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PRINCIPLES OF EUROPEAN TORT LAW (PETL) AND THEIR IMPACT ON APPROXIMATION OF UKRAINIAN TORT LAW TO EUROPEAN STANDARDS

1. GENERAL PROVISIONS GOVERNING THE UKRAINIAN ROAD TO THE EU

The year 2014 was a serious milestone in Ukrainian history. Ukraine made its choice and started moving towards Europe. Nowadays, this means that Ukraine has to confirm its belonging to Europe, acknowledgeand accept European values, principles and concepts in all spheres of life in general and in the legal sphere in particular.

In law, "Europeanization" means approximation and harmonization of Ukrainian and European legislation in all fields of legal regulation. Ukraine has to systemically transform its legal regulation by moving from the Soviet past to the European future.

The first Concept of the adaptation of Ukrainian legislation to EU legislation was approved by the Regulation of the Cabinet of Ministers of 16 August 1999. The Concept defines adaptation of Ukrainian legislation to EU legislation as a process of approximation and gradual bringing of Ukrainian legislation into accordance with EU legislation. In 2011 Ukraine adopted the National Program on Approximation of Ukrainian Laws to EU laws. The Program determines the main legislative areas which should be harmonized: economic activity, customs, banking, accounting, intellectual property, financial services, competition law, public procurement, standardization and technical regulations, energy industry.

The Ukraine–European Union Association Agreement, signed in 2014, established a political and economic association between the parties. This is the most significant international treaty in Ukrainian modern history. The parties committed to cooperate and converge economic policy, legislation, and regulation across a broad range of areas, including equal rights for workers, steps towards visa-the free movement of people, exchange of information and staff in the area of justice,

modernization of Ukraine's energy infrastructure, and access to the European Investment Bank[1].

The Association Agreement also commits to the convergence of Ukrainian legislation with EU law in all spheres of social life. To perform this task the Cabinet of Ministers of Ukraine adopted a Regulation on the Implementation of the Association Agreement between Ukraine on the one part and the European Union, Euroatom and Their Member States on the other part on 17 September 2014. After that the Cabinet of Ministers of Ukraine adopted 33 regulations and 129 plans for the implementation of 179 EU legal acts in the spheres of medicine, infrastructure, justice, agriculture, education, social issues etc.[2] A lot of monographs and research papers are devoted to the problems of approximation of Ukrainian laws to EU laws. Experts in international law and in different fields of law which are going to be approximated have made research into the existing situation in Ukrainian legislation and the need for harmonization[3].

The above shows that the priority spheres for approximation are the spheres of public law because the EU *Acquis Communaitaire* focuses mostly on the regulation of public relationships.

2. APPROXIMATION OF TORT LAW

Even so, private law shall not stand aside from the harmonization process. Equal private rules are one of the main conditions of Ukraine – EU cooperation. One of the functions of private law is to provide effective remedies in cases of human rights' infringement. Private law has a successful mechanism, proven for millennia – in the form of tort law. Tort or an obligation to compensate for non-contractual damage has been known since Ancient Rome. And nowadays, both in Ukraine and in Europe, tort law provides instruments for human rights protection in cases of causing damage to life, health, property or other rights.

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[1] https://en.wikipedia.org/wiki/Ukraine–European_Union_Association_Agreement (accessed 3 May 2017).

[2] Харитонов Є. О. *Україна – Європа: проблеми адаптації у галузі приватного права*: монографія. – Одеса: «Фенікс», 2017. – с. 6.

[3] Муравйов В. *Гармонізація законодавства України з правом Європейського Союзу в рамках Угоди про асоціацію між Україною та ЄС* / В. Муравйов, Н. Мушак // Віче. – № 8. – 2013. – С. 12–18; *Європейський проект та Україна*: монографія / А. В. Єрмолаєв, Б. О. Парахонський, Г. М. Яворська, О. О. Резнікова [та ін.]. – К.: НІСД, 2012. – 192 с.; Ващенко Ю. В. *Адміністративно-правовий статус енергетичного регулятора в Україні: сучасний стан та перспективи реформування у контексті європейської інтеграції*: Монографія. – К.: Юрінком Інтер, 2015. – 288 с.

Therefore having similar regulation of torts is of high importance for productive cooperation between Ukraine and the EU.

The main problem in this field is that the European Union does not have a unified tort law, similar in each Member State. There are some EU legal acts targeting specific torts, such as the Directive 2014/104/EU on antitrust damages actions; Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products etc. as well as Regulation (EC) No 864/2007 – the law applicable to non-contractual obligations (Rome II). But all of them deal with either international private law issues or specific torts.

In general, there are three main tort law systems in Europe: French, German and Common Law. The French system or the system of "general delict" is based on the provisions of the French Civil Code (Code of Napoleon). The German system (which is used in Ukraine as well) is based on the BGB (German Civil Code) and has both general tort rules and rules of special delicts. And the Common Law system (used in England and Wales, Cyprus and Malta) does not know of general delict and deals mostly with the consequences of specific acts of wrongdoing.

There have been several attempts to unify tort law in Europe. One of the most significant was the creation of the Principles of European Tort Law (PETL).

3. PRINCIPLES OF EUROPEAN TORT LAW AS AN INSTRUMENT FOR APPROXIMATION

The Principles of European Tort Law (PETL) were drafted by the European Group on Tort Law or, as it is called, the "Tilburg Group"[4]. The Group exists till today and meets regularly to discuss fundamental issues of tort law liability as well as recent developments and future directions of the law of tort. The European Group on Tort Law aims to contribute to the enhancement and harmonization of tort law in Europe through the framework provided in the PETL and its related, ongoing research, and in particular to provide a principled basis for rationalization and innovation at national and EU levels[5].

The Group has drafted a collection of the Principles of European Tort Law (PETL) similar to the Principles of European Contract Law drafted by the European Contract Law Commission ("Lando Commission"). In preparation for the actual drafting of the Principles the core topics of tort law were examined in separate projects. For each of these topics a questionnaire which had already

[4] The name of the group comes from the working place of its leader – Jaap Spier – who was a professor at the University of Tilburg at the time.

[5] http://www.egtl.org (accessed 30 May 2017).

been discussed in advance with all members was distributed. In response to these questionnaires, members or guests of the Group produced country reports. These reports became the basis of comparative reports drafted by the respective project leaders[6]. In 2002 a comprehensive set of Principles was formed by the Drafting Committee. The full text of the Principles, together with commentaries given by the members of the European Group on Tort Law, was published. The official language of the PETL is English. Principles were translated into other languages of the EU and some other widely used languages. But in case of a different use of some rule in English and in another language, the English text prevails[7].

The PETL is an example of so-called "soft law" whose classical definition has been given by F. Snyder, who describes soft law as rules of conduct that are not legally binding but may have a practical implication[8]. Scholars outline the primary purpose of the Principles as a presentation of a common framework both for further development of national laws and for uniform European legislation [9].

When evaluating the Principles of European Tort law as a document which could help approximate Ukrainian tort law to European standards we need to outline some differences in the understanding of the term "principles" in Ukrainian legal doctrine and in the PETL. In Ukrainian jurisprudence, principles of law are defined as core ideas of law, the existence of which expresses the most important patterns and foundations of the exact type of the state and law, which are in accordance with the essence of law, characterized by universality, the highest imperativeness and general significance, and which match the objective necessity of exact social formation building and reinforcing[10]. To simplify, principles of law in Ukraine are recognized as core ideas, the most general statements which characterize the essence of law in society. Principles are written as legal norms and are legally binding. On the other hand, the Principles of European Tort Law is a set of rules which are not binding on any country. They are guidelines for developing national legislation in the field of torts as well as joint European rules.

As a guideline, the PETL could be used for the developing of tort law of Ukraine and its approximation with the European tort practice. There are some rules which are similar in the tort law of Ukraine and in the PETL. Both the Civil

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[6] B. A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law"*, "The American Journal of Comparative Law" 2005, Vol. 53, issue 1, pp. 189–205.

[7] Whilst preparing this paper we found errors in the translation of the PETL into Russian. In the English version para 3 of Article 2:102 says that extensive protection is granted to property rights, including those in intangible property. But in the Russian translation property and personal non-property rights are widely protected.

[8] F. Snyder, *Soft Law and Institutional Practice in the European Community*, (in:) S. Martin (ed.), *The Construction of Europe: Essays in Honor of Emile Noel*, Dordrecht 1994, pp. 197–225.

[9] B. A. Koch, *The "European Group on Tort Law"...*

[10] Колодій А. М. *Принципи права України*: монографія / А. М. Колодій. – К.: Юрінком Інтер, 1998. – С. 27.

Code of Ukraine and the PETL recognize damage caused as a general condition of tort liability. No damage – no tort. Damage includes material or immaterial harm to legally protected interests (Articles 1166–1167 of the Civil Code of Ukraine, Article 2:101 of the PETL). Besides damage, there are other requirements of tort liability: wrongful conduct, causation and fault – which are necessary in general but could not be considered in specific tort cases (strict liability, product liability etc.).

But the general understanding of each requirement differs greatly in the Ukrainian legal doctrine and in the PETL. The Ukrainian doctrine since the middle 1950s has been based on the concept of the "compound of civil wrong". One of the founders of the concept was the well-known Soviet academic Olympiad Ioffe. He pointed out that a civil wrong is a complex but unified act which includes several subjective and objective elements[11].

The "compound of civil wrong" concept was expounded in detail by Professor Gennadiy Matveev. He proposed that the "compound of civil wrong" was a legal fact which generated relationships between a wrongdoer and a victim[12]. He made an analogy to the "compound of crime" concept which was and is recognized as the basis of criminal liability. "Compound of crime" consists of four elements: object, objective side, subject, subjective side. All elements are important and necessary for the qualification of an act as a crime.

The "Compound of civil wrong" concept similarly consists of four elements: wrongful conduct, damage, causation (a causal link between the wrongful conduct and the damage) and fault. The first three elements are characterized as objective ones and exist in the objective world. Fault is a subjective element and denotes a subjective relation of the person to his or her behavior and its consequences.

The concept of the "compound of civil wrong" is criticized by some scholars[13]. But it is still recognized officially and used in judgments.

The European approach of the PETL does not recognize the notion of "compound". And to our mind such an approach is more correct for tort law. The term "compound" suggests an indissoluble combination of elements where an absence of one element destroys the compound. The "compound of crime" has such a meaning. In criminal law textbooks it is defined as a combination of objective and subjective attributes which allow for qualifying an action as a specific

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[11] Иоффе О. С. *Избранные труды*: в 4 т. / О. С. Иоффе. – СпБ.: Юридический центр Пресс, 2004. – Т. 3: Обязательственное право. – с. 150.

[12] Матвеев Г. К. *Основания гражданско-правовой ответственности* / Г. К. Матвеев. – М.: Юридическая литература, 1970. – с. 5.

[13] Брагинский М. И., Витрянский В. В. *Договорное право. Общие положения*. – М.: Статут, 1997. – с. 569–570; Отраднова О. О. *Проблеми вдосконалення механізму цивільно-правового регулювання деліктних зобов'язань*. Монографія. – К.: Юрінком Інтер, 2014. – с. 104.

crime[14]. The presence of all elements of the "compound of crime" are necessary for qualification.

As for civil torts, an analysis of legislation and cases shows that tort liability sometimes arises where damage is caused by legal conduct or in spite of fault. So we can hardly talk about any "compound".

The only condition of tort liability is damage (Title II of the PETL). Damage may be pecuniary or non-pecuniary. Pecuniary damage is defined as a diminution of the victim's patrimony caused by the damaging event (Article 10:201 PETL). In the case of personal injury, which includes injury to bodily health and to mental health, pecuniary damage includes loss of income, impairment of earning capacity and reasonable expenses, such as the cost of medical care. In the case of death, persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of the loss of that support (Article 10:202 PETL). Non-pecuniary damage is not clearly defined by the PETL. Article 10:301 merely mentions that considering the scope of its protection (Article 2:102), violation of an interest may justify compensation of non-pecuniary damage. This is the case in particular where the victim has suffered personal injury or injury to human dignity, liberty or other personality rights. Non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

Other prerequisites of tort liability, such as wrongful conduct, causation and fault, also display some differences in Ukrainian tort law and in the PETL. And if the differences in wrongfulness mostly concern the victim's conduct, causation and fault have an extremely different meaning in Ukrainian legal practice and in the PETL.

As regards causation we should mention that it is not a legal category and the Ukrainian legislator rarely appeals to it. Ukrainian legal doctrine knows different concepts of causation, including the theory of "necessary and random causation" (prof. I. Novitsky, prof. L. Lunts, prof. G. Matveev)[15], the theory of "possibility and reality" (prof. O. Ioffe[16]) etc.

Legal practice tends to refer to so-called "direct causation". A plenum of the Supreme Court of Ukraine in the Resolution Re N 6 of 27 March 1992 on court practice in claims for compensation for damage stated that "when considering claims for damages the courts shall keep in mind that (…) damage, caused to the

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[14] Чернишова Н. В., Володько М. В., Хазін М. А. *Кримінальне право України*. – К.: Наукова думка, 1995. – с. 37.

[15] Новицкий И. Б., Лунц Л. А. *Общее учение об обязательстве*. – М.: Юридическая литература, 1950 – 300–319; Матвеев Г. К. *Основания гражданско-правовой ответственности* - М., 1970. – с. 97–102.

[16] Иоффе О. С. *Избранные труды*: в 4 томах. Том 3 Обязательственное право. – СПб, 2004. – с. 161.

personality or property of a human being as well as damage caused to the property of a legal entity shall be compensated by the person who caused the damage in case that his or her conduct was illegal and there was direct causation between the conduct and the damage".

The term "direct causation" means that there is no intermediary between the action and the resultant damage. This can be fittingly analysed where one tortfeasor performs one isolable act. But in case of several actions of multiple tortfeasors the idea of direct causation fails. Neither Ukrainian legislation nor legal doctrine provide any official recommendations. The High Commercial Court of Ukraine in the Elucidation N 02-5/215 from 01.04.1994 on some questions concerning the practice of deciding claims for compensation for damage advised to judge every case individually and to analyse causation considering all facts of the case.

The approach of the PETL could be helpful for Ukrainian legal practice in terms of conducting analyses of causation. The main concept of causation used in the PETL is "Conditio sine qua non". Article 3:101 states that "an activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred". Subsequent articles of the PETL provide recommendations for cases of multiple activities of several tortfeasors. There are provisions about concurrent causes, alternative causes, potential causes and uncertain partial causation in the PETL.

Concurrent causes mean that in case of multiple activities, where each of them alone would have caused damage at the same time, each activity is regarded as a cause of the victim's damage. Alternative causes take place in case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it. In this case each activity is regarded as a cause to the extent corresponding to the likelihood that it may have actually caused the victim's damage. Potential causes is a rule applicable where an activity has definitely and irreversibly led the victim to suffer damage, and it would appear that a subsequent activity which alone would have caused the same damage is to be disregarded. That subsequent activity is nevertheless taken into consideration if it has led to additional or aggravated damage. And in the case of multiple activities, when it is certain that none of them caused the entire damage or any determinable part thereof, those that are likely to have minimally contributed to the damage are presumed to have caused equal shares thereof (uncertain partial causation).

One more aspect the prerequisites of tort liability are understood differently in Ukrainian law and in the PETL concerns fault. Traditionally, Ukrainian tort law has understood fault as a psychological relation of a tortfeasor to his tortuous conduct and damage caused. When a tortfeasor realizes the danger of his or her conduct and desires to cause damage or envisages its possibility, fault is qualified as intent. Negligence is a type of fault when the tortfeasor does not have an intention to act illegally and to cause damage. Despite criticism, the psychological

concept of fault remains the leading concept in Ukrainian legal doctrine. The psychological relation is analysed both in cases of a natural person tortfeasor and a legal entity tortfeasor. The final part of judicial reasoning involves analysing the psychological relation between the direct tortfeasor (employee or constructor) and the legal entity that takes responsibility for them (vicarious liability).

The Principles of European Tort Law provide a different meaning of fault based on an objective standard. Fault means not a psychological (internal) relation but a breach of the "required standard of conduct". Article. 4:102 of the PETL states that the required standard of conduct is that of a reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of damage, the relationship of proximity or special reliance between those involved, as well as availability and the costs of precautionary or alternative methods.

The understanding of fault via the required standard of conduct suits civil law better than the subjective concept. Civil law, unlike criminal law, is devoid of a mechanism to prove fault as a psychological, internal relation. So judges in civil cases may operate merely upon objective facts and standards.

As a conclusion, we could state that the PETL, as any other soft law instrument, does not pretend to be an ideal regulator of any relationships of a particular kind. But the document provides some general rules, based on the sum of European experience, both current and past. Therefore, the PETL ought to be taken into consideration by both the EU Member States and the Associated Countries, including Ukraine.

Obviously, it should be noted that approximation of Ukrainian laws to the EU laws is not a goal in itself. This is a process that, in fact, defines the priorities and competence of the government and executive bodies to create prerequisites required for the full membership of Ukraine in the EU and ensure an internal integration process.

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Summary

Ukraine has chosen its way of development towards Europe, European values and respect for human dignity and human rights. The signing of the Association Agreement

in 2014 obliged Ukraine to harmonize its legislation in priority spheres of life with the legislation of the European Union. But legislative approximation should touch not only upon the fields of public law, but private law too and, in particular, tort law. The main problem of tort law approximation is that there are no joint tort rules in the EU. All attempts to harmonize tort law stopped at the creation of acts of "soft law" – general non-binding rules and principles. One of the most significant examples is the PETL – the Principles of European Tort Law. The PETL show a modern understanding of torts, spell out the conditions of tort liability, as well as other relevant requirements. Ukrainian rules of tort law do provide protection of a victim's violated rights, however some recommendations of the PETL, such as provisions governing the conditions of tort liability, the understanding of causation and fault should be taken into account when Ukrainian tort law is modernised.

BIBLIOGRAPHY

Брагинский М. И., Витрянский В. В. *Договорное право. Общие положения*. – М.: Статут, 1997

Ващенко Ю. В. *Адміністративно-правовий статус енергетичного регулятора в Україні: сучасний стан та перспективи реформування у контексті європейської інтеграції*: Монографія. – К.: Юрінком Інтер, 2015

Європейський проект та Україна : монографія / А. В. Єрмолаєв, Б. О. Парахонський, Г. М. Яворська, О. О. Резнікова [та ін.]. – К.: НІСД, 2012

Иоффе О. С. *Избранные труды*: в 4 т. / О. С. Иоффе. – СпБ.: Юридический центр Пресс, 2004. – Т. 3: Обязательственное право

Koch B. A., *The "European Group on Tort Law" and Its "Principles of European Tort Law"*, "The American Journal of Comparative Law" 2005, Vol. 53, issue 1

Колодій А. М. *Принципи права України*: монографія / А. М. Колодій. – К.: Юрінком Інтер, 1998

Матвеев Г. К. *Основания гражданско-правовой ответственности* / Г. К. Матвеев. – М.: Юридическая литература, 1970

Муравйов В. *Гармонізація законодавства України з правом Європейського Союзу в рамках Угоди про асоціацію між Україною та ЄС* / В. Муравйов, Н. Мушак // Віче. – № 8. – 2013

Новицкий И. Б., Лунц Л. А. *Общее учение об обязательстве*. – М.: «Юридическая литература», 1950

Отраднова О. О. *Проблеми вдосконалення механізму цивільно-правового регулювання деліктних зобов'язань*. Монографія. – К.: Юрінком Інтер, 2014

Snyder F., *Soft Law and Institutional Practice in the European Community*, (in:) S. Martin (ed.), *The Construction of Europe: Essays in Honor of Emile Noel*, Dordrecht 1994

Харитонов Є. О. *Україна – Європа: проблеми адаптації у галузі приватного права*: монографія. – Одеса: «Фенікс», 2017

Чернишова Н. В., Володько М. В., Хазін М. А. *Кримінальне право України*. – К.: Наукова думка, 1995

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prawo ukraińskie, prawo czynów niedozwolonych, zbliżanie prawa, zasady, europejskie prawo czynów niedozwolonych, szkoda, związek przyczynowo-skutkowy, wina