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INSTITUTE OF COMPENSATION FOR MORAL DAMAGE: INTERNATIONAL LEGAL EXPERIENCE AND LEGISLATIVE INNOVATIONS

Abstract. The purpose of the article is to present and analyze the conceptual review of the provisions of international legal experience in dealing with compensation for moral (non-property) damage in the context of priorities for the protection of democratic rights and freedoms of citizens. **Research methods.** Research toolset is the unity of general scientific dialectical research methods and the comparative method, which allow the authors to conceptually analyze the international legal experience of the development of the institute of compensation for moral damage. **Results.** The study analyzes the legal tradition of advanced countries to solve the issue of compensation for moral damage to citizens. The authors distinguish between the English, American, German, and French legal tradition of developing the institute of moral damage; determine relevant problems; outline promising ways to solve them. It is stated that most of the advanced countries of the world address compensation for moral and pecuniary damage in unity. It has been found that foreign law, when characterizing the institute under study, uses terms that are more focused on an individual and are humanized. **Conclusions.** The article notes that the foreign experience of developing the institute of compensation is important to Ukraine, which faces significant difficulties in building a well-managed way to compensate for moral damage. It has been established that in European law, the concept of "moral damage" is part of the institute of compensation for moral damage, which is of a civil-law nature but exists at the level of other law branches. Therefore, it can be considered interbranch that, in turn, leads to diversity and heterogeneity of the definition of the concept of "moral damage" in various regulations. The authors believe that in the context of the future evolvement of domestic law, the English experience, which is based on the assessment of possibilities of losing life, is of much interest: it is estimated the degree of reduction of the victim's life expectancy due to harm to his health compared to the average life expectancy in the country. The authors have justified the expediency of introducing other analyzed instruments of compensation for moral damage into the Ukrainian judicial practice, which would not only contribute to strengthening the integrity of the European legal space but also significantly humanize the legal system of modern Ukraine.

Key words: moral (non-pecuniary) damage, compensation, recovery, legal institute, extent of moral damage, international experience, non-property nature.

1. Introduction

The conceptual analysis of the legal experience of modern Ukraine shows that the issue of compensation for moral (non-property) damage at the present day is poorly regulated by the legislator, which significantly limits the protection and implementation of human rights and freedoms. In addition, it should be noted that the legal system is concerned about finding legal methods of compensation for moral damage. It is driven by the emergence of new legal rules that regulate the activities of the relevant institute. Thus, guaranteeing human rights and freedoms effectively requires solving the mentioned problem.

The purpose of the study is to present and analyze the conceptual review of the provisions of international legal experience of dealing with compensation for moral (non-property) damage in the context of priorities for the protection of democratic rights and freedoms of citizens. As a result, it is essential to complete some research tasks, i.e., to identify the specifics of the development of the institute of moral (non-property) compensation in the world's major economies, determine innovative directions, and outline the prospects for their implementation in Ukraine. The research toolkit is based on the unity of general scientific dialectical research methods and the comparative method, which allow the authors to conceptually analyze the international legal experience of developing the institute of compensation for moral damage.

The study's theoretical framework comprises scholarly contributions on the issue concerned by M. Aharkov, S. Bieliatskii, V. Hliantsev, O. Hryshchuk, V. Dubrivnyi, O. Kuchynska, Ye. Machulska, Ye. Mikhno, V. Nor, V. Paliuk, I. Poteruzha, P. Rabinovych, et al. At the same time, despite the essential academic popularity of the institute of compensation for moral damage, the search for ways of its evolution is still poorly studied, especially with regard to methods for defining compensation for moral damage.

2. Institute of compensation for moral damage in Ukraine and abroad

According to the Constitution of Ukraine and the current legislation, individuals and legal entities are entitled to compensation for moral (non-property) damage caused by the violation of their rights and freedoms and legitimate interests. Following Art. 23 of the Civil Code of Ukraine, moral damage caused to a legal entity involves humiliating its business reputation. It is almost the only legislative reference to the nature of moral damage that may be caused to a legal entity. The authors also note that under para. 3 of Art. 23 of the Civil Code of Ukraine, moral damage is compensated by

money, other property, or otherwise (*Civilnij kodeks Ukraini, 2022*).

The court determines the amount of monetary compensation for moral damage given the nature of the offense, the extent of physical and mental suffering, the deterioration of the victim's abilities or deprivation of his ability to implement them, the degree of guilt of the person who caused moral damage, if guilt is the basis for compensation, as well as considering other circumstances that are of the essence. In assessing the amount of compensation, the requirements of reasonableness and fairness are taken into account (Kohanovska, 2010, p. 144).

Modern researchers mark that moral damage should be regarded as the unlawful destruction (or attempt to destroy) of human dignity, which triggers negative processes and states in the psyche. It consists of the very losses, negative consequences of a non-property nature that have arisen due to suffering. For instance, it refers to some changes in a person's life: 1) inability to realize his habits and desires; 2) deterioration of relations in the team or family; 3) loss of work, career opportunities; 4) loss of trust of close people, potential contractual counterparties, etc. The mental suffering which a person experiences because of encroachment on his personal non-property rights and benefits can be manifested in confusion, fear (for example, for the afterlife of the family, career, property), worries, disturbances, emotional anxiety, etc. Consequently, a person is not able to make the right decisions and continue keeping his usual lifestyle. These changes force a person to make additional efforts to organize his life and indicate the presence of moral damage (Petrenko, 2019, p. 64).

In general, moral damage means non-property losses due to moral or physical suffering or other adverse phenomena caused to a natural or legal person by illegal actions or omissions of other persons. A legal entity may also be subject to non-property damage, e.g., losses of a non-property nature because of the degradation of its business reputation, violation of the company name, trademark, disclosure of trade secrets, as well as actions aimed at lowering prestige or undermining confidence in its activities. The issue of compensation for moral damage resides in the infeasibility of assessing the amount of compensation that coincides with the damage caused, since it is impossible to determine the scope of pain and suffering experienced by a person. Thus, the court decides at its discretion, observing the principle of reasonableness (Pushkina, 2019, p. 63).

General aspects of compensation for moral damage in foreign countries have some differ-

ences and peculiarities. Thus, English law has no substantial difference between property and non-property damage in terms of the grounds and remuneration procedure. The American legal system, as it befits common law, has a similar situation. However, there is a so-called institute of torts – “privacy”, the creators of which regard its function as protecting the inviolability of a person and everything that helps the person to preserve himself as an individual (for example, the violation of privacy or the right to privacy, dissemination of information besmearing the plaintiff, appropriation of the plaintiff’s name, and use of his image for profit).

In Germany, damage is divided into property and non-property; there is a single principle of liability for both types of damage. At the same time, the German civil legislation lacks a list of interests protected by law in terms of the inviolability of a person; specially conditioned ones comprise causing damage to the body or health, deprivation of liberty, a woman’s inclination to cohabitation by deceit or threats. However, German civil law has the concept of “*Personlichkeit*” which is equivalent to “privacy” in American law. Interesting point is that monetary compensation is not the only remedy; the basic principle of liability is restitution, that is, the return of the injured party to the position it would have had if the offence had not been committed; if restitution is fully or partially impossible, the damage is compensated by money (Kohanovska, 2010, p. 144).

The French civil legislation does not distinguish between pecuniary and non-pecuniary damage as well. Thus, in defining damages, the French Civil Code means compensation for damage or loss in general, not limited only to monetary damage which includes the option of compensation for moral damage (Slipchenko, 2014, p. 21)

As shown by the above analysis of the current international legislation of the most progressive countries from the legal point of view, all regulatory systems do not contain such term as “moral damage”; although, there are institutions similar in essence and more developed than in Ukraine. Moreover, when characterizing these institutions, the terms are more focused on the concept of individual and everything related to him.

It is worth mentioning that in every country, compensation for moral damage has its own particularities that reflect the need of the state and society for an adequate system of legal rules regulating compensation for moral damage. Thus, the general aspects of compensation for moral damage are quite relevant to civil legislation today, because these issues have begun to be implemented in practice quite recently. In

addition, with the adoption of the current CC of Ukraine, the rules governing the issue under study are characterized by specific features (Reznik, 2014, p. 54).

3. Implementation of the international experience of the functioning of the institute of compensation for moral (non-pecuniary) damage in the legal framework of Ukraine.

Researchers assert that when choosing the most optimal domestic model of compensation (reimbursement) for moral damage to a person and bringing national legislation in line with international standards in human and civil rights, it is advisable to take into account the best practices of the advanced countries: the United States, England, France, Germany, New Zealand, the Netherlands, Canada, Switzerland, and Belgium. Nowadays, there is an urgent need to develop and adopt an individual law in Ukraine that would clearly define and designate the concept of moral damage and regulate the procedure, grounds, conditions, and mechanisms for compensation for moral damage to victims. Among other things, state support for victims, who are unable to obtain compensation from the accused, should be strengthened if compensation cannot be provided otherwise. Based on the international experience of effective mechanisms of compensation for moral damage by litigation, the above can be realized by creating and achieving the proper functioning of the State Fund for the Crime Victims’ Compensation and establishing a state mediation organization to introduce “restorative justice” (Rudenko, 2021, p. 15).

It is interesting to note that some countries encounter a so-called problem of competition of contract and tort claims. For example, in the United States, if a railway passenger is injured due to the negligence of railway employees, the company may be held liable for damage that is both a breach of contract and a tort. As a general rule, the court is not bound by any rules, and it can only determine whether the competition of claims in a particular case is allowed. In some world countries, the qualification of relations to be contractual or non-contractual significantly affects the scope of liability.

Scientists draw attention to the fact that American legislation has an entirely different judicial practice in addressing the issue of the extent of moral damage. The jury, which predominantly favors the plaintiff, decides on the extent of moral damage. Another way is to undergo a psychological examination, which allows the court to understand as clearly as possible the degree of suffering of the person and amount in controversy. The authors believe that the introduction of expertise will be very appropriate and based on specific facts (the

victim's psychological state after mental suffering), and not only interpreted at the discretion of the court (Pushkina, 2019, p. 63).

In the European Union, particularly in the countries of Anglo-Saxon law, the extent of moral damage is set given the defendant's guilt. In addition, there are even special commissions for compensation for moral damage that calculate the appropriate amount of compensation. France and Germany deal with such matters by analogy with previous cases but considering the specifics of the relevant case. Under German law, compensation for suffering must be fair: the general principle of benefit equalization is taken into account. The victim should be restored to the state before the violation of his rights or interests, but he should not benefit from compensation for the damage caused to him. In France, the court satisfies claims for compensation for moral damage being guided by the plea of justice. This means that the judge does not refer to arithmetic calculations but has regard to the specifics of relations. It will also depend on the specific nature of individual cases of compensation for moral damage and compensation that can indirectly alleviate the victim's condition. The court considers and assesses all merits of a case, e.g., the genuine needs of the victim, the evil intent of the person who caused the damage, the reasons that moved the victim to make claims for damages (Pushkina, 2019, p. 63).

Moreover, in France, exclusively direct damages are compensated under a contractual obligation. The debtor is liable for losses that were foreseen or could have been foreseen at the time of contracting, unless the obligation was not fulfilled due to the debtor's intent. A non-contractual obligation comprises both direct and indirect ones. However, the rigidity of the rule on the compensation of direct and indirect damages under tortious liability is mitigated by the fact that the extent of damages is ultimately determined by the court. From the perspective of German civil law, the distinction between contractual and non-contractual obligation to determine the scope of liability is irrelevant, since compensation for direct and indirect dam-

ages is provided both in the case of the breach of a contract and in the case of non-contractual damage (Dzery, 2010, p. 89).

In general, France, Germany and England recognize the possibility of applying compensation for non-pecuniary damage in the interests of unconscious persons ("vegetative", comatose, or similar states). The German Federal Court of Justice emphasizes that the extent of appropriate compensation should be more than nominal, since it should convey the losses caused to the victim's individuality and human dignity (Stefanchuk, 2010, p. 68). At the same time, it seems that German law is characterized by a rather restrained attitude to the overall trend among other European states to compensate for non-pecuniary damage caused to "secondary" victims – close relatives of deceased individuals who have suffered significant bodily harm (Van Dam, 2013, p. 366).

4. Conclusions

One can state that the international experience of developing the compensation institute is of great importance to Ukraine, which faces significant difficulties in building a clear way to compensate for moral damage. In European law, the concept of "moral damage" is part of the institute of compensation for moral damage, which is of a civil law nature but exists at the level of other law branches. Therefore, it can be considered interbranch that, in turn, leads to diversity and heterogeneity of the definition of "moral damage" in various regulations. The authors believe that in the context of the future development of domestic law, English experience, which is based on the assessment of the possible loss of life, arises strong interest: it is estimated a degree of the reduction of the victim's life expectancy due to harm to his health compared to the average life expectancy in the country. Consequently, it is advisable to introduce other analyzed instruments of compensation for moral damage into the Ukrainian judicial practice, which would not only contribute to strengthening the integrity of the European legal framework but also significantly humanize the legal system of modern Ukraine.

References:

- Civilnij kodeks Ukraini** [The Civil Code of Ukraine]. (2022, January 01). *Vidomosti Verhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo (in Ukrainian).
- Dzery, O. V., Kuznecovoi, N. S. Majdanyka, R. A.** (Eds.) (2010). *Cyvilne pravo Ukrainy. Zagalna chastyina* [Civil law of Ukraine. The general part]. Kyiv: Jurinkom Inter (in Ukrainian).
- Kohanovska, O.** (2010). *Ponjattja ta vydy osobystyh nemajnovykh prav u cyvil'nomu pravi Ukrainy* [Concepts and types of personal non-property rights in the civil law of Ukraine]. *Visnyk Kyivskogo nacionalnogo universytetu im. T. Shevchenka – Bulletin of Kyiv National University T. Shevchenko*, 84, 7–10 (in Ukrainian).
- Omelchuk, O. M., Grynko, S. D., Ivanovska, A. M., Misinkevych, A. L. & Antonjuk, V. V.** (2021). *Zahyst prav ljudyny v konteksti formuvannja pryncypu verhovenstva prava: mizhnarodnyj aspekt* [Protection of human rights in the context of the formation of the rule of law: the international aspect]. *Visnyk Nacionalnoi*

akademii pravovoyh nauk Ukrainy – Bulletin of the National Academy of Legal Sciences of Ukraine, 28, 1, 32–43. DOI: 10.37635/jnalsu.28(1).2021.32–42 (in Ukrainian).

Petrenko, V. (2019). Ponjattja ta zmist moralnoi shkody za chynnym zakonodavstvom [The concept and content of non-pecuniary damage under current law]. *Pidpryjemnyctvo, gospodarstvo i pravo – Entrepreneurship, Economy and Law*, 4, 60–64 (in Ukrainian).

Pushkina, O. V., Todoroshko, T. A. & Bocharova, M. O. (2019). Problemni aspekty vidshkoduvannja moralnoi shkody v ukraini [Problematic aspects of compensation for moral damage in Ukraine]. *Aktualni problemy vitchyznjanoi jursyprudencei – Current issues of domestic jurisprudence*, 1, 62–65 (in Ukrainian).

Reznik, G. (2014). Osoblyvosti vidshkoduvannja moralnoi shkody, sprychynenoj posjagannjam na osobysti nemajnovi prava dytyny [Features of compensation for moral damage caused by encroachment on the personal inalienable rights of the child]. *Jurydychna Ukraina – Legal Ukraine*, 8, 53–58 (in Ukrainian).

Rudenko, Ju. I. (2021). Osoblyvosti jurydyko-psyhologichnyh mehanizmv vidshkoduvannja (kompensacii) moralnoi shkody v kryminalnomu procesi Ukrainy [Features of legal and psychological mechanisms of compensation (compensation) for moral damage in the criminal process of Ukraine]. Mykolaiv (in Ukrainian).

Slipchenko, S. O. (2014). Mehanizm pravovogo reguljuvannja osobystyh nemajnovykh vidnosyn z oboro-tozdatnymy ob'jektamy [The mechanism of legal regulation of personal non-property relations with negotiable assets]. *Extended abstract of Doctor's thesis*. Kharkiv (in Ukrainian).

Stefanchuk, R. O. (2010). Kompensacija moralnoi shkody jak sposib zahystu osobystyh nemajnovykh prav: problemy ta shljahy vyrishennja [Compensation for moral damage as a way to protect personal non-property rights: problems and solutions]. *Universytets'ki naukovy zapysky – University scientific notes*, 1 (21), 67–83 (in Ukrainian).

Van Dam C. (2013). *European tort law*. Oxford, United Kingdom: Oxford University Press (in English).

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ІНСТИТУТ КОМПЕНСАЦІЇ МОРАЛЬНОЇ ШКОДИ: ЗАРУБІЖНИЙ ПРАВОВИЙ ДОСВІД ТА ЗАКОНОДАВЧІ ІННОВАЦІЇ

Анотація. Мета – представити та проаналізувати концептуальний зріз положень зарубіжного правового досвіду з проблеми відшкодування моральної (немайнової) шкоди у контексті пріоритетів захисту демократичних прав і свобод громадян. **Методи дослідження.** В основі дослідницького інструментарію – єдність загальнонаукових діалектичних методів дослідження та порівняльно-компаративного методу, які дають змогу концептуально проаналізувати зарубіжний правовий досвід розвитку інституту компенсації моральної шкоди. **Результати.** У дослідженні проаналізовано правову традицію провідних країн з вирішення проблеми відшкодування моральної шкоди громадян. Виокремлено особливості англійської, американської, німецької та французької правової традиції розвитку інституту моральної шкоди, з'ясовано проблеми та окреслено перспективні шляхи їхнього вирішення. Констатовано, що у більшості провідних країн світу відшкодування моральної і матеріальної шкоди розглядається у єдності. З'ясовано, що у зарубіжному праві при характеристиці зазначеного інституту використовуються терміни, більше орієнтовані на поняття особистості та гуманізовані. **Висновки.** У дослідженні констатовано, що для України, де є значні складнощі з побудовою чіткого способу відшкодування моральної шкоди, велике значення має зарубіжний досвід розвитку інституту компенсації. Виявлено, що у європейському праві поняття «моральна шкода» входить

до складу інституту відшкодування моральної шкоди, що носить цивільно-правовий характер, але існує і на рівні інших галузей права, а тому може вважатися міжгалузевим, що, у свою чергу, призводить до строкатості та неоднорідності в визначенні поняття «моральна шкода» у різних нормативних актах. Виснувано думку про те, що у контексті перспектив розвитку вітчизняного права значний інтерес становить англійський досвід, в основі якого лежить оцінка перспектив втрати життя: приблизно розраховується, наскільки знижується тривалість життя потерпілого за рахунок шкоди для його здоров'я порівняно із середньою тривалістю життя в країні. Доведено, що доцільно запровадити в українську судову практику й інші проаналізовані інструменти відшкодування моральної шкоди, що не лише сприяло б зміцненню цілісності європейського правового простору, а й суттєво гуманізувало б правову систему сучасної України.

Ключові слова: моральна (нематеріальна) шкода, компенсація, стягнення, правовий інститут, розмір моральної шкоди, зарубіжний досвід, немайновий характер.

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