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COMPARATIVE LEGAL STUDIES OF LEGAL LIABILITY: SPECIFIC FEATURES

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Introduction: modern methodology of legal studies is a basis and the main condition of achieving the truth in the process of scientific cognition of the state and legal reality. Comparative legal study on the key categories of law, including that of legal liability, requires relevant strategy and methods. It is impossible to move ahead and steadily develop a legal thought without proper understanding of the essence and content of comparative legal studies on legal liability constructive elements. **Purpose:** to reveal the most common specific features and peculiarities of comparative studies in respect of a theoretical structure (model) of legal liability as a central category of law, as well as to develop a general method of comparative legal studies on legal liability hereon. **Methods:** general scientific (dialectical method with logical techniques implied) and specific legal (formal legal, comparative legal, systemic legal, legal modeling and others) methods of obtaining knowledge in accordance with the subject-oriented scientific worldview have been applied. **Results:** legal liability is one of the key categories of legal science, studied as part of a special theory of legal liability and based on objective grounds. Specificity of comparative legal studies in the field of the legal liability theory is determined by factors of various levels. Generalization of knowledge about the theoretical structure of legal liability (which is characterized by means of a number of special legal methods) lets us to develop an appropriate research method that takes into account general theoretical, branch and national legal aspects of legal liability, as well as to expand the possibility of further development and qualitative improvement of legal doctrine and practice. **Conclusions:** comparative legal studies of legal liability depend on objective grounds (existence) of the given category and a whole range of factors which should be considered in the process of scientific work and form the basis for methods of legal liability comparative study.

Keywords: methodology; comparative legal studies; object of study; subject of study; legal liability; theory of legal liability; structure of legal liability; methods

Information in Russian

**СПЕЦИФИКА СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
ЮРИДИЧЕСКОЙ ОТВЕТСТВЕННОСТИ**

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Введение: современная методология юридических исследований является основой и главным условием достижения истины в процессе научного познания государственно-правовой действительности. Проведение сравнительно-правовых исследований центральных категорий юриспруденции, к которым также относится юридическая ответственность, подразумевает необходимость использования специальной методологии и методики. Без правильного уяснения сущности и содержания сравнительно-правовых исследований конструктивных элементов юридической ответственности дальнейшее движение и поступательное развитие юридической мысли в данном направлении невозможно. **Цель:** раскрыть наиболее общие специфические свойства и особенности компаративного исследования применительно к изучению теоретической конструкции (модели) юридической ответственности как центральной категории юриспруденции, а также выработать на этой основе универсальную методiku сравнительно-правовых исследований юридической ответственности. **Методы:** использованы общенаучные (диалектический метод и вытекающие из него логические приемы) и специально-юридические (формально-юридический, сравнительно-правовой, системно-правовой, юридического моделирования и др.) методы познания в соответствии с предметно-ориентированной научной картиной мира. **Результаты:** юридическая ответственность – одна из центральных категорий правоведения, изучаемая в рамках специальной теории юридической ответственности и имеющая под собой объективные основания. Специфика сравнительно-правовых исследований в области теории юридической ответственности детерминируется разноуровневыми факторами. Обобщение знаний о теоретической конструкции юридической ответственности (охарактеризованной в результате применения целого ряда специально-юридических методов) позволило разработать соответствующую научно-исследовательскую методiku, учитывающую общетеоретические, отраслевые и национально-правовые аспекты юридической ответственности, а также расширить возможности дальнейшего развития и качественного улучшения юридической доктрины и практики. **Выводы:** сравнительно-правовые исследования юридической ответственности зависят от объективных оснований (бытия) данной категории и целого ряда факторов, которые необходимо учитывать в процессе научного творчества и которые должны лежать в основе методики компаративного исследования ответственности в праве.

Ключевые слова: методология; сравнительно-правовые исследования; объект исследования; предмет исследования; юридическая ответственность; теория юридической ответственности; конструкция юридической ответственности; методика

Introduction

Modern methodology of legal research provides the possibility for studying any legal categories belonging to a wide range of issues. The use of general, special and specific scientific methods al-

lows us to achieve significant results in cognizing elements of the legal and state reality, identifying their strengths and weaknesses, determining their practical potential, and predicting consistent patterns (tendencies) of their development and change.

Legal liability is one of the key categories of legal science, the reasonable and appropriate use of which at the national and international levels allows for achieving essential success in strengthening the legal order. The essence of legal liability goes beyond such categories as: measure of law enforcement, penalty (sanction) and negative action upon offenders [13, pp. 49–50]; its regulative potential is much wider. Goals, objectives and functions of legal liability, in the first place, have preventive, law enforcement tendency – it creates a protective barrier for secure operation of the legal system and law enforcement processes. Therefore, the prospectiveness of studying legal liability with the use of necessary methodology is obvious.

In this article, we are going to reveal specific features and peculiarities of the comparative studies of legal liability resulting from particular characteristics of its general-theoretical aspects, ontology and praxeology, and provide methodology for conducting relevant research.

1. Comparative Legal Studies of Legal Liability

1.1. Objective Grounds of the Theory of Legal Liability

Legal liability as the main institutional component of the protective system of every state possesses great potential to block illegal behavior and oppose law violation in different life spheres at the national and international level. Numerous publications devoted to global problems of legal liability in spheres of medicine and health care (for example, liability for improper vaccination from Ebola fever or liability for law violations concerned with medical research [9; 18]) can serve as an illustration of the mentioned above.

Theory of legal liability as a self-sufficient element of the general theory of law is based, in the first place, on the following objective grounds:

- Specific scientific theory of legal liability (with its issues in question) is an independent area of scientific research;
- Legal liability serves goals of *law enforcement* and *provision of effective execution of rules of law in any sphere of social relations* (including the economic sphere [11, p. 11]);

- Legal liability is a *retrospective (negative)* phenomenon; only a wrongful act that took place in the past can cause its implementation [16, p. 203] (a contradictory position on this matter is proposed by F. Bastiat [10, pp. 3–4, 47–48].

- Legal liability, regardless of its belonging to a particular branch of law and its implementation procedure, is always connected to the *state enforcement* (provided by it) [8, pp. 15–16];

- Legal liability implies *imposition of subsequent deprivation* on the law violator and includes the category of punishment [4, p. 37];

- When determining the legal nature of legal liability, we should take into account its *objective (regulatory) provision and subjective implementation* in particular social relations, as well as static and dynamic features (W. N. Hohfeld proved the existence of connection between legal liability and subjective law in 1919 [14, pp. 229–238]).

- Legal liability can be considered from *different perspectives* (as an institution of law, as a legal means, as an enforcement measure, as a subjective responsibility etc.) [2, pp. 263–264];

- In the system of “close” legal categories (remedies, measures of operational actions etc.) legal liability should be distinguished according to its *key feature and tendency (assignment)* [1, pp. 23–24].

Equity and current relevance of these theses can be demonstrated with the Chinese approach to legal liability, which was reviewed by P. V. Troshchinskiy. Chinese scholars understand legal liability as: a) legal responsibility, b) negative legal consequences that occur (may occur), c) penalty, d) special situation [7, pp. 21–28]. Among features of legal liability, Chinese scholars also name its connection with sanctions, law violation, public enforcement. Moreover, a special procedure of its imposition by competent authority bodies is stipulated [7, pp. 39–51].

1.2. Legal Liability and Its Elements as the Research Subject of Comparative Legal Studies

Comparative legal studies have their object and subject, the choice of which depends on various

reasons and factors. Studies of *key legal categories* in terms of interstate (international) comparison are of special methodological value since they give the most objective and prospective data for further research on the state and tendencies in development of the legal system in the whole and of these legal phenomena in particular.

Talking about the extent of legal comparison, Ju. A. Tihomirov reasonably notes, that jurisprudence is not a synonym for law, and it includes all sources of law, public (and other) institutions, legal authorities, law enforcement, legal education and science; that is why emphasis on comparison of laws is not justified since other legal life phenomena are left in the background [6, p. 6].

In the author's opinion, the position on the status of comparative jurisprudence proposed by the authors of the complex monograph, written on the basis of the Oxford University and published in the UK, USA and Canada, is reasonable. It states that in order to provide the status of comparative jurisprudence, it is necessary to "set a researcher free" from guidance of the authorities (policy) in the state, as well as distinguish between functions and methods of comparison. As an example confirming this thesis, the authors of the monograph study the phenomenon "statute" (law) and come to a conclusion that comparative study of this phenomenon cannot be restricted to comparison of legislation of two countries, but a certain "criterion" and "point of distinction" should be set in order to conduct scientific research [17, p. 182].

Legal liability as a subject of any legal research should be considered as a complex legal institution, which includes a number of elements:

1) general theory of legal liability (the system of knowledge about liability as a general theoretical formal legal category/construct: concept, background, goal, objectives, principles, functions, forms of liability realization etc.) – a general theoretical unit;

2) theories of specific legal liability forms (specific systems of knowledge about international, constitutional, criminal, administrative, civil and other forms of liability) – a specific unit;

3) establishment practice (law-making), interpretation and enforcement (realization) of specific

forms of legal liability, issues of its efficiency and improvement – a practical unit.

In the process of comparative legal studies, comparison of theoretical and statutory peculiarities, as well as practical results of establishment and application of liability in different legal systems should be performed with due regard for objective knowledge about the entity and content of liability on the basis of the determined specific criteria (researcher's interests).

Disclosing the *content* of the category under study from the perspective of the legal theory, we should note its basic features, according to which legal liability is considered to be:

– a body of legal norms constituting the institution of penalties (penalty system) in the national and international legal system;

– a peculiar protective legal measure (act of realization of a subjective responsibility to undergo penalty) in the mechanism of legal regulation;

– connected with the reaction of the state and other subjects of law to law violation (at this point it obtains a form of public enforcement);

– a phenomenon that implies negative sanctions of specific sort and kind which can be applied and are applied to law violators;

– a phenomenon that can be widely classified because it is meant for protection of the whole system of social relations regulated by the law;

– a phenomenon which is provided with special procedural mechanisms of its own implementation;

– a phenomenon, which is realized both in compulsory (by authorized subjects) and voluntary (a law violator undergoes the responsibility to suffer punishment by his actions) form

– a phenomenon with a number of other relevant characteristics (generates the state of "being punished", and can create limits to professional (official) activity etc.).

1.3. Background and Content of Comparative Legal Studies of Legal Liability

Comparative legal study of legal liability and its components should be conducted with due attention to the following factors:

1. *Whether the term liability is mentioned in legislation of the countries under study; and if it is, in what sense it is mentioned (what synonyms corresponding to its content and what word combinations are used).* It should be noted that, on the whole, national legal systems primarily use the term “liability” in the sphere of criminal law relations. However, criminal legislation of Japan can be an exception to the rule, because there is no term “criminal legal liability”, although the term “penalty” is widely used. In the Article 218 of the Criminal Code of Japan, extralegal liability in its positive meaning is mentioned (more specifically this article specifies the scope of persons who are responsible for caring for a senior citizen, a minor, a person with disabilities or a sick person)¹. Some legislators understand elements of the liability system in different ways. For example, in the Swiss Criminal Code (Article 9) two kinds of criminal acts are distinguished: crime and offense². In the Russian Federation legislation, offenses are distinguished from crimes according to the degree of social danger (offenses are not considered socially dangerous).

2. *Whether the general theory of legal liability is developed in countries whose legal systems are compared* (comparison of general theoretical provisions on liability in different countries helps to improve the quality of research; for this purpose, a system of measurement and assessment of legal categories should be used). In the process of studying every legal category, a concept theoretical analysis must be performed; that is why in every particular case of studying legal liability, general provisions of the theory of law must be used. Meanwhile, we should take into account that in countries with the Anglo-Saxon legal system jurisprudence tends to improve the implementation procedure for different kinds of legal liability and determination of basic principles of penalty (sanction). In this

context, we have to agree with the position of V. I. Lafitskiy, who states that common law formed in these countries is basically case law, which includes a judge-made system of legal norms, institutions and categories as well as a particular law enforcement mechanism for solving cases based on goals, principles and methods of social relations regulation (including bringing law violators to legal liability) [3, p. 371].

In any case, it is necessary to use methodological works by disciples of the global philosophical doctrine. For example, analysis of E. Durkheim's works helps O. N. Rodionova to come to a conclusion about the existence of two types of legal liability: repressive (punitive) and restitutive (restoration of rights) [5, p. 44], which perform their own functions in the process of maintaining collective consciousness and harmonization of cooperation between different elements of society.

3. *Whether the compared aspects of legal liability are present in legal systems under study.* For instance, legislation of many foreign countries contains the institution of criminal liability of legal entities, whereas legislation of the Russian Federation does not have such legal norms and provisions. The Criminal Code of Australia, introduced in 1992, stipulates cases when a legal subject bears criminal liability despite the absence of guilt (absolute liability) or regardless of culpability (strict liability³), while the Criminal Code of the Russian Federation⁴ in the Part 2 of the Article 5 stipulates prohibition of objective imputation. The situation is reverse in case of legal liability in the form of recall of a deputy from a representative body. This liability is provided for in national legislation (concerning deputies of representative bodies of local self-government), but in some foreign countries (Germany, France, Italy etc.) recall of a deputy as a form of liability is not enshrined in legislation.

¹ *The Criminal Code of Japan: Law of Japan of April 24, 1907 г. No. 45. Federal web portal “Legal Russia”.* Available at: <http://law.edu.ru/norm/norm.asp?normID=1241616&subID=100097517,100097519#text> (accessed: 01.06.2016).

² *The Criminal Code of Switzerland of December 21, 1937. Federal web portal “Legal Russia”.* Available at: <http://law.edu.ru/norm/norm.asp?normID=1241950&subID=100098712,100098713#text> (accessed: 01.06.2016).

³ *Criminal Law of Israel. Haifa, 2010. 253 p. Scientific net “Crimpravo.ru”.* Available at: <http://crimpravo.ru/codecs/izr/2.pdf> (accessed: 01.06.2016).

⁴ *The Criminal Code of the Russian Federation: Federal Law of the Russian Federation of June 13, 1996 No. 63-FZ (as amended of July 03, 2016). Official Gazette of the Russian Federation. 1996. No. 25. Article 2954.*

4. *Whether the legal framework of the legal liability system includes statutory acts of interpretation of the supreme judicial and administrative authorities, compulsory clarifications which effect the content of legal liability and elements connected with it.* In the Russian Federation, the most important acts interpreting the content and peculiarities of legal liability implementation are enacted by the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation. Decisions of the Constitutional Court of the Russian Federation are obligatory throughout the territory of the Russian Federation for all subjects of law according to the Article 6 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”¹. Decisions of the Supreme Court of the Russian Federation (as stated in the Article 2 of the Federal Constitutional Law “On the Supreme Court of the Russian Federation”²), and decisions of the Constitutional Court of the Russian Federation³ are also obligatory for all lower courts operating in the territory of the Russian Federation. In proof of the above statement, we can mention Rulings of the Supreme Court of the Russian Federation concerning the problems of understanding and execution of material liability of the employee to the employer⁴, of criminal liability of minors⁵, liability for ecological crimes⁶ etc. The Central Election Commission

of the Russian Federation can be mentioned as an example of an administrative body whose resolutions are obligatory within the scope of its competence (Clause 13 of the Article 21 of the Federal Law “On Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”⁷).

It should be noted that in foreign legal systems there are similar mechanisms for issuing obligatory interpretation provisions. For example, the Constitutional Court of the Republic of Belarus, according to the Article 85 of the Law “On the Constitutional Proceedings”⁸, issues obligatory and directly applicable regulations and decisions. As an example we can mention the decision of the Constitutional Court of the Republic of Belarus on legal regulation of liability of land tenants⁹. In one of the court cases in 1803, the judge of the Supreme Court of the US G. Marshall stated that the Supreme Court’s responsibility for constitutional interpretation and application is referred to its liability for compliance with the Constitution [15].

5. *What the level of efficiency of the law enforcement system and the level of corruption in social relations regulated by the law are.* Crime control and proper protection of the state, society and individuals from different law violations, including corruption-related crimes, involve a whole system of law enforcement bodies (courts, prosecutor’s office, police, justice agencies, advocacy, ombudsmen etc.) as their key components. General welfare and many other significant factors (including integrity and adequacy of the legal concept of legal liability and its enforcement) depend on the abovementioned system. The most important indicator of proper functioning of the system of law enforcement bodies is the index of corruption, which means social mass abuse of power for the public officials’ benefit, in violation of the public interest. According to the Transparency

¹ *On the Constitutional Court of the Russian Federation:* Federal Constitutional Law of the Russian Federation of 21 July 1994 No. 1-FKZ (as amended of 14 December 2015). *Official Gazette of the Russian Federation*. 1994. No. 13. Article 1447.

² *On the Supreme Court of the Russian Federation:* Federal Constitutional Law of the Russian Federation of 05 February 2014 No. 3-FKZ (as amended of 15 February 2016). *Official Gazette of the Russian Federation*. 2014. No. 6. Article 550.

³ *Judgment of the Constitutional Court of the Russian Federation of 23 December 2013 No. 39-P.* *Official Gazette of the Russian Federation*. 2014. No. 1. Article 79.

⁴ *On application by the Courts of General Jurisdiction of Legislation on Material Liability of Employee to Employer:* Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 16 November 2006 No. 52 (as amended of 28 September 2010). *Rossiyskaya Gazeta*. 29 November 2006.

⁵ *On judicial practice of application of legislation on peculiarities of criminal liability and punishment of minors:* Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 01 February 2011 No. 1 (as amended of 2 April 2013). *Rossiyskaya Gazeta*. 01 February 2011.

⁶ *On application by the Courts of General Jurisdiction of legislation on legal liability for crimes in the sphere of environmental defense and natural resource management:* Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 18 October 2012 (as amended of 26 May 2015). *Rossiyskaya Gazeta*. 31 October 2012.

⁷ *On basic guarantees of electoral rights and the right of citizens of the Russian Federation to participate in a referendum:* Federal law of the Russian Federation of 12 June 2002 No. 67-FZ (as amended of 05 April 2016). *Official Gazette of the Russian Federation*. 2002. No. 24. Article 2253.

⁸ *On constitutional proceedings:* Law of the Republic of Belarus of 08 January 2014 No. 124-Z. *National Legal web portal of the Republic Belarus*, 16 January 2014, 2/2122. Available at: <http://www.pravo.by/main.aspx?guid=3961&p0=H11400124> (accessed 01.06.2016).

⁹ *On legislative regulation of legal liability of land tenants:* Ruling of the Constitutional Court of the Republic of Belarus of 17 November 2010 No. R-514/2010. *Narodnaya Gazeta*. 9 December 2010.

International, the Russian Federation (as of the end of January 2016) is in the 119 place among the ranked countries [12]. Specialists of the Center for Anti-Corruption Research and Initiatives state that this rate is negative for the country and can be only corrected by means of special measures. In the light of this, we can state that low effectiveness of law enforcement bodies and high level of corruption essentially influence the methodology of comparative legal study. It can be seen in the following: 1) unreliability of statistical data on the level of law violation and crime prevention; 2) lack of legislative provisions on legal liability measures and on the mechanisms of their implementation; 3) insufficient interest of legal bodies (representatives of the bodies) in real decrease of law violations and improvement of crime control; 4) application of biased methods for assessing the efficiency of the law enforcement bodies' activities, narrowing it down to the quality of documents and quantitative criterion ("ticket quota system"); 5) orientation of the state administration, in spite of its public origin, towards serving the interests of a small group of confidants of the state authority. These and many other factors cannot but influence theoretical conceptions of legal liability and its enforcement practice in a particular country, which should be taken into account by researchers.

The abovementioned peculiarities of conducting comparative law research on legal liability can be divided into two groups: *objective* and *subjective*. The objective peculiarities are predetermined by the nature of legal liability, its particular characteristics as of a legal institution and legal means in different legal systems, real possibilities (capabilities) of researchers to gain the true knowledge. These peculiarities are formed and operate directly, according to the objective laws of development of the society and its legal sphere. That is why we should remember that liability is the phenomenon reflecting the objective necessity for coordination of the behavior of social interaction subjects. The subjective peculiarities depend on the legal policy and conceptual orientation (accentuation) of the official position and scientific thought in a particular country, as well as on the particular researcher

(his/her preferences and beliefs). Without going into discussion, let us note that the main concern of authors studying legal liability is to identify and take into account all the peculiarities mentioned above. However, the subjective-objective dichotomy should not be made absolute due to relatively nominal boundaries between its elements (for example, objective inaccessibility of official sources on legal liability to researchers can be overcome by their subjective actions for gaining access to the state service and relevant sources).

2. The Author's Opinion of the Methods for Comparative Legal Research on the Theoretical Model of Legal Liability

Based on the above studies and materials, we suggest taking special methodology as the foundation for comparative legal studies of legal liability, as far as it takes into account both particular characteristics of legal comparativistics and a range of issues associated with legal liability. In the author's opinion, due to the universality of the suggested methodology its use lets us improve the quality of research and provide its integrity, systematize gained knowledge and evaluate perspectives of the extension of the specific legal methodology. The comparative legal research methods for studying the theoretical model of legal liability include the following elements:

1) determination of legal systems studying of which will allow us to identify and define particular general theoretical principles of the emergence, development and functioning of legal liability (they might be not only national legal systems but also whole legal families, the international legal system);

2) determination of the research subject (as far as the object of research is the theoretical concept of legal liability, the research subject is represented by constituent elements of legal liability, such as: notion, essence, types, goals, functions, principles, forms of realization etc.);

3) selection of research methods (it is reasonable to use formally legal methods as well as different methods of the humanities and those of physical and mathematical sciences. For example, evaluation of legal liability effectiveness regardless of the public (including expert) opinion or studying social mass

characteristics of legal liability is impossible without the use of sociological and statistical methods);

4) determination of a set of sources and means of research (completeness of research on legal liability is predetermined by the degree of availability (language and subjective) for the author of laws and regulations, professional literature, other sources covering the phenomenon of legal liability);

5) analytic and synthetic comparison of normative and theoretical concepts of legal liability in different national legal systems, detection of their similarities and distinctive features with the use of a complex of methods and instruments;

6) generalization of the findings, followed by their practical realization, and generation of recommendations for improvement of the legal liability concept (its components) on the basis of the revealed strengths and shortcoming of legal liability;

7) assessment of the results of the comparative legal research with a view to identification and further development of the perspective lines of research within the issues under study.

Monitoring of regulatory legal acts and law enforcement in a particular sphere of legal liability incurrence is a good supplement for legal liability study. Observation of the process of transformation of the legal liability statutory concept, practice of its enforcement as well as its doctrinal characteristics will allow us to heighten the academic interest to the problem and practical utility of the research.

Conclusions

I. Legal liability is one of the key categories of legal science. It has some specific peculiarities and is of exceptional theoretical, methodological and praxeological value. The general theory of legal liability as a substantive component of the general legal theory is based on objective grounds, which should be considered when studying any issues associated with legal liability.

II. The specificity of comparative legal studies in the field of the legal liability general theory is determined by factors of different levels, including the following: use of the term “legal liability” in legislation and its definition, the fact and status of the theory of legal liability, existence of the aspects of legal liability to be compared, peculiarities of interpretation of elements of the theory, the level of efficiency of law enforcement practice and level of

corruption in countries whose legal systems are compared.

III. Generalization of knowledge about the theoretical concept of legal liability, special methodology and empirical findings allows for developing an appropriate comparative legal research method for studying the theoretical model of legal liability. This method will include:

– determination of legal systems included into the research object;

– determination of the research subject (characteristics of legal liability);

– selection of fundamentally diverse research tools (methods and means) providing the possibility for research at different levels;

– determination of a set of sources subject to research;

– analytic and synthetic comparison of normative and theoretical models of legal liability in different national legal systems;

– generalization of the findings followed by their practical realization, and elaboration of recommendations for improvement of lawmaking, law enforcement and law interpretation in the field under study;

– assessment of the perspectives and vectors for future comparative legal research in the field of establishment and implementation of legal liability with due regard to the research results.

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