the question of actual and social kinship outside the scope of the study, since the persons who brought up the child (actual educators) should also have the right to communicate with him, as noted by E.G. Komissarova, "the low scientific "authority" of this concept makes it difficult to correlate it with other scientific and normative concepts" [20, p.220].

When assessing harm, it should be borne in mind that the right to respect for personal and family ties is an essential element of a person's self-identification, and it is also aimed at maintaining mental and social well-being.

E.V. Yershova notes that "a separated parent (as a rule, the father of the child) is put in a humiliated position of a person who may at any moment be denied out of court the exercise of his natural, inalienable and fundamental parental rights under the pretext of ensuring the "best interests of the child" [21, pp. 68-69]. Thus, harm is expressed in the moral suffering of the parent and, above all, the child, to whom psychological trauma is inflicted by unjustified refusal to provide the opportunity for communication, which implies the desirability of conducting a psychological examination to assess the impact of restricting communication with the second parent on the child. It is also necessary to take into account the

fact that the provisions of Article 57 of the RF IC on the age at which consideration of a child's opinion becomes mandatory are questioned in the scientific literature. So, N.N. Tarusina rightly believes it is necessary to take into account the individuality of the child [22, p.159].

The "deferred" nature of the harm also complicates the proof, which can manifest itself much later by weakened personal ties, lack of mutual understanding, difficulties in communicating with the opposite sex.

O.A. Sitkova notes among the specific features of family sanctions their law-restoring nature, which implies, among other things, a weakening of the effect of deferred harm [23, p. 134].

A causal relationship between illegal behavior and moral harm is assumed, but a parent living with a child has the right to prove its absence.

Based on the previously noted characteristics of the wrongfulness of the violator's behavior and the specifics of the harm caused, it seems that the condition for compensation for moral harm in personal family relations in connection with the realization of the child's right to communicate should be an intentional form of guilt, when the main goal of a parent living with a child, based only on selfish desires, is a gap (often painful) existing the child's feelings of attachment to the second parent,

Only in this case it is advisable to resolve the issue of compensation for moral damage, taking into account the educational effect of this measure [24, p.84]. As A. V. Danilenkov notes, "this is a measure of public condemnation, stigmatization of the harm-doer and recognition of his behavior model as unacceptable, reproachful and reprehensible from the point of view of norms of public morality and morality, clothed in the form of a legal ban"[25, p.155].

Filing a claim for compensation for moral damage due to disrespect for kinship and family ties in connection with the avoidance of the second parent, guardian (trustee) from providing an opportunity to communicate with the child implies attempts to resolve differences, including in court, by establishing a procedure for communication with the child. Also, a possible confirmation of the fact of violation of the right may be the search for a child who was unlawfully, without warning, taken away by

the second parent. The above implies the need for legal confirmation of kinship with the child, and established paternity (motherhood).

### **5. Conclusions.**

Respect for kinship and family ties presupposes the acceptance and support of traditional family values, which precluded the possibility of compensation for moral harm in case of encroachment on them, provided for by Resolution No. 33 of the Plenum of the Supreme Court "On the practice of applying the norms on compensation for moral harm by courts". Current law enforcement practice, as a rule, is associated with claims for compensation for moral damage in connection with the death of a family member, the appointment of a survivor's pension, etc.

The subject of consideration in the framework of this paper was the fundamental possibility of filing a claim for compensation for moral damage caused by the refusal of a parent to provide an opportunity to communicate with a child and participate in his upbringing to a separate parent. The necessity of expanding the subject of proof in such a dispute with the inclusion of the following circumstances has been identified. The presence of objective obstacles to communication, which may be related both to the child (illness, unwillingness of the child to communicate with the parent) and to the personality of the parent living alone, communication with whom may negatively affect the child. It is necessary to take into account the opinion and best interests of the child. It is also necessary to take into consideration the actions of the parent himself, demanding compensation for moral damage, so if he evades the responsibilities of maintaining his child, we assume the possibility of rejecting the claim. Making a decision on compensation for moral damage involves taking into account the guilt of the causer and his motives, which should not correspond to the interests of the child.

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