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DISCRETIONAL NATURE OF SUBJECTIVE REASONABLENESS

Abstract. *The purpose* of the article is to clarify a specific nature of the reasonableness category as a means of achieving the flexibility of legal regulation and, most particularly, as the scope of judicial discretion during the external evaluation of the conduct of participants in civil law relations. **Research methods.** The paper is based on general scientific and special methos of scientific cognition. **Results.** The article characterizes the reasonableness principle of tortious liability in the discretionary realm as a requirement for extending the scope of law enforcement discretion of the judgment of tortious liability for the tortfeasor's civil offense from the perspective of conformity and commensuration. The contribution also justifies the expediency of extending the scope of discretionary law enforcement considering the evaluative dimension of the principles of justice, good faith, the rationality of tortious liability that, in the context of solving a civil case, allows keeping in mind its particular characteristics, addressing more meticulously and approaching flexibly to the protection of the rights and legitimate interests of the injured party in legal relations, guaranteeing relevance of the judgment, contributing to the development of consistent case law. **Conclusions.** The reasonableness principle of tortious liability can be applied in civil law only to evaluate measures of tortious liability for the tortfeasor's civil offense. It is about reasonableness, conformity, commensuration, and, certainly, equity of the penalties, as the primary objective of tortious liability in civil law is the restoration of violated rights and legitimate interests through the tortfeasor's recovery of inflicted losses (damages).

Key words: principle of justice of tortious liability, principle of good faith tortious liability, principle of reasonableness of tortious liability, injured party, tortfeasor, offence, civil liability.

1. Introduction. Effective legal regulation of public relations stipulates the use of some technical and legal remedies, which could ensure its flexibility and accuracy. It is referred to legal remedies that make it possible to calculate the effect of a legal prescription accurately. One of such remedies is reasonableness that is quite logical given the nature of law as a product of the human mind, and this principle must be used in legal regulation to the fullest.

The uniqueness of reasonableness as a principle is manifested not only in the fact that it is a means of achieving flexibility of legal regulation but also the inner limit of the law-enforcer's discretion while defining the evaluative concept. The latter aspect covers the discretionary nature of subjective reasonableness, because the court, as a law enforcement body, must both analyze specific legal documents (acts) mechan-

ically and understand the principles and goals underlying their adoption.

The purpose of the article is to clarify a specific nature of the reasonableness category as a means of achieving the flexibility of legal regulation and, most particularly, as the scope of judicial discretion during the external evaluation of the conduct of participants in civil law relations. To reach the purpose, it is necessary to complete the following tasks:

- to elucidate the essence of the discretionary nature of subjective reasonableness of tortious liability in civil law;
- to outline for what purpose and in which cases the principle of the reasonableness of tortious liability is applied in civil law;
- to establish whether it is possible to apply the principle of reasonableness of tortious liability in civil law to assess the tortfeasor's

conduct and ascertain the measure of damages within tortious obligations.

Research methods. The article is based on general scientific and special methods of scientific cognition.

2. The concept of judicial discretion

The generally accepted concept of judicial discretion has not yet been formed in legal science, as the court's discretion is "a dynamic category which changes due to both the development of social, political and legal life of society and the state and the degree of compliance with basic principles of law by the subjects of such powers, i.e., by the very judges, and citizens to whom they apply" (Kryzhova, 2015, pp. 159–162). At the same time, the analysis of doctrinal definitions of judicial discretion has allowed the authors to single out the universally recognized properties of this phenomenon. First, judicial discretion is exercised by a special subject – a judge; secondly, judicial discretion is reduced to the relative freedom of choice from a set of possible decisions; thirdly, judicial discretion is limited to the relevant right and the court's scope of its powers.

In practice, the establishment of clear statutory and moral boundaries for exercising judicial discretion seems the most challenging among the above properties. Legal literature has the traditional standpoint noting that the boundaries of judicial discretion should be distinct, strict limits of choice which the judge is not authorized to break meeting the current legislation. However, there is no well-defined vision of the types of limits of judicial discretion and the criteria for their determination.

According to O.A. Panasiuk, the limits of judicial discretion are divided into: 1) objective (consisting of: a) factual, i.e., when there are facts of the case confirmed by case evidence driving the judge's specific choice); b) legal (there are rules of procedural law, exclusively ones which allow court discretion); 2) subjective (Panasiuk, 2011, pp. 248–258). Thus, in substantiating the thesis that judicial discretion does not exist without limits, A.S. Petrova classifies them as: 1) those that are set by the regulatory prescriptions of the law (they can be called 'legal'), and 2) those which depend on moral characteristics, the culture of a judge, etc. (moral and legal) (Petrova, 2017, p. 156–163).

The authors believe that the limits of judicial discretion can be identified and grouped following types of the court activity. In particular, scientists believe the processes of court judgment comprise: the interpretation of principles and norms of law; overcoming conflicts between principles and rules of law; the application of alternative and optional rules of law; the application of certain principles and rules

of law; filling gaps in regulations and other forms of law. By relying on the above, the authors conclude that the limits of judicial discretion are manifested in the process of using a legal analogy, solving law conflicts, and applying the principles of law by the court (including ones which are of evaluative nature).

3. Purpose and limits of application of reasonableness of tortious liability in civil law

While covering the discretionary nature of subjective reasonableness, the authors highlight that the courts consider this principle in civil procedure not only and not so much from the perspective of the conduct of participants in the procedure as in terms of the application of the legal construction of judicial discretion. Therefore, the reasonableness principle in civil law and procedure, when deciding about the measures of tortious liability, is an evaluative category combining objective and subjective features, which on the one hand depends on the discretion of the judge and, on the other – the set of legal and factual circumstances of the consideration of a particular civil case by the same judge. Given the above, the authors deem it expedient to enshrine in law the reasonableness category in the general procedural rules relating to the legal status of the court. This will help ensure judges' uniform understanding while exercising their discretion.

Despite the obvious objective need to apply the general principles of civil law (primarily reasonableness and justice) to judicial coercion, many civil law scholars have worries about the emergence of so-called "judicial arbitrariness" because of the unlimited (broad) interpretation of evaluative concepts by judges (primarily of reasonableness, justice) that may result in a situation when any subjective right can be "legally" violated (neglected) using an official reference to the fact that a holder of right exercised it in bad faith or unreasonably. Contrary to the above, L.M. Nikolenko notes that in the context of interpreting actions of the parties in dispute, the judge's subjectivity is reduced to a minimum, because discretionary powers are exercised publicly (Nikolenko, 2013, pp. 32–36). In N.A. Huralenko's opinion, guarantees against judicial arbitrariness, first of all, comprise the moral and legal position and sound academic background of judges. Further, the scientist rightly emphasizes that the adoption of moral laws does not guarantee their "adequate" implementation, which must also comply with moral fundamentals and principles. The moral essence of any legal process, principally one which includes the discretion element, is stipulated not only by the ethical basics of law but also moral requirements

applied to persons who carry out procedural activities" (Huralenko, 2012, pp. 292–304).

According to legal doctrine, the reasonable ness principle is closely related to the principle of good faith. Scientists see the dual nature of the principles of reasonableness and good faith in the unity of objective and subjective principles. For example, K. Adams holds that reasonableness is an objective category, and good faith, on the contrary – a subjective concept because it provides for a personal assessment of one's actions (Adams, 2011). Partially agreeing with the above standpoint, the authors note the following. Acting as the principles of civil law, reasonableness and good faith fix the scope of possible subjective behavior. At the same time, these principles manifest themselves more likely as internal boundaries (limits) of private, in particular, judicial vision. As for the very reasonableness, it introduces subjective-worldview principles into the legal relations and thus, subjects independently assess the value of the balance of opposing interests, mutual encumbrances (obligations) are harmonized due to which reasonableness is an individual boundary for prescriptions established by law. The reasonable ness concept is used in common law countries, especially in the law of England, as an equivalent of good faith. Moreover, the Principles of European Contract Law emphasize that "reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable" (Bakalinska, 2012, p. 150–154).

Some authors, interpreting the reasonable ness category in its subjective (non-discretionary) terms, hold that "an abstract clever person (subject of law) should be able not only to participate in legal relations, be a holder of rights and obligations but also recognize similar civil rights for other individuals. At the same time, such recognition in legal relations appears in respect and observance of "other man's" civil rights and modeling personal behavior in such a way as not to violate the limits of other people's rights" (Volkov, 2008, pp. 161–166). If the above position is regarded from the perspective of this research, achieving the goal of "recognition of the rights of others" seems possible precisely due to the reasonableness of tortious liability because measures of tortious liability must be fair, proportionate, and reasonable, and statutory means of rights protection should be characterized by similar features.

In the course of the research, the authors found that the criteria of reasonableness and good faith, together with the justice principle, are most often used by courts while exercising their discretion if any legislative gaps.

The relevant rule is enshrined in para. 2 of art. 6 of the Civil Code of Ukraine noting: "in case of failing to use the law analogy for the regulation of civil relations, they shall be regulated according to the general foundations of civil legislation (law analogy). A similar provision is found in the Resolution of the Plenum of the Supreme Court of Ukraine "On Judgment in a Civil Case" as of 18.12.2009, para. 2 of which states: "if matters in controversy are not regulated by law, the court uses the law controlling similar relations (law analogy), and in the absence of one – the court proceeds from the general principles of law (analogy of law). Keeping in mind the extreme complexity of applying the analogy of law, the authors conclude that the judge shall make great intellectual efforts and have a reasonable approach to choosing the civil rule which will fit in such a situation (Tobota, 2008, pp. 51–56).

4. Application of the reasonableness of tortious liability to determine the extent of damages in tortious obligations. In addition to the analogy of law, the limitations of judicial discretion are also found during the court's application of law principles (including those which have an evaluative nature). The authors emphasize that the reasonableness principle, as the very evaluative category, is actively and widely used by courts in disputes over compensation for damages (especially for compensation for non-pecuniary damage) and even more often in combination with the principle of justice, because these principles can be recognized as the only guideline for setting the specific amount of compensation. Consequently, when deciding on the relevant category of cases, courts are guided by their own understanding of "reasonableness" and "justice, while the parties are often dissatisfied with the amount of compensation determined by the court (sometimes even both parties). The complexity of setting reasonable compensation under the application of such a method of protection of civil rights and interests as compensation for non-pecuniary damage is driven by the fact that the latter is characterized by intangible forms of its implementation. In this regard, the authors believe that the court should follow non-property criteria, which comprise reasonableness, justice, and good faith, to determine the amount of non-pecuniary compensation while exercising its discretion.

The dependence of judicial discretion on reasonableness in resolving cases of damages provides for, on the one hand, the need for the court to find out all the circumstances of the tort and, on the other hand, establish an adequate and reasonable amount of compensation by making a fair and reasoned decision.

Both in terms of compensation for pecuniary damage and recovery of compensation for non-pecuniary losses caused by violations of personal non-property rights of civil law subjects, the amount of the debtor's compensation obligation should not exceed the sum of pecuniary sanction necessary and sufficient for the balanced implementation of compensatory and preventive functions of civil liability (Prymak, 2014, pp. 85–89). Thus, if the victim's claims for compensation for non-pecuniary damage are inflated, inadequate and do not rely on the principle of reasonableness, the courts, using discretion, are authorized to reduce compensation (Otradnova, 2007, p. 120–123).

In all the above cases regarding the sum of compensation in tortious obligations, the authors attribute an extremely crucial role to judicial discretion, which allows protecting and restoring violated rights fully with regard to reasonableness and justice of measures of civil liability. At the same time, the achievement of such a goal is impossible without the high professionalism of the judiciary. Therefore, the burning issue of today is the optimization of limits of judicial discretion so that, on the one hand, "a qualified and bona fide judge has the amplest opportunities to take into account the circumstances of a particular case to the utmost, and on the other – an unqualified or mala fide judge cannot improperly use or abuse granted discretion" (Huralenko, 2012, pp. 292–304). However, a judge having any qualification level must "exercise his discretion reasonably" while executing his discretionary powers.

5. Conclusions

1. Discretionary nature of the subjective reasonableness of tortious liability in civil law is defined as a requirement for updating the scope of law enforcement discretion of the evaluation of measures of tortious liability for a civil offense committed by the tortfeasor from the perspective of adequacy and proportionality.

2. The reasonableness of tortious liability can be applied in civil law only to assess the measures of tortious liability for a civil offense committed by the tortfeasor. It is about reasonableness, adequacy, proportionality and, definitely, justice of the measures, because the primary purpose of tortious liability in civil law is to restore violated rights and legitimate interests through the offender's recovery of damages. If the victim's claims for compensation for non-pecuniary damage are inflated, inadequate and do not rely on the principle of reasonableness, then the courts, using discretion, are authorized to reduce compensation. As for the sum of damages in tortious obligations, the authors attribute an extremely crucial role to judicial discretion, which allows protecting and restoring violated rights fully with regard to reasonableness and justice of measures of civil liability.

3. The application of the principle of reasonableness of tortious liability in civil law to assess the tortfeasor's conduct, which is illegal, is impossible, because illegal behavior contrary to law cannot be regarded reasonable under any circumstances. However, the application of the reasonableness principle is essential while setting the amount of damage in tortious obligations.

References:

- Kryzhanova, O.H.** (2015). Dyskretsii povnovazhennia sudu v konteksti dotrymannia pryntypu verkhovenstva prava [The Discretionary powers of the court in the context of adherence of the principle of the rule of law]. *Visnyk Natsionalnoho universytetu «Lvivska politekhnika»*, № 827, 159–162 (in Ukrainian).
- Panasiuk, O.** (2011). Dyskretsii povnovazhennia sudu v kryminalnomu sudechynstvi Ukrayni: teoretychni aspekty [Discretionary powers of court in criminal proceedings: theoretical aspects]. *Visnyk Akademii pravovykh nauk Ukrayni*, № 4, 248–258 (in Ukrainian).
- Petrova, A.S.** (2017). Dyskretsii povnovazhennia suddi u kryminalnomu sudechynstvi yak odyn iz vydiv koruptsiynykh ryzykyv sudovoї systemy Ukrayni [Discretionary powers of a judge in criminal proceedings as one of the types of corruption risks in the judicial system of Ukraine]. *Visnyk kryminalnoho sudechynstva Ukrayni*, № 1, 156–163 (in Ukrainian).
- Nikolenko, L.M.** (2013). Dyskretsii povnovazhennia hospodarskoho суду: mezhî ta umovy yikh realizatsii [Discretion Commercial Court: the limits and conditions for their implementation]. *Naukovyi visnyk Mizhnarodnoho humanitarnoho universytetu*, № 6/2, 32–36 (in Ukrainian).
- Huralenko, N.A.** (2012). Svoboda vybora yak atrybutivna oznaka suddivskoho rozsudu [Freedom of Choice as Attributive Feature of Judicial Discretion]. *Naukovyi visnyk Lvivskoho derzhavnoho universytetu vnutrishnikh sprav*, № 4, 292–304 (in Ukrainian).
- Adams, A.** Kenneth Reasonableness and Good Faith in Contracts. April. 25, 2011 (in English).
- Bakalinska, O.O.** (2012). Kontseptualni pidkhody do vyznachennia zmistu poniatia dobrosostyvnist u zakhidnii pravovii doktryni [Conceptual approaches to defining the meaning of the concept of good faith in Western legal doctrine]. *Chasopys Kyivskoho universytetu prava*, № 2, 150–154 (in Ukrainian).

Volkov, A.V. (2008). Prezumpsyia dobrosovestnosti y razumnosti deistvyi pry osushchestvlenyy hrazhdanskykh prav [Presumption of good faith and reasonableness of actions in the exercise of civil rights]. *Vestnyk Saratovskoi vosudarstvennoi akademii prava*, № 5 (63), 161–166 (in Ukrainian).

Tobota, Yu.A. (2008). «Rozumnist» – fundamentalna katehoriia tsyvilnogo prava Ukrayny ["Reasonableness" is a fundamental category of civil law of Ukraine]. *Problemy zakonnosti*, № 93, 51–56 (in Ukrainian).

Prymak, V. (2014). Spravedlyvist tsyvilno-pravovoї vidpovidalnosti u spivvidnoshenni z pryntsypamy rozumnosti, dobosovisnosti, verkhovenstva prava, yurydychnoi rivnosti ta proporsionnosti [Justice of civil liability in relation to the principles of reasonableness, good faith, rule of law, legal equality and proportionalit]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu*, № 24, 85–89 (in Ukrainian).

Otradnova, O. (2007). Realizatsia pryntsypu spravedlyvosti u tsyvilno-pravovykh zобовязаннях iz zavdannia ne dohovirnoi shkody [Implementation of the principle of justice in civil law obligations for non-contractual harm]. *Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa Shevchenka*, № 74/76, 120–123 (in Ukrainian).

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ДИСКРЕЦІЙНИЙ ХАРАКТЕР СУБ'ЄКТИВНОЇ РОЗУМНОСТІ

Анотація. *Mета* статті полягає у з'ясуванні особливої природи категорії розумності як засобу досягнення гнучкості правового регулювання та як масштабу суддівського розсуду під час зовнішнього оцінювання поведінки учасників цивільних правовідносин. **Методи дослідження.** Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання. **Результатами.** У статті охарактеризовано принцип розумності деліктної відповідальності в дискреційному змістовому спрямуванні – як вимогу актуалізації розширення сфери впровадження правозастосовного розсуду оцінки мір деліктної відповідальності за вчинене деліквентом цивільне правопорушення з позицій адекватності та співінісності. Також у статті обґрутовано доцільність розширення сфери розсудового правозастосування з огляду на оціночний вимір принципів справедливості, добросовісності, розумності деліктної відповідальності, що своєю чергою дасть змогу під час вирішення кожної цивільної справи брати до уваги її конкретні особливості, більш ретельно враховувати та гнучко підходити до захисту прав і законних інтересів потерпілого в деліктних правовідносинах, забезпечувати обґрунтованість прийнятого рішення, сприяти виробленню сталої судової практики. **Висновки.** Принцип розумності деліктної відповідальності в цивільному праві може бути застосований виключно з метою оцінки мір деліктної відповідальності за вчинене деліквентом цивільне правопорушення. Ідеться про розумність, адекватність, співінісність і, звичайно, справедливість цих заходів, адже первинною ціллю деліктної відповідальності в цивільному праві є відновлення порущених прав та охоронюваних законом інтересів шляхом здійснення деліквентом відповідного відшкодування завданіх збитків (шкоди).

Ключові слова: принцип справедливості деліктної відповідальності, принцип добросовісності деліктної відповідальності, принцип розумності деліктної відповідальності, потерпілий, деліквент, правопорушення, цивільно-правова відповідальність.

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