

Compensation of damages to victim of criminal offence under Criminal Procedure Code of Ukraine

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Abstract

A significant number of criminal offenses affects the life, health or property of citizens, accompanied by physical, property or moral harm. It must be admitted that the most important right of a victim in a criminal procedure is the right to compensation for damages caused by criminal offenses. Today, in Ukraine, the legal regulation of the victims' right to compensation is not in line with constitutional guarantees, therefore measures from the state to strengthen these guarantees are relevant. In this view, international instruments that regulate the compensation for victim in the criminal procedure are analyzed, as well as the practice of developed countries. The evolution of the Ukrainian legislation concerning compensation to the victim in the criminal process is described. The difference in the terminology of international acts, acts of developed states and Ukrainian legislation in relation to compensation to victim is revealed. It is concluded that it is worthwhile to use the term "compensation". It is noted that Ukraine needs to take into account the experience of foreign countries in compensating for the harm caused to victim in a criminal procedure at the expense of the State budget. This mechanism can be implemented by creating a State Victim Assistance Fund that would function as a specific credit institution.

Keywords: *criminal procedure of Ukraine, victim, compensation of damages, property damages, moral damages, harm, criminal offence, repair of damages.*

JEL Classification: K14

1. Introduction

In most democratic countries of the world the level of protection of the rights, freedoms and legitimate interests of citizens is measured by their normative security and criminal law protection, which becomes of particular importance in the investigation of the facts of encroachment on the life, health or property of citizens, as this is due to gross violation of natural rights of a person, causing moral, physical or property damage. According to European choice, Ukraine launches a new process of changes that should be based on the European human-centred system of pan-European values⁴ (Vashchuk, 2018). It must be admitted that the most important right of the victim, envisaged by the current Criminal Procedure

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⁴ Vashchuk O. (2018), *Formation of modern incentive system for managers*, „Baltic Journal of Economic Studies”, Vol. 4, No. 1. P. 49-61.

Code (CPC) of Ukraine, is the right of the victim to repair (compensation) of harm caused by a criminal offense - an inalienable right of a citizen, an element of the legal status of a person. This victim's right is guaranteed by the state, but, unfortunately, it is least protected.

The victim of crime remained a relatively forgotten figure in the criminological policy of Ukrainian state. Humanization of political consciousness in Ukraine implies a real turning of the system of criminal justice to the problem of victims of crimes⁵.

The unsatisfactory state of ensuring the rights, freedoms and legitimate interests of the victim is inherent not only to our state. According to the International survey on criminality (Victimization), more than half of victims of crimes around the world are not satisfied with the attitude of public authorities to their complaints and the amount of compensated damages⁶.

However, in Ukraine this problem is extremely topical, even catastrophic. Most of interviewed victims believes that the legal regulation of the rights of victims is such that it does not meet the constitutional guarantees of their rights to compensation for damage caused by a criminal offense. 78 of the 120 victims (or 65%) were in favor of strengthening state guarantees for damages to the victim⁷.

2. Methodology

In order to find out the problem of compensation to the victim of damage caused by a criminal offense, the author applied the method of questioning, which was addressed to both scientists and practitioners, and, in particular, the investigators of Investigative Department of the General Directorate of the National Police of Ukraine in Odessa region was questioned (31 persons), including investigators of the department for investigation of crimes in the sphere of transport of Investigative Department of the General Directorate of the National Police of Ukraine of the Ministry of Internal Affairs of Ukraine in the Odessa region (19 persons), as well as scientific and pedagogical staff (50 persons). The results of the survey showed that the current state of ensuring the right of victim to compensation of the damages caused by a criminal offense is assessed as: 1)

⁵ Туляков В. О. (2001) *Вчення про жертву злочину: соціальні та правові основи*. (дис. ... доктора юрид. наук). Одеса: Національна юридична академія. [Tulyakov, V. O. *Victim of crime doctrine: social and legal fundamentals. (Doctor of Law thesis)*. Odessa National Law Academy].

⁶ Лисенко А.М. (2007) *Захист прав потерпілого у кримінальному процесі. Відновне правосуддя в Україні*. 1 (5). С. 85-93. (Lysenko, A. M., *Protection of victim's rights in criminal procedure, „Restorative justice in Ukraine”*, 1(5), p. 85-93).

⁷ Дідківська Г. В. (2018) *Міжнародний досвід правового положення потерпілого у кримінальному провадженні. Кримінальний процесуальний кодекс 2012 року: ідеологія та практика правозастосування*. Одеса: Видавничий дім «Гельветика». (Didkivska, G. V., *International experience of the legal status of the victim in a criminal proceeding*. In: *Criminal Procedure code 2012: ideology and practice of law enforcement: collective monograph*. Odessa: Publishing House «Helvetica»).

critical, the rights are insufficient (60%); 2) the right is partially provided, the mechanism of implementation in some cases is not provided by the CPC (38%); 3) excellent, rights are fully provided (2%). Regarding the compensation to the injured party at the expense of the State budget of Ukraine, in cases stipulated by law, 100% of respondents supported the opinion on the need for a real legislative consolidation of such a type of compensation for damage to a victim in a criminal proceeding.

3. International regulation concerning compensation of damages to victims

Adopting a number of organizational and legal measures for the establishment of state institutions for the compensation of material and moral damages to victims of criminal offenses should be proceeded from international standards of human rights protection in the criminal process. Such standards can be considered as a set of basic principles of ensuring human rights, established by international legal acts, which are obliged "for execution by all national authorities during criminal proceedings in case of ratification by the Verkhovna Rada of Ukraine". The main international legal acts in this area are the Declaration of Basic Principles of Justice for victims of crime and abuse of power, European Convention on the Compensation of victims of violent crimes, Council of Europe Committee of Ministers Resolution "On the compensation of victims of crime", Council of Europe Committee of Ministers Recommendation "On the position of the victim in the framework of criminal law and procedure" and some other.

Thus, according to Parts 12, 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, "when compensation is not fully available from the offender or other sources, states should endeavour to provide financial compensation to:

- (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) families, in particular, dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization".

The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Other funds may also be established for this purpose, including those cases, when a state (a citizen of which is a victim) is unable to compensate damages for the harm.⁸

According to the European Convention on the Compensation of Victims of Violent Crimes, when compensation is not fully available from other sources state shall contribute to compensate:

- (a) those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
- (b) dependants of persons who have died as a result of such crime.

⁸ Declaration of Basic Principles of Justice for victims of crime and abuse of power, dated November 29, 1985. A/RES/40/34.

Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished. Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance⁹.

European Convention on the Compensation of victims of violent crimes has been ratified by more than 25 states of the world, but Ukraine has not yet ratified the Convention. Although in 2005 during the European Conference of Ministers of Justice in Helsinki on strengthening the protection of victims' rights, the Ukrainian side joined the Convention.

4. Tendency of improve the protection of victims' rights

The European tendency to strengthen the protection of rights of victims of crimes was initiated by the Federal Republic of Germany, in which the relevant Law on Compensation for victims of violent crimes was adopted on May 11, 1976. At the end of the 70's in Germany a special fund for victims was created, from which the state compensated the damages. Germany initiated the adoption of the Convention in 1983.

For example, in the Kingdom of the Netherlands, the Government Directive on Victims was adopted in 1995. In the Kingdom of Belgium, the law, which substantially reformed the criminal procedural law also in the above aspect, was adopted on March 12, 1998. In the French Republic there is a Law "On consolidating the protection of the presumption the innocence and rights of the victim" adopted on June 15, 2000.

In the United States, this issue is regulated by the Laws "On the Protection of Victims and Witnesses" (1982) and "On Victims of Crime" (1984), which regulate the use of the procedure of state compensation for damages.

By joining the Council of Europe, Ukraine undertook not only to recognize, but also to legislatively establish a legal mechanism for observance of the relevant human rights standards, including in criminal proceedings to compensate for damage to a victim of a criminal offense. For this purpose:

- in 1993 the Verkhovna Rada of Ukraine has adopted Resolution № 2931-XII "On the status of implementation of laws and decisions of the Verkhovna Rada of Ukraine on law and order and measures to strengthen combating of Crime", paragraph 6 of which stated: "consider the establishment of a Fund for the compensation for citizens, who have suffered from crimes and abuse by the authorities" (in 1996 the above paragraph of this Resolution has become invalid);

- in the Order of the President of Ukraine "On measures to intensify the fight against corruption and organized crime" dated February 10, 1995, the issue of organizing the State fund for the assistance to victims of crime, coordination of

⁹ European Convention on the Compensation of victims of violent crimes, dated November 24, 1983. A/RES/40/34.

work on the drafting of the Statute on the state fund for the assistance to victims of criminal offenses was raised;

- on December 8, 2004, the President of Ukraine issued an order “On the Concept of protection of the legal rights and interests of victims of crimes”, which established only certain standards for the protection of the rights of victims, recognized by the world community as international;

- the Concept of the reform of the criminal justice of Ukraine dated April 8, 2008 provides the introduction of a procedure for restoring the rights of victims and reimbursement of the harm through compensatory procedures;

- the Verkhovna Rada of Ukraine drafted a bill “Compensation for Pecuniary Damage to Victims of Crime” dated October 27, 2010 (sent for refinement);

- during the adoption of the CPC in 2012 in its Article 127 legislators identified the following forms of repair (compensation) for damage to a victim in a criminal proceeding: voluntary compensation of harm to a suspected, accused (Article 128 of CPC); recovery of compensation on the basis of a court decision on the results of a civil claim in a criminal proceeding (Article 129 of CPC); compensation for damages by the State Budget of Ukraine (requires urgent legislative consolidation).

In accordance with part 1 of Article 127 of the CPC the suspected, the accused (and with his consent) any other natural or legal person has the right at any stage of criminal proceedings to compensate the damage inflicted on the victim, the territorial community, the state as a result of a criminal offense. Moreover, legal entities of private ownership may at their own discretion voluntarily compensate the victim property and/or moral damage for the suspected, accused. As for legal entities of public law and legal entities formed and functioning on the basis of state or communal property, reimbursement by them of property and/or moral damage to the victim caused by the suspected or accused is due to the fact that their leaders can not at their discretion dispose of property of such legal entity.

However, part 3 of Article 127 of CPC of Ukraine states that the damage suffered by a victim as a result of a criminal offense is compensated to him at the expense of the State Budget of Ukraine in cases and in the manner prescribed by the law. However, unfortunately, there is still no such law in Ukraine. There is also no appropriate fund for victims of crime. While, in accordance with the provisions of the Declaration of the Basic Principles of Justice for Victims of Crime and Victims of Abuse of Power, in order to fulfill their obligations to the victims of the State, they should promote the creation, strengthening and expansion of national funds.

Today, the relevant compensation funds operate in almost all developed countries of the world – the USA, Canada, Germany, Austria, Australia, Japan and others. As noted above, these countries have enacted relevant laws that stipulate the right of victims for state compensation for damages caused by a criminal offense, as well as ways of reconciliation of the victim with the suspected/accused, as well as professional medical and psychological assistance to victims of criminal

offenses. In our opinion, in Ukraine it is also advisable to create a State Fund for the Assistance to Victims of Crime, since it has not been established yet.

5. Terms “repair” and “compensation” in criminal procedure

First of all, we consider it necessary to note that in the current CPC of Ukraine the terms “repair” and “compensation” are used by the legislator as identical (for example, Article 127 of the CPC –“Repair (compensation) of damage to the victim”, Article 130 of the CPC –“Repair (compensation) of damage caused by illegal decisions, actions or omission”).

We emphasize that compensation for damage to the victim of a criminal offense as a party to criminal proceedings is regulated today exclusively by the Criminal Procedural Code of Ukraine (Articles 127-129 of the CPC), the provisions of which in turn refer to a non-existent law. According to such law the harm suffered by the victim as a result of a criminal offense would be compensated for it at the expense of the State Budget of Ukraine.

The lack of legislative regulation of compensation for damage to a victim of a criminal offense is unacceptable for a legal, democratic and socially-oriented state, which is Ukraine (Article 3 of the Constitution of Ukraine). The consolidation at the legislative level of the order of compensation for damage at the expense of the State Budget is an urgent requirement of the present. At the same time, in the doctrine there are strange proposals “to exclude from the CPC of Ukraine all the existent norms to the non-existent legislation concerning the provision of the rights and legitimate interests of the victim of a criminal offense (Part 3 of Article 127 and other articles of the CPC)”¹⁰. But this is the constitutional duty of the state to protect the rights and legitimate interests of citizens, who have suffered from criminal encroachment and have the right to compensation for damages caused by a criminal offense. In our opinion, it should be not an exception, but only the real provision.

Thus, “compensation” (from latin *compensatio* - reimbursement, remuneration, balancing) - 1) a legal way of protecting the material and non-material benefits of individuals and legal entities; the essence of compensation is to reimburse the damage¹¹; 2) compensation, balancing, remuneration for something, as well as the amount paid as compensation, remuneration; cover of expenses, losses¹².

¹⁰Кавун Д. Ю. (2017), Кримінальний процесуальний механізм забезпечення прав потерпілого (фізичної особи) у досудовому розслідуванні: автореф. дис. канд. юрид. наук. Харків: Харківський національний університет імені В.Н. Каразіна. 20 с. [Kavun, D. *Criminal Procedural mechanism of ensuring the rights of the victim (a natural person) in the pre-trial investigation. (PhD thesis)*. Kharkiv, Kharkiv National University named after V. N. Karazin].

¹¹ Юридична енциклопедія (1998) Київ: «Українська енциклопедія». (Legal Encyclopedia. Kyiv: “Ukrainina encyclopedia”).

¹² Словник української мови: в 11 томах. (1970). Том 1. Київ: Наукова думка. (Dictionary of the Ukrainian language: in 11 volumes. Vol. 1. Kyiv: Scientific thought).

As for the term “repair” - is money, which compensate some kind of damage¹³; 2) that someone returns an amount for the harm, expenses¹⁴.

Physical and moral harm is essentially irreparable and practically can not be reimbursed. It is impossible to compensate for the loss of health, it is impossible to compensate for a feeling of fear, a feeling of pain. Therefore, repair for physical and moral damage involves the possibility of their compensation. In cases where the recovery of the victim is possible, the reimbursement of the physical harm inflicted on the plane of restoration of the victim's violated property rights in the form of reimbursement of expenses for treatment (the cost of drugs, medical services, etc.)¹⁵.

In the theory of criminal proceedings, the use of the term “compensation of harm” is considered to be appropriate (in respect of moral damages), since it is difficult to imagine compensation for suffering, and compensation for the latter is quite possible.

But is it possible to use the term “compensation” not only in respect of moral damages, physical harm, but also in relation to material? In fact, in criminal proceedings the consequences of a criminal offense are the task of three types of harm - material, moral or physical, although the current CPC of Ukraine does not define peculiarities of these concepts in criminal proceedings.

It is pointed out in the literature that it will be expedient to use the expression “indemnity”, but not “compensation of harm” in the CPC of Ukraine and in a special law, which should regulate the procedure and conditions for reimbursement of harm caused to a victim as a result of a criminal offense¹⁶. The main argument of this is the fact that the phrase “indemnity” is used in the Civil Code of Ukraine, as well as in the law regulating the procedure for compensation for damages caused by unlawful actions of pre-trial investigation bodies, prosecutors and the court. By the way, it should be noted that the law of Ukraine “On the Procedure for Compensation of Damage Inflicted on the Citizen by the Unlawful Acts of Bodies Investigating Operative Investigation Activities, Prudential Institutions, Prosecutor's Office and the Court» dated December 1, 1994 contains no provisions regarding compensation for damage to a victim of a criminal offense. At the same time, in accordance with the Declaration of Basic

¹³ Ушаков Д. (1935-1940) Толковый словарь русского языка. М.: Сов. энцикл. (Ushakov D., *Explanatory dictionary of the Russian language*. Moscow: Soviet Encyclopedia).

¹⁴ Словник української мови: в 11 томах. (1970). Том 1. Київ: Наукова думка. (Dictionary of the Ukrainian language: in 11 volumes. Vol. 1. Kyiv: Scientific thought).

¹⁵ Ківалов С. В., Міщенко С. М., Захарченко В. Ю. (2013) *Кримінальний процесуальний кодекс України: науково-практичний коментар*. Харків:Одіссей. 1104 с. (Kivalov, S. V., Mishchenko S.M., Zaharchenko V.Yu. *Criminal procedure code of Ukraine: scientific practical commentary*. Kharkiv: Odissey, 1104 p.).

¹⁶ Азаров Ю.І, Письменний Д. П, Хабло О. Ю. (2014) Відшкодування шкоди потерпілому у кримінальному провадженні за рахунок держави. *Юридична наука*. №5. С. 49-56. (Azarov, Y. I., Pysmennyi, D. P., Khablo, O. Y. *Compensation for damage to a victim in a criminal procedure at the expense of the state*, „Legal Science”, 5, p. 49-56).

Principles of Justice for Victims of Crime and Abuse of Power, restitution is considered as compensation for damage caused by illegal actions of officials.

In addition, with regard to the legislation of other European states, then, analyzing their respective laws, we note that, for example, in accordance with the Austrian Law on Assistance to Victims of Crimes of July 9, 1972, the Austrian legislator mainly uses the term “right to help”, and in §§ 2 “Assistance services” refers to “compensation for lost earnings or retention; treatment; costs for crisis treatment by clinical psychologists and health-improving psychologists; medical, social and professional rehabilitation; orthopedic support; supplement for care, surcharge for the blind; reimbursement of funeral expenses; additional services depending on income level; flat rate (pauschale) compensation for moral damages”¹⁷.

The Law of the Swiss Confederation on Assistance to Victims of Criminal Acts dated February 23, 2007 also indicates the right to help and in Article 2 “Victim Assistance Forms” notes that victim assistance includes: counseling and emergency care; long-term assistance to the counseling point; cash payments within the framework of long-term care of third parties; reimbursement; satisfaction; exemption from the costs of proceedings. Article 5 of the relevant law also refers to free services and explains: counseling, immediate assistance and long-term care of counseling centers are provided to victims and their relatives free of charge.

Returning to the definition of the terms “indemnity”/“compensation”, we note that, based on the definitions of these concepts, we consider that the semantic meaning of these words makes it possible to notice that the compensation is synonymous with “indemnity, the amount paid as compensation” as well as “balancing, legal way of protecting material and immaterial goods”, but synonymous with compensation can not be called indemnity (“money, which is compensated for harm”). That is, we come to the idea that it is possible to use the term “compensation” and to material damage. Therefore, in our opinion, it is possible to use and use both concepts, but it would be more appropriate to fix it at the level of the law by one term – “compensation”.

Therefore, it should be agreed with V. Tulyakov, who was drafting the law “On the Protection of the Rights of Victims of Crimes”, and proposed that Article 9 of the draft law “Right to compensation” should be worded as follows: “Every victim of a crime is guaranteed the right to liberty, personal integrity and protection of dignity. The state guarantees the victim of a crime the right to protection of life, health, free qualified medical aid in public and communal health care facilities, and promotes the creation of safe conditions for human life.

¹⁷ Банчук О.А., Дмитрієва І.О., Малишев Б.В., Саїдова З.М.. (2015) *Відшкодування потерпілим від насильницьких злочинів: європейські стандарти і зарубіжне законодавство*. К.: Москаленко О.М., 2015. 268 с. 165-167. (Banchuk, O. A., Dmytrieva, I.O., Malyshev, B.V., Saidova Z.M. *Compensation for victims of violent crimes: European standards and foreign law*. Kyiv: Moskalenko O. M., pp. 165-167).

The victim of a crime has the right to receive compensation for physical and psychological injuries caused by a crime, emotional damage, loss of income, compensation for treatment not compensated by the system of social assistance adopted in the state, and the amount of restitution by the offender”¹⁸.

6. Compensation of physical and moral damage in Ukrainian criminal procedure

It is noteworthy that the analysis of practices in one of the dissertation research [213 criminal cases (proceedings), 2010-2014] showed that the voluntary compensation by the accused or his relatives was recorded only in 68 criminal cases (proceedings) (31.9%)¹⁹. In recent years, over 300,000 such violent crimes have been registered in Ukraine as murder, beatings, rape, however, according to the results of the survey of victims of violent crimes, almost 96% of victims were not compensated for damage caused by criminal offenses²⁰.

We emphasize: the legislator points out in paragraph 10 part 1 of Article 56 of the CPC of Ukraine, that the victim during the criminal proceedings has the right exclusively to compensation for damages caused by a criminal offense in the manner prescribed by the law. We believe that such an instruction contradicts and does not comply with Chapter 9 of the CPC, where the legislator clearly regulates the compensation of harm in criminal proceedings. Therefore, it turns out that the victim is entitled to compensation (moral, physical) in accordance with the provisions of Chapter 9 of the CPC and at the same time does not have such a right in accordance with Article 56 of the CPC. In addition, part 1, 3 of Article 127 of the CPC are not entirely consistent with each other, and indeed with the title of this article, since the title of the article refers to “compensation of harm”, part 1 of the article deals only with “... to compensate for damage done ...”, and part 3 of the article is only indicative of the fact that “the damage ... is compensated for ...”. This requires making appropriate changes to the current criminal procedural law of Ukraine. So, in our opinion, taking into account the foregoing, should be set forth in paragraph 10 part 1 of Article 56 of the CPC in the following wording:

¹⁸Туляков В. О. (2001) *Вчення про жертву злочину: соціальні та правові основи*. (дис. ... доктора юрид. наук). Одеса: Національна юридична академія. [Tulyakov, V. O. *Victim of crime doctrine: social and legal fundamentals. (Doctor of Law thesis)*. Odessa: National Law Academy].

¹⁹ Татарин І. І. (2016) *Забезпечення відшкодування шкоди, заподіяної кримінальним правопорушенням, на досудовому розслідуванні*. (дис. ... канд. юрид. наук). Львів: Львівський національний університет імені Івана Франка. [Tataryn, I.I. *Ensuring of compensation for damage caused by a criminal offence at pre-trial inquiry. (PhD thesis)*. Lviv: Lviv National University named after Ivan Franko].

²⁰Погорецький М. А., Сергєєва Д. Б. (2017) Проблемні питання реалізації процесуального статусу потерпілого у кримінальному провадженні. *Науковий вісник Ужгородського національного університету. Серія Право*. Вип. 46. Том 2. С. 118-123. (Pogoretskyi, M. A., Sergeeva, D. B., *Problematic issues on the implementation of the procedural status of the victim in a criminal procedure*, „Scientific herald of Uzhgorod National University. Series Law”, 46 (2), p. 118-123).

“compensation for damage inflicted by a criminal offense, including at the expense of the State Budget of Ukraine, in the manner prescribed by law”.

Consequently, the regulation of compensation for damage to a victim of a criminal proceeding in Ukraine at the expense of the State Budget of Ukraine urgently requires the elaboration and adoption of a special law that clearly regulates the grounds, conditions and procedure for appropriate compensation.

Thus, in the literature it is noted that at the expense of the state only property damage should be compensated, which includes also the funds spent on restoring the health of victims, and in case of their death - to the burial, payment for the maintenance of the disabled family members of the victim and his minor children²¹. It should be noted that a similar approach is also followed in the draft law “On Compensation at the expense of the State for pecuniary damage to individuals who have suffered from a crime” dated October 27, 2010, where part 3 of Article 1 stipulates that its action “does not apply to the compensation of moral damage inflicted on the victim. This does not deprive such person of the right to compensation for moral damage in accordance with the procedure established by law”²².

Regarding the discussion, whether the state should assume the responsibility for compensation and moral damage inflicted by a criminal offense, on the one hand, it is impossible to disagree with the Opinion of the Main scientific and expert department of the Verkhovna Rada of Ukraine on the abovementioned draft law: “if the state undertakes an obligation to recover, but it can not really do it, it can create a state of social discontent, when hundreds of thousands of victims will not be reimbursed by the state, even after receiving of corresponding decisions in their favor”. In particular, the doctrine states that such an approach in the present conditions is justified, since it is in accordance with the principle of justice and will allow reparation for those victims who really need it²³.

In fact, in determining the amount of compensation should take into account the requirements of fairness and reasonableness. Compensation for moral damage should be based on the study of the emotional condition and psychological characteristics of the victim²⁴. The court determines the amount of moral compensation for moral damage depending on the nature of the offense, the depth of physical and mental suffering, the deterioration of the ability of the victim or the

²¹ Азаров Ю.І, Письменний Д. П, Хабло О. Ю. (2014) Відшкодування шкоди потерпілому у кримінальному провадженні за рахунок держави. *Юридична наука*. №5. С. 49-56. (Azarov, Y. I., Pysmennyi, D. P., Khablo, O. Y., *Compensation for damage to a victim in a criminal procedure at the expense of the state*, „Legal Science”, 5, p. 49-56).

²² Про відшкодування за рахунок держави матеріальної шкоди фізичним особам, які потерпіли від злочину: Проект закону від 27.10.2010 р. (On compensation by the state for pecuniary damage to individuals who have suffered a crime: Draft Law dated 27 October, 2010).

²³ Азаров Ю.І, Письменний Д. П, Хабло О. Ю. (2014), Відшкодування шкоди потерпілому у кримінальному провадженні за рахунок держави. *Юридична наука*. №5. С. 49-56. (Azarov, Y. I., Pysmennyi, D. P., Khablo, O. Y., *Compensation for damage to a victim in a criminal procedure at the expense of the state*, „Legal Science”, 5, p. 49-56).

²⁴ Mudrak, I., Hloviuk, I., Murzanovska, A., Voloshyna V. (2019) Physiological and psychological condition of victim of criminal offense in Ukraine. *Amazonia Investiga*. Vol. 8, Núm. 19. P. 34-42.

deprivation of their realization, the degree of guilt of the person who caused moral harm, if the guilt is a ground for compensation, and also in the light of other circumstances, which have a significant meaning. Moral damage is indemnified irrespective of the property damage to be recovered, but not related to the amount of this compensation. After a long period of complete denial of the possibility of compensation for moral harm, legal science and practice today are attempting to develop theoretical approaches and criteria for assessing moral harm, a scientifically sound and fair way of defining the reasonable amount of its compensation. On this occasion, some scientists believe that compensation for moral harm will always be partial, since it is impossible to establish precise criteria for the material identification of mental pain²⁵. Other scholars emphasize that it is possible to speak only about the permissible harm, and not about the one that has come, arguing such an approach by impossibility to prove the fact of mental suffering in court²⁶. Compensation for moral harm is complicated by the fact that it combines the medical, material and procedural aspects to be clarified.

7. Compensation for moral damage

As for the methods of compensation for moral damage, some scholars recognize only the freedom of judicial evaluation in resolving this issue²⁷, others add to this the principle of fixed amounts for certain types of crime²⁸, others are convinced that the development of certain criteria in the tables and / or schemes for assessing the amount of compensation for moral damage will be most correct by solving the problem of preventing abuses by members of the judiciary when deciding on the amount of compensation²⁹, and the fourth believes that the determination of the amount of compensation for moral damage can only give generalized judicial practice³⁰.

²⁵ Шевчук П. І. (1998), *Відшкодування матеріальної і моральної шкоди та компенсаційні виплати. Нормативні акти, роз'яснення, коментарі*. Київ: Юрінком Інтер. 928 с. (Shevchuk, P. I. *Compensation for material and moral damages and compensation. Statutory acts, explanations, comments*. Kyiv: YurinkomInter. 928 p.).

²⁶ Донцов С. Я., Маринина М.Ю. (1986) *Имущественная ответственность за вред, причиненный личности*. Москва: Юрид. лит-ра. 160 с. (Dontsov, S. Y., Marinina, M. Y. *Property liability for personal injury*. Moscow: Legal literature, 160 p.).

²⁷Малеина М. Н. (1991), Компенсация за немущественный вред. *Вестник Верховного Суда СССР*. № 5. С. 27-29. (Maleina, M. N., *Compensation of non-material harm*, „Bulletin of the Supreme Court of the USSR”, 5, p. 27-29).

Палиук В. П. (2000), *Возмещение морального (немущественного) вреда*. Киев: Право. 272 с. [Paliuk, V. P. *Compensation of moral (non-material) damages*. Kyiv: Pravo. 272 p.].

²⁸Зернова Е. (1996), Возмещение морального вреда причиненного преступлением. *Кодекс-INFO*. № 11. С. 21-27. (Zernova, E. *Compensation for moral harm caused by the crime*, „Kodeks-INFO”, 11, p. 21-27).

²⁹Эрделевский А. М. (2006) *Компенсация морального вреда в России и за рубежом*. Москва: БЭК. (Erdelevskiy, A. M. *Compensation for moral harm in Russia and abroad*. Moscow: BEK).

³⁰Сиротинко С. Є. (2002), Деякі теоретично-практичні питання визначення розміру відшкодування моральної (немайнової) шкоди. *Вісник Верховного суду України*. № 6. С. 41-44. [Syrotenko, S. E., *Some theoretical and practical questions of determining the amount of*

For example, N. Klymkovska proposed to resolve this issue by “carrying out by a qualified specialists of the Department of the Ukrainian Research Institute of Social and Forensic Psychiatry and Narcology a comprehensive judicial psychopsychiatric examination (special expert examination) on moral damage and the amount of compensation for it. Specialists-psychiatrists work with the victims on average two to three hours. How many techniques will be applied during the examination: 2-3 or 15-20 - depends on the complexity of the case. This special expertise, according to specialists from the same institute, is a “know-how” of a research team, but it needs to be substantiated by practice”³¹. V. Vvedenska offered to calculate the amount of compensation for the damage caused, which is based on the personal contribution of the injured person to the development of society, and in particular on the basis of the amount paid by taxes³².

Thus, in the process of studying the issues, the question whether the state should assume the obligation to compensate for the moral damage inflicted by the victim of a criminal offense arises, above all, the idea: if the court determines the amount of monetary compensation for moral damage, depending on the nature of the offense, the depth of physical and mental sufferings of the victim, then can the state allow that in one case such a judgment was executed (in terms of compensation for the victim of moral harm), and in the other - no (for example, if the accused is not in able to compensate for such damage). But will such practice be consistent with the underlying principles of criminal proceedings, the requirements of fairness and reasonableness? After all, all victims in criminal proceedings (Article 10, paragraph 1, Article 56 of the CPC) have the right to compensation and there can be no restrictions on the procedural rights provided by the CPC of Ukraine (Part 1, Article 10 of the CPC), in relation to victim, in our opinion, the relevant restrictions can not be from the point of view of regulating the mechanism for the implementation of procedural rights and for certain procedural issues of enforcement of court decisions.

That is why we arrive at the conclusion that it is impossible to maintain such a legal position, in which compensation for moral damage caused to a victim of a criminal offense must in all cases be given solely to the surrender of the suspected, the accused.

compensation for moral (non-property) damage, „Bulletin of the Supreme Court of Ukraine”, 6, p. 41-44].

³¹Климковська Н. (2002), Моральну шкоду можна виміряти так само точно, як температуру тіла. *Хрещатук*. 11 січня. (Klymkovska, N. *Moral damage can be measured in the same way as the body temperature*. Khreshchatyk, 11 January).

³²Введенська В. В. (2009) Кримінально-процесуальні гарантії реалізації права на юридичну допомогу осіб, постраждалих від злочину. (дис. ... канд. юрид. наук). Київ: Нац. акад. прокуратури України. [Vvedenska, V. V. *Criminal and Procedural Guarantees of Exercising the Crime Victims' Right to Legal Assistance*. (Ph.D thesis) Kyiv: National Prosecution Academy of Ukraine].

8. Conclusion

To summarize, we note that the procedure of compensation for damage to victims in a criminal proceeding at the expense of the State Budget is legally foreseen and developed in many countries of the world. Such experience should be taken into account today in Ukraine. In particular, the state may pay compensation if: the compensation for damages was not provided by the guilty party or by any other source (Austria, the Netherlands, Sweden); financial support for compensation must be provided (Belgium); state compensation is an additional measure and is paid only to the extent that the damage is not compensated by guilty, insurance programs or other public funds (Denmark, Germany); the defendant has been convicted, the victim may apply for compensation, and this right does not depend on the payment capacity of the offender (Finland); death or serious bodily injury occurred as a result of the crime (in France); if the crime is registered, the compensation is paid to the victim regardless of the identity of the guilty person and his detention (US). As to the compensation which is appropriate and sufficient in order to remedy a breach of a right at national level, this will depend on all the circumstances of the case, regarding, in particular, to the nature of the violation³³.

So, there is an urgent need for the drafting and adoption of the Law of Ukraine “On compensation to the victim of damage caused by a criminal offense at the expense of the State budget”, as well as the creation of a State victim assistance fund that would effectively ensure the requirement of the law on compensation for damages to a victim in a criminal proceeding, even when a criminal offense is not disclosed or when the guilty person is not able to make the appropriate penalties. Such a fund can be created at the Ministry of Justice of Ukraine, formed at the expense of the State budget, which could be filled with funds collected from the person who caused the damage, funds from fines, other payments within the framework of criminal proceedings, selling of confiscated property, etc. If we turn to the experience of foreign countries, such a state fund should function as a kind of credit institution, which will reimburse part of the money for a lump sum payment with the gradual payment of all the proper amount to the victim, and then it will collect the expenses from sources of income to the fund.

The existence of legal conflicts and gaps in the current procedural law, the lack of systematic implementation of legal positions and the case law of the European Court of Human Rights indicates the need for further reform of the national legislation in order to bring it in line with generally accepted European standards in the field of human rights. Our further scientific research will focus on this.

³³ Gäfgen v. Germany: Judgement of ECHR dated June 1, 2010, application № 22978/05.

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