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NON-PECUNIARY COMPENSATORY DAMAGES - COMPARATIVE LAW ASPECTS WITH SPECIFIC REFERENCES TO FRANCE AND ITALY

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Abstract: *The article briefly outlines the evolution of the non material damage concept in Romanian civil law as well as the conversion hereof in other states' legislation especially of France and Italy. This legislation adjunction is not at all random considering the fact that these are EU member states and share a common juridical patrimony inherited from Roman law. The article also presents the analyses of the European Guidelines drafted by the European Group on Tort Law, principles aiming for the harmonisation of European legislation in matters relating to tort. The article concludes with an assessment of national current regulation on compensation of non material damage.*

Key words: *tort liability, non material damage, damage/expense, moral, compensation*

1. A brief analysis of the evolution of the concept of non-pecuniary damage and its compensation in the Romanian civil law

The matter of delicts has undergone a complex evolution, forming multiple categories and legal institutions. Crimes, in general, were understood by the Romans as illicit deeds, "likely to affect the interests of the ruling class, sanctioned in principle by paying sums of money." (Molcuț & Oancea, 1997, p.314); the deeds were diverse and could generate various consequences" ... from material prejudices to injury or killing of people." (Brasiello, 1960, as cited in Molcuț &Oancea, 1997, p.314). Private crimes were formed in the process of changing the form of social organization, respectively from the gentile society to the political society, when the state took over the attributions of the community. (Maschi, 1962 as cited in Molcuț& Oancea, 1997). The gentile society applied the rule of retaliation, respectively, "if a person suffered a bodily injury, he/she was entitled to cause a similar evil to the perpetrator" (Molcuț & Oancea, 1997, p.314). Subsequently, until the political society, the parties had the opportunity to conclude an agreement according to which the victim waived harming the perpetrator in exchange

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for a sum of money that the latter paid to the victim (voluntary composition) (Molcuț & Oancea, 1997,p.315). The next stage is when the state intervenes and takes over the obligation of determining the amount with which the victim is to be compensated (legal composition) and the victim no longer has the opportunity to take revenge but only to accept the amount set by the state (second stage of the legal composition).

Among the old private delicts, the "iniuria" (outrage) occupied a special place, a word that "designates any unlawful action." (Huvelin, 1903 as cited in Molcuț&Oancea, 1997,p.322) ; "In a general sense, in the old law, iniuria is the delict of bodily injury, in a special sense, iniuria is the act of simple hitting" (Molcuț & Oancea, 1997, p.322).

In the feudal system, a distinction was made between public and private delicts. (Cazacu as cited in Eliescu, 1972, p.12). The era of transition from Feudalism to Capitalism (early seventeenth century) is marked by the "Caragea Legislation" and the "Calimach Code".

Quite comprehensive rules governing the principle of civil liability can be found in Caragea's Legislation (implemented in Muntenia September 1, 1818) and which established, in Chapter X point I, under the title Addition for *damage* (s.n.), a general liability principle, which is worded as follows: "Whoever knowingly, or unknowingly, or mistakenly harms the other, *is obliged to be liable for the harm (s.n.)*." … The damage, the reparation of which is due, may consist either in an injury to the claimant's work or animal *or even in a personal injury*. In the latter case, the compensation to which the perpetrator of the prejudicial act is to be obliged is equal to the amount necessary for the *remedy of the injury suffered by the victim*."(Ghimpa, 1946, p.35); the Calimach Code" enshrines… the unity of civil-tort and contractual liability-based on the illicit deed…" (Eliescu, 1972, p.16), both liabilities assuming the error.

The Civil Code of 1865, in art.998 and art. 999, regulated that the damage caused to another had to be repaired, by not distinguishing between the types of damages; for this reason the role of the legal literature but also of the doctrine was to interpret the legal provisions regarding the non-pecuniary damage, if the legal texts had or did not have in mind the compensatory damage. For example, one opinion showed that the provisions of art. 998 and 999 (of the Civil Code of 1865) gave the possibility to compensate the damage caused, including, *"regarding the rights inherent to the person."* (Cantacuzino, 1998, p. 417). With regard to the extent of liability, it has been shown that a full compensation of the damage caused without distinction between pecuniary and non-pecuniary damage is due*,* as the latter are likely to allow a monetary compensatory damage from the judges; following that, in case of delictual civil liability, the judge guiding himself "… only after finding a *violation as small as possible of the right of another* by exceeding the field of freedom of the perpetrator to any extent. … Although compensation of the damage caused must be *in full* in all cases, the sense of fairness still makes the judge's assessment more severe in case of an actual delict (which involves bad faith, deceit) than in case of a quasi-delict." (Cantacuzino, 1998, p.420-421).

A provisional definition of delictual liability can be found in the legal literature, as follows: "The delictual liability is the obligation of the one who caused *another a damage, through an extra contractual unlawful act* which is imputable to him, to compensate the damage thus caused." (Eliescu, 1972, p.7) and about the terms of

prejudice, damage, injury in an opinion the following are shown: ”The delictual civil liability defines *prejudice, damage or injury* as the negative pecuniary effects - also non-pecuniary to a certain conception - that a person experiences as a result of either the unlawful conduct of another person, either of a human act, of an animal or thing, or of an event that removes the delictual liability of the agent. Thus, the *prejudice* means to destroy or damage an asset, *or to injure a person in its physical composition or in non-patrimonial personal values inextricably linked to the person, such as honor, reputation, quality of intellectual author* (sn). In order to exist, the civil delict, necessarily presupposes a prejudice. In absence of an injury, the obligation to compensate cannot arise. The mere infringement of a person's right or interest, however legitimate, does not justify the arising of the right to compensation, if no injury was caused by such an infringement. This is what distinguishes civil reparation from criminal sanction. The principle is unanimously admitted in the legal literature and constantly enshrined in judicial or arbitral practice. "(Eliescu, 1972, p.90-91).

Other authors have noted that the essence of civil liability ”... is the duty to compensate. From this point of view, one can say, without error, that to be liable from a civil point of view means, in fact, *to compensate for the damage caused to another, and to compensate for a damage means, in a legal sense, to have civil liability*. "(Albu& Ursa,1979, p.25). The same authors specified that *“… non-pecuniary human values concern the law* only insofar as they enjoy the protection of the law, i.e. only insofar as they are regulated in the form of what we usually call subjective rights. In other words, subjective rights are the specific legal form that human values must take in order to be subject to the law." (Albu, & Ursa, 1979, p.71). The delimitation of the matter of civil wrongdoing from other matters leads an author to state that it includes ” ...all the facts that violate legal norms of a civil nature... Meeting all civil liability conditions requires reinstatement of the balance broken by committing the unlawful act. Ultimately, civil liability means *compensating for the damage caused by tort* or contractually generated." (Jugastru, 2017, p.130).

The legal literature has shown that "non-pecuniary damage" has been commonly referred to as "moral damage" (Albu, & Ursa, 1979, p.47), taking into account the criterion of the intrinsic nature of the damage. With respect to the terminological notions conferred over time by the Romanian civil law on the non-pecuniary damage, we have identified the use of terms such as "extra-patrimonial damage", "moral or non-material damage", or "non-pecuniary damage" as well as "moral damage” or "moral prejudice", as well as "personal non-pecuniary prejudice, damage” or “non-pecuniary personal injury". (Albu, & Ursa, 1979, p.48-49)

Provisions on the non-pecuniary personal injury we find in the Decree no.31 / 1954 (repealed by art.230 of the Law no.71 of 03/06/2011 on 13.06.2011) regarding the natural persons and legal persons that the authors Ioan Albu and Victor Ursa took into account in the analysis of the concept of non-pecuniary damage / moral damage, interpreting the expression "personal" as indicating "not the nature of that injury, but the value that is directly concerned (the human as an individual or as a member of an organized community) through this injury. "(Albu, & Ursa, 1979, p.51) .

The legal practice and also the doctrine, based on art. 998 and 999 Civil Code of 1865, admitted without reservations a compensation of any damage, though the non-pecuniary damage, leading to the legislative enshrining in the ”Romanian Criminal Code from 1936, which provided, by an express provision that the damages awarded to the injured party must always constitute a fair and complete reparation of the material and non-material damages suffered as a result of the offense and may be established in a lump sum, but may also consist of amounts paid periodically for a determined period of time, if it would satisfy the interests of the parties more equitably (art. 92 para.3) "(Turianu, 2009, p.177) until 1952 and after this year, the granting of compensations for moral damages were suppressed by the adoption by the Supreme Court of the Guidance Decision no. VII of December 29, 1952. (Collection of decisions for the years 1952-1954 cited in C. Turianu, 2009, p.180). The return to the granting of monetary compensations for moral damages was made after 1965 considering the numerous doctrinal works but also the solutions of the courts. (Turianu, 2009, p.184).

The new Civil Code capitalized on both the national case-law and doctrine, but also benefited from ”... the experience of recent civil law reforms implemented by other states (Italy, France, Canada, Quebec, the Netherlands, Spain) and the provisions of instruments of European and international law. " (Reason - Draft law for the implementation of Law no. 287/2009 on the Civil Code Retrieved from https://www.cdep.ro).

The monistic concept of regulating private law relations found in the new Civil Code is based on the models provided by the Italian, Swiss, and Dutch Civil Codes (Reason - Draft law for the implementation of Law no. 287/2009 on the Civil Code Retrieved from https://www.cdep.ro) and proceeds to establishing legal norms regarding the non-pecuniary compensatory damage. Thus, art. 1391 of the new Civil Code bears the marginal name of "Non-pecuniary compensatory damage". The provisions of art. 1357 para. (1) Civil Code do not distinguish with respect to the type of damage to be compensated. Consequently, it can be seen that they do not lead to the clarification of the previously mentioned issue, respectively on the exact delimitation of the concepts of non-pecuniary damage/moral damages, etc. but neither to establishing the concept of reparable damage.

2. A brief analysis of the evolution of the concept of non-pecuniary damage and its compensation in the French civil law

The drafters of the French Civil Code of 1804 include as a general principle of civil liability, a rule that can be applied indefinitely to certain requests. Bertrand de Greuille (1934) as cited in Mazeaud & Mazeaud (1934, p.48) states that all individuals are liable for their actions, being the first rule of the society, which shows that if an act causes harm to a person, whoever was at fault for causing the damage is held to compensate. H. Lalou (1928, p.1) states that the idea of civil liability appeals to the concepts of obligation and guarantee.

Professor R. Savatier (1939, vol.I, p.1) defines civil liability as the obligation that can revert to a person to repair the damage caused to another by his /her deed or by the act

of persons or things that depend on it. The illustrious civil law specialist said that the most frequent situations in the practice of the times were those that presupposed a mixed reparation, namely: partly in kind and partly in cash; they considered the need to compensate the damage caused to persons, showing that they had to cover the costs of medical treatment, reimbursement of expenses incurred in repairing or replacing the damaged or destroyed item, compensation of damage to a person's reputation, etc. The courts were the ones that had the obligation to verify the fulfillment of the conditions of compensation both in kind and in cash if two conditions were met, namely: the need for these costs for compensation in kind and the repair not to exceed the damage that can be compensated in kind (Savatier, 1939, vol. II, p.183). The French legislation of the time provided that it was for the judge to decide whether or not to make compensation in kind or not for the damage/injury caused. (Savatier, 1939, vol.II, p.183).

The illustrious master Savatier defines *moral damage* as any human suffering that is not caused by material loss, this damage can take extremely varied aspects consisting of physical suffering (damage that deserves special compensation in the name of pretium doloris) or moral pains that have various causes, the victim could have suffered as a result of damaging the reputation, offending the legitimate authority, injuring his/her modesty, violating his/her safety and tranquility, violating his/her self-esteem, damaging the integrity of his/her intelligence, hurting his/her feelings, etc. (Savatier, 1939, vol.II, p.101). The author presents a concrete case of normal, natural compensation of a moral damage in those times, as follows: insofar as the moral damage is reparable in kind, it has been shown that there is no reason to hesitate on its compensation in this way. For example, the perpetrator of a defamation could have been sentenced to compensation by adequate publicity for the damage caused. In practice, it shows that these measures lead to a financial impact that for example will need to be paid for the publicity of the compensation. Also in case of accident, in order to ensure the health of the victim, the perpetrator of the accident must pay a monetary compensation to the victim, if the latter has no income and considering that the protection of this "moral good" requires pecuniary expenses. It has been shown that there is a form of indirect compensation in money, which logically involves a moral damage. However, as soon as this phase is over, the material compensation for non-pecuniary damage gives rise to a serious difficulty in principle. (Savatier, 1939, vol. II, p.101). The author emphasizes that there can be no sign of equality between physical or moral suffering and a sum of money, but in order to support the previous affirmations he also indicates the solutions ruled by the French courts, in the sense that they did not hesitate to award compensation to the victim, seeking a balance, and not being able to speak of an equivalence, between this damage and the compensatory indemnity. He explains the possible conversion of a moral damage into pecuniary indemnity as follows: two ideas have guided the French case-law, says the illustrious professor, namely: compensatory satisfaction and private punishment (Savatier, 1939, vol.II, p.101); ideas that led to an undoubted influence on court decisions, both on the pecuniary assessment they make on the damage and on the non-transferability of the claim for compensation, respectively for filtering the reparable damages. (Savatier, 1939, vol. II, p.103).

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The modern French law contains the definition of the institution of delictual civil liability as "the set of rules that obliges the perpetrator of the damage caused to another to provide compensation to the victim." (Viney as cited in Boilă, 2014, p.28)

Currently, the French Civil Code regulates non-contractual liability in art.1240-1252 as follows: Chapter I. Non-contractual liability in general (art. 1240-1244); Chapter II. Liability for defective products (art.1245-1245-17); chapter III. Compensation for the ecological damage (art.1246-1252) (Annotated Civil Code, Update of the law reforming justice of March 23, 2019 and the pact law of May 22, 2019).

In this way, the current French Civil Code retains in art. 1240 ”Any act of the man who causes damage to others, obliges the one through whose fault it occurred, to compensate for it”, has its equivalent in the former art.1382 of the French Civil Code.

Implementation of a clear distinction between damages and prejudices is a growing concern of the lawyers. It was said about the bodily injury that, above all it is the attack committed against the physical integrity of the person being represented by injuries of different severity and for cause of death, equally. It was said that these prejudices naturally require compensation for the victim, and taking into account the cases that led to the death of the victim, it is better to be referred to as indemnity than compensation.

The French case-law retained other types of reparable prejudices with a personal nature and related to the physical or moral suffering of the victim, such as loss of amenity (Jourdain, 2010, as cited in Terré, Simler, Lequette, Chénedé, 2018,p.1016); sexual injury (Civ.2^{e},28 may 2008; 17 juin 2010 cited in Terré et al, 2018, p.1016), anxiety damage that may accompany bodily harm (Civ.1re,19 dec.2006 cited in Terré et al, 2018, p.1022) , material or economic injuries (Terré et al, 2018, p.1017), indirect injury (Crim.27 may 2014 cited in Terré et al, 2018, p.1019), distress (loss of affection)(Civ.2^{2}, 24 february 2005 cited in Terré et al, 2018, p.1024).

3. A brief analysis of the evolution of the concept of non-pecuniary damage and its compensation in the Italian civil law

The institution of civil liability emphasizes the element of unfair prejudice that was caused to the victim and reparable damages. (M.Franzoni, 2010, p.7)

For clarification purposes find below the provisions of art. 2043 of the Italian Civil Code: Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obliga colui che ha commesso il fatto a risarcire il danno." (Codice della responsabilità civile, 2017, p.3) that is, "any intentional or negligent act, which causes unfair prejudice to others, obliges the person who committed the act to compensate for the damage" and the provisions of art.2059 of the Italian Civil Code: Il danno non patrimoniale deve essere risarcito solo nei casi determinatti dalla lege" (Codice della responsabilità civile,

2017, p.647) i.e. “Non-pecuniary damage must be compensated only in cases determined by law"

This new view on the non-pecuniary damage includes compensation for damage to health, non-pecuniary damage and all other cases where the national law or a rule contained in the Treaty on European Union or a regulation expressly provides for non-pecuniary damage compensation.

It has been shown that it is difficult to attribute a semantic equivalence to the terms “repair” and “compensation” (M. Franzoni, 2010, p. 723-724).

The entire matter of non-pecuniary damages is limited to the provisions of art. 2059 of the Italian Civil Code specifying that, except in cases established by the law, the protection extends only to non-pecuniary damage caused by violation of the inviolable rights of the person recognized and guaranteed by the Constitution on the basis of the principle of minimum compensation due to the inviolable constitutional rights, provided that there is serious harm and prejudice and excluding the provision of compensations for minor, unnecessary damages. Thus, a picture of non-pecuniary damages that can be compensated, only if they are provided by the law has been created; the figure of these reparable damages may be represented by the biological damages aimed at compensating the damage of the psycho-physical integrity regardless of the patrimonial consequences derived from them; damages; existential damages - resulting from the harm of other interests inherent in the person who finds a constitutional guarantee - taking into account the criteria established by the "Milan tables".

4. Non-pecuniary damage compensation in accordance with the European Guidelines

Given the importance of delictual liability at European level, there was a need to establish guidelines governing the legal institution of delictual liability, principles that govern the European space by taking into account the intention to further develop a European private law. In this regard, the European Group on Tort Law has published the results of the comparative law research project on the principles governing the legal institution of civil liability in EU Member States. It was intended to take a first step towards a European civil liability law.

The European guidelines provided as a baseline departed from the obligation of each person to bear its own loss unless there is a legal basis for this obligation to be borne by someone else.

This general rule is resumed in Article 10:101 of the Principles of European Civil Liability Law as follows: damages consist of the payment of a sum of money intended to compensate the victim's damages. (European Tort Law, Principles of European civil liability law, 2011,p.43-44). The same article points out that, although damages have primarily a remedial function, they also have a preventive function.

A principle of civil liability is mentioned as the compensation in kind for the damage, a principle contained in art.10:104. The comments related to art.10:104 within the European principles indicate that repair in kind takes the form of compensation in kind which means that the responsible person must restore - as much as possible - the initial situation, the purpose of compensation being to place the injured party as best as

possible in the situation he/she would have had if the violation of the right, his/her interest had not taken place; in most cases money is an adequate form of compensation that will help the victim to repair his/her own injury in the right way. It has been estimated that in most cases the perpetrator of the damage will not be able to compensate the damage having neither the possibility, nor the competence, nor the desire to offer compensation in kind. (One example is the healing of the victim's bodily injury or the repair of the damaged object.) It is also highlighted that the money cannot provide an adequate remedy in cases of restoring the reputation of the defamed victim and that in such cases art.10:104 establishes the right to request compensation in kind. (European Tort Law, Principles of European civil liability law, 2011p.21).

The situation reported in the domestic judicial practice is also found in the European texts, which ascertain that in accordance with most European laws, the stated principles have led to the claim of the right to compensation in kind as a form of reparation for the damage suffered exceptionally, while compensation in kind in the form of an indemnity for the damages suffered has become the rule.

The general principles of civil liability under European private law in art. 2:101 provide a definition for reparable damages as those damages consisting of material or immaterial damage brought against a legally protected interest, while protection depends on their nature. It has been shown that the best protection is enjoyed in terms of life, bodily or mental integrity, human dignity and freedom. (European Tort Law, Principles of European civil liability law, 2011,p.21). Within the European principles we find rules regarding the bodily injury and rules regarding the case of the death of the victim. Thus art.10:202 provides that in case of bodily injury that includes injury to physical integrity and mental health leading to a recognized illness, the material damage must include loss of income, impairment of ability to make a living (even if it is not accompanied by loss of income) and reasonable expenses such as the cost of healthcare. In the event of death for persons who were dependent on the victim or who would have received care from the victim if the death had not occurred, they will receive compensation for the damage suffered up to the amount equivalent to this support. (European Tort Law, Principles of European civil liability law, 2011,p.230).

We note that the European principle provides that bodily injury also includes injury to mental health, which is repairable only to the extent that the type of injury suffered by the victim can be diagnosed, and attributed to a disease recognized by the medical standards. The comments of provisions 10:202 show that the article considers special rules for compensating the economic consequences of bodily injury also in the case of death of the victim, thus not for emotional injuries arising from this type of damage because, the authors say that these are the most common situations that justify the award of damages and therefore their assessment, a special importance being given to the rights protected by the law (respectively the right to life, health, etc.). Considering the degree of importance of the protected rights, it has been shown that the solutions must be fair and equitable for the injured party. (European Tort Law, Principles of European civil liability law, 2011,p.230-239).

The European principles also list the provisions of art. 10: 301 on the extra-patrimonial damage, which reveal that the violation of an interest can justify the compensation of the extra-patrimonial damage; these include cases where the victim has suffered bodily harm or even a violation of human dignity, liberty or an attack on other personality rights.(European Tort Law, Principles of European civil liability law, 2011,p.239).

Being aware of the few commonalities between e.g. bodily injury and violation of dignity, we intended to use an as general and comprehensive terminology, so that the compensation that can be awarded be seen as having an important function in providing comfort, relief for the victim's suffering, and for the affirmation of human dignity. This would also aim at sanctioning the misconduct. (European Tort Law, Principles of European civil liability law, 2011,p.241). We have noticed that for this compensation, indemnity should be aimed at sanctioning an inappropriate behavior, especially since in the comments of the text of art.10: 301 the authors show that punitive damages are excluded from these provisions. (European Tort Law, Principles of European civil liability law, 2011,p.245).

5. Instead of Conclusions

The amendments brought by the new Civil Code are welcome, especially regarding the non-pecuniary damage and its compensation, by introducing special regulations.

Regarding personal injury, we mention that the European trend is to establish a European law on personal injury according to the recommendations of the Council of Europe Resolution no. 75-7 of 14 March 1975 made to EU member states to take into account the 19 principles on compensation of damages caused by bodily injury and death.

Although the law-maker does not explicitly use the concept of bodily injury, in the legal texts it refers to compensations for the damage of bodily integrity or health; in this sense, see the provisions of art. 1387, 1391 Civil Code; the specificity of the bodily injury expressly resulting from the content of par. (1) of art. 1391 of the Civil Code.

In order to make use of the European guiding principles in the national internal legislation, we turned our attention to the provisions of art. 5 of the Civil Code, provisions stipulating that the norms of the European Union law apply as a matter of priority. Under the European Union law, the primary sources are considered to be treaties, regulations, decisions and directives. The opinions and recommendations are not seen as sources of law as they do not contain mandatory conduct. (Rebeca, 2019, p.17).

The European principles of delictual civil liability have not been embodied in a European directive so that their direct implementation in the national law has been left to the discretion of each Member State.

With respect to the reviewed subject, we show that since the Recommendations of the Council of Europe Resolution no. 75-7 of 14.03.1975 made to the EU member states to take into account the 19 principles caused by bodily injuries and death, no other specific recommendations have been identified so far.

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