

COMPENSATION FOR DAMAGE CAUSED BY OFFENCES AS THE WAY OF PROTECTION OF VICTIMS' RIGHTS (ON THE EXAMPLE OF UKRAINE): THE ECONOMIC AND LEGAL ASPECTS

Andrii Lapkin, Yaroslav Mudryi National Law University
Volodymyr Maryniv, Yaroslav Mudryi National Law University
Daryna Yevtieieva, National Academy of Law Sciences of Ukraine
Anton Stolitnii, Classical Private University
Andrii Borovyk, International University of Economics and Humanities
named after academician Stepan Demianchuk

ABSTRACT

***Purpose:** The article is devoted to the economic and legal aspects of compensation for damage caused by an offense using an example of Ukraine. The purpose of this scientific article is to determine the main ways and mechanisms of compensation to the victim of damage caused by an offense, as well as to find promising avenues for increasing the economic effect of such compensation.*

***Methodology:** The research methodology is based on the results of scientific studies of national (Ukrainian), and European scientists on the issues of compensation for damage caused by an offense. To substantiate the completeness and reliability of their own results, the authors used the method of dialectics, method of scientific synthesis and analysis, economic and legal modeling method, comparison method, method of forecasting and others.*

***Results:** The study allowed comparing different ways of compensation for damage caused by an offense, including voluntary and compulsory compensation based on a review of international standards, current legislation of Ukraine and some draft laws. As part of compulsory compensation the compensation for damage caused by an offense by means of a civil claim in criminal proceedings, as well as compensation for such damage at the state's expense were studied. Positive and negative aspects of each of the means of compensation for damage caused by an offense were analyzed. The obtained results shows that positive social and economic effect will have the model in which the state will guarantee victims full and timely compensation of damage caused by an offense by combining various means of compensation. This article draws a conclusion that the principle of compulsory compensation to the victim of damage caused by an offense should be incorporated into legislation, which will reflect the obligation of the State to provide full compensation for damage in each case of committing an offense.*

Keywords: Damage, Compensation for Damage Caused by an Offense, Victims of Offences, Criminal Proceedings, Compensation Mechanism.

INTRODUCTION

Crime has a significant negative impact on the economic situation of the country, society, and above all on those who have suffered from crimes. On the one hand, it causes material loss to victims of crime, destroys public relations, and violates the economic interests of the state. Thus, in 2018, 344 780 people suffered damage from crimes in Ukraine, among them 6 233 people succumbed. The total amount of material damage caused by the crimes (in criminal proceedings, in which the pre-trial investigation was completed) amounted to 8 800 246 075 UAH (about 275 million euros) (Law and Regulation, 2018). On the other hand, counteraction to a criminal offense requires significant expenses from the State Budget to finance law enforcement, judicial and penitentiary systems. In these circumstances, the scientific research of the problems of compensation for damage caused by an offense becomes the matter of topical interest.

Compensation for damage caused by an offense is also one of the most important directions of ensuring rights and legitimate interests of victims of criminal offenses. This issue should be considered as the most important component of the wider concept-the restoration of victim's rights, infringed by an offence. Through the ensuring the right to indemnity for damage caused by an offence, the state not only restores victim's rights infringed by an offence, but also rehabilitates the balance of social relations destroyed by an offence what has an appropriate economic effect.

The purpose of this scientific article is to analyze economic and legal aspects of compensation to victims of offences, to determine the main ways and mechanisms of such compensation, as well as to search for promising vectors to increase the economic effect of compensation for damage caused by offenses.

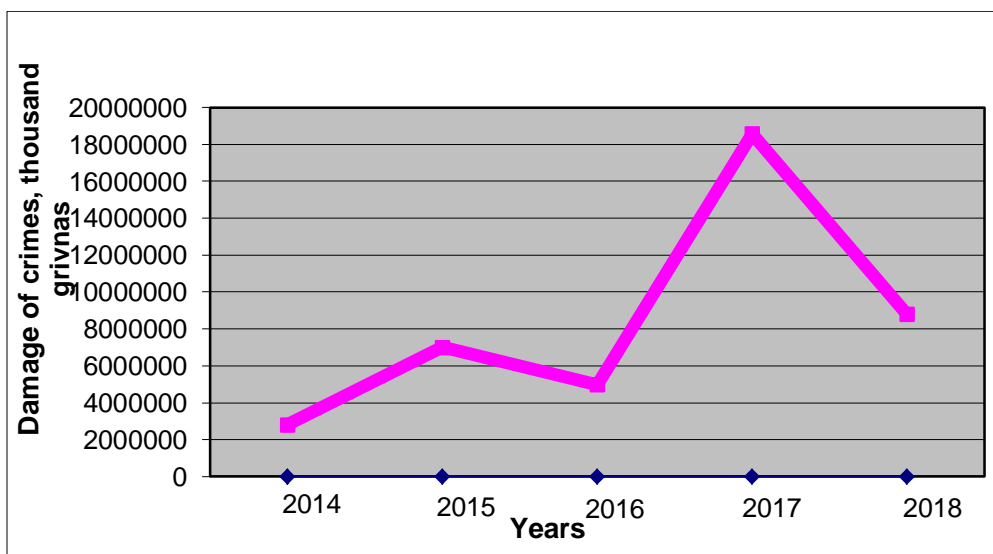


FIGURE 1
DYNAMICS OF CAUSING MATERIAL DAMAGE OF CRIMES IN UKRAINE
FOR 2014-2018

METHODOLOGY

In order to highlight this problem, a number of philosophical and general scientific research methods were used. In particular, the method of dialectics was used to find out the essence of compensation for damage caused by an offense and its connection with other legal and economic phenomena. The normative-dogmatic method was used in the study of the content of the most important European legal acts on the issue of compensation for damage to the victims of offenses. The economic and legal modeling method provided an opportunity to construct the optimal system for compensation for damage caused by an offense. Comparison method made it possible to compare economic efficiency of various approaches to compensation for damage caused by an offense. Method of forecasting was used for formulating a vision for the prospects for improving the system for compensation for damage caused by an offense.

The International Standards of Compensation for Damage Caused by an Offense

The indicated issues were broadly reflected in the international legal acts. In particular, one of the first internationally recognized documents on the protection of victims' rights-the European Convention on the Compensation of Victims of Violent Crimes of November 23, (European Convention, 1983) was dedicated to these issues. In particular, this act enshrines that when compensation is not fully available from other sources the State shall contribute to compensate: (1) those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence; (2) the dependents of persons who have died as a result of such crime. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished (Article 2). Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalization expenses and funeral expenses and as regards dependants, loss of maintenance (Article 4).

The main international act in the area of protection of victims' rights-the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of November 29, (Law and Regulation, 1985) contains separate sections on restitution and compensation for damage caused by an offense. In particular, it is noted that under appropriate conditions offenders or third parties responsible for their behavior should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights (paragraph 8). In cases when compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation (paragraph 12). It also encourages establishment, strengthening and expansion of national funds for compensation to victims (paragraph 13).

In addition, the Recommendation (1985) 11 of the Committee of Ministers recommended to its Member States to make every effort to ensure compensation to the victims and to impose the performance of this task on police authority, the prosecution or prosecuting authorities and the courts (paragraphs 2, 5, 9-14). Recommendation R (1987) 18 concerning the Simplification of Criminal Justice emphasized that victims should be provided with the possibility of obtaining compensation through formal or informal legal procedures, and compensation for damage to the victim may be due to refusal of criminal prosecution, etc.

The Ways of Compensation for Damage Caused by an Offense

Based on the analysis of the world practice, two main ways of compensation for damage caused by an offence can be distinguished, according to the source of reimbursement: (1) at the expense of the person who committed an offense or the persons who are responsible for his/her actions; (2) at the state's expense.

Conventionally, the first approach is approved in the majority of countries, since it is most desirable for the state in economic and socio-educational terms. On the one hand, the state does not bear additional financial expenses for the compensation for damages caused by an offense, and on the other hand the perpetrator undergoes certain restrictions in his well-being because of the compensation, which is the manifestation of his (her) responsibility. Two forms of compensation are possible: voluntary compensation for damage caused by a crime and compulsory compensation.

Voluntary compensation for damage caused by an offense is an optimal method of resolution of a criminal-legal conflict, since in this case the offender independently, without government coercion, restores the victim's financial situation, which has been violated by an offense. This facilitates the work of official agencies and individuals who conduct criminal proceedings. Due to this, the state does not spend extra money to collect such compensation, which results in positive economic effect. The main problem is how to ensure the expansion of the practice of voluntary compensation, since its implementation and scope depend entirely on the will of the perpetrator of the crime. The compulsion method is not applicable in such situations, since it means that compensation ceases to be voluntary. Therefore, the state can influence the perpetrator only by means of the method of persuasion, providing him certain advantages of positive post-criminal behavior. Aware of this, the state must support and encourage the voluntary compensation of damage by means of institutional, material, legal and procedural mechanisms.

Thus, Article 127, Paragraph 1 of the Code of Criminal Procedure (hereinafter referred to as the CPC of Ukraine) provides that the suspected, the accused, as well as any other natural or legal person with the consent of the former, has the right to compensate damage caused to the victim, the territorial community, the state as a result of the criminal offenses at any stage of criminal proceedings (Legislation of Ukraine, 2001). At the same time, the law encourages voluntary compensation for damage caused by a criminal offense by means of criminal-legal institutions of exemption from criminal liability (Articles 45 and 46 of the CPC) and commutation (Article 2, Article 66 of this Code) (Criminal Code of Ukraine of April 05, 2001). In addition, the victim and the suspected (the accused) can conclude an agreement on reconciliation, the mandatory condition of which is compensation for damage caused by a criminal offense (Article 471 of the CPC of Ukraine). These arrangements are binding on the court when the deciding on the sentence. An investigator, a prosecutor and a court are obliged to inform the suspected (accused) and the victim of their right to reconciliation, to clarify the mechanism for its implementation and not to put obstacles in their way. They should also explain to the suspected, accused the benefit of voluntary compensation in other cases.

A Civil Claim in a Criminal Proceeding

Among the means of mandatory compensation for damage in criminal process of Ukraine and other post-Soviet states, the most widespread is the presentation and consideration of a civil claim in criminal proceeding. According to Article 127, Paragraph 2 of the CPC of Ukraine, the

damage caused by a criminal offense or other socially dangerous act, may be recovered by a court decision on the results of consideration of a civil claim in a criminal proceeding. The right to file a civil claim against a suspected, an accused or a natural or a legal person who is legally responsible for the damage caused by him (her) has a person who has suffered material loss and/or moral damage by a criminal offense or other socially dangerous act. To protect the interests of minors and incapacitated or physically disabled persons, civil claim may be filed by their legal representatives. A civil claim in the interests of the State is filed by the prosecutor.

A civil claim is a form of statement of claim for compensation for damage caused by an offense, which is subject to the provisions of civil and civil procedural law, since the civil claim in a criminal case retains its civil-procedural nature (Mazalov, 1977). The very possibility of a joint consideration of a civil claim and a criminal case is appeared to be in the presence of a single legal fact, which underlies the prosecution of a person for criminal and civil liability in cases when an offense caused material loss or moral harm (Klymenko, 2003). As Bozhev correctly points out, in comparison with an option compensation of damage as part of civil proceedings, consideration of a claim simultaneously with a criminal case has a number of advantages for both a victim and a court: saving of funds for the proceedings; exemption of claimant from payment of State duty; the presence of favorable conditions for a more complete and rapid proof of a claim and the identification of persons obliged to bear responsibility; availability of more effective means for ensuring the appearance of the defendant in court; the possibility of faster compensation for damage, etc. (Bozhev, 2004). Therefore, the institution of civil claim in criminal proceedings is more convenient for parties and cost-effective variant of the application for compensation for damage caused by an offense than the usage of procedures of civil proceedings, which are typical for compensation for damage.

To determine the amount of damage to be recovered through a civil claim in criminal proceedings, one should proceed from the assumption that such a connected process must guarantee the victim an option of compensation for damage caused by an offense in the amount he could obtain in civil proceedings, otherwise the existence of this institution in the criminal process would be ineffective (Hoshovskyi, 1997). Thus, it is necessary to include to this amount: actual direct damage, loss of profit, costs beard by the injured party in connection with his involvement in court proceedings (Neskorodzhena, 2002), and the expenses for the restoration of victim's rights (the value of medical, social, legal aid etc.), as well as compensation for moral damage of a special and personal nature. According to the views of researchers, the subject matter of a civil claim includes the following circumstances: an offence which caused damage; the existence of damage caused to a person; cause-and-effect link between a crime and damage; the culpable of an injurer; the existence of circumstances, excluding the possibility of applying for a civil claim; negative behavior of the victim; the amount of damage; a victim and a person who bears responsibility for the civil claim (Vashchuk, 2007).

It is important to note that the success of civil action does not mean restoration of victim's financial situation, infringed by an offense, since property rights may be considered as restored only after full reparation. Meanwhile, the securing of the latter becomes of particular importance, considering that due to enforcement of judicial decisions victims often don't get the sum of compensation, set in the verdict (Kuchynska, 2009). It is connected with unsatisfactory functioning of the system of enforcement of judgments, which was acknowledged by the European Court of Human Rights in its judgments in cases *Ivanov v. Ukraine* of October 15, 2009 (Legislation of Ukraine, 2009), and *Burmych and Others v. Ukraine* of October 12, 2017 (Legislation of Ukraine, 2017). Therefore, the state must assume additional guarantees for

prompt and full implementation of court decisions in terms of compensation for damage caused by an offense.

At the same time, in a number of cases, problems arise when recovering damage caused by an offense through a civil claim in a criminal proceeding. First of all, this occurs in cases of closure of criminal proceedings, which is very widespread in Ukraine. For example, in 2018, according to official statistics of the General Prosecutor’s Office of Ukraine, 429 626 criminal proceedings of 916,759 criminal cases initiated were closed at the pre-trial investigation, which is almost one-half (Law and Regulation, 2018). In such cases, the victim loses an option to claim compensation within the framework of criminal proceedings and has to bring a civil claim in the general way of civil proceedings.

In addition, a significant part of criminal proceedings (from those remaining after closure) is not subject to judicial review for various reasons and are not resolved in substance, which makes it impossible to consider a civil claim. Thus, in 2018, only 173,257, or 35% criminal proceedings came to courts with the indictment of the total number of 487,133 criminal proceedings in which a pre-trial investigation was conducted (Law and Regulation, 2018). Of these number, the courts passed sentences in 79 472 criminal proceedings (about 46%) (Law and Regulation, 2018). The total sum for which civil claims were filed in these criminal proceedings is 2343011000 UAH (about 73 million euros), which is only 26% of the total amount of damage caused by criminal offenses in 2018 (Law and Regulation, 2018).

Official statistics does not record, how many civil claims for compensation for damage caused by an offense were granted in criminal proceedings. According to data from 2017, 374 238 individuals were victims of crimes in Ukraine, whereas only 6.7 thousand of enforcement orders on the compensation for damage caused by offences with a total value of 297920000 UAH (about 9300000 euros) were issued by courts (Law and Regulation, 2018). Thus, in most of the criminal proceedings, victims do not receive compensation for damage caused by an offense with the aid of the criminal justice system.

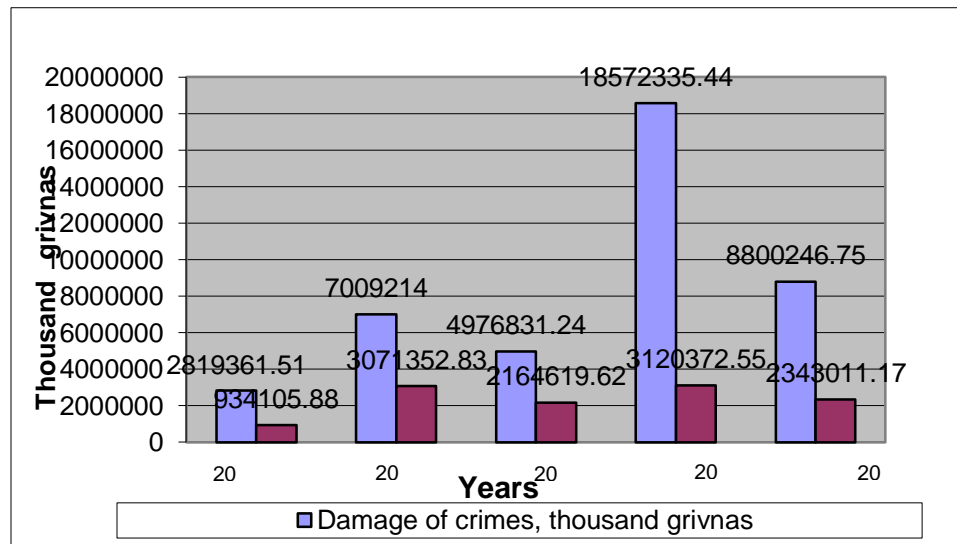


FIGURE 2
CORRELATION BETWEEN THE AMOUNT OF THE DAMAGE CAUSED BY
CRIMES AND THE AMOUNT CLAIMED FOR CIVIL ACTIONS (WITHOUT MORAL
HARM)

Compensation at the State's Expense

In this situation the compensation for a victim of an offense at the State's expense becomes increasingly important. The basis of this approach is the idea that if the State is unable to protect its citizens from criminal offenses and to force those, who have caused it to compensate damage, the State should compensate for damage by itself.

As it was noted above, the compensation for damage at the State's expense is recognized internationally the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the European Convention on the Compensation of Victims of Violent Crimes (European Convention, 1983; Law and Regulation, 1985), the Recommendations of the Committee of Ministers of the Council of Europe). In addition, an option of the compensation for damage at the state's expense is provided in many foreign countries: in Germany, where the relevant Law on the Compensation of Victims of Violent Crimes was adopted on May 11, 1976; in France (Articles 706-3-706-13 of the Criminal Procedural Code of France), in Great Britain, New Zealand, Australia, Canada, the United States (Section 18 USC § 3664 of the United States Code of Law, the Law On Victims of Crime of 1984) and others.

The legal preconditions for its implementation in Ukraine are already laid. The Civil Code of Ukraine states that property damage caused to the property of an individual as a result of a crime (Article 1177), as well as damage caused by injury, other kind of damage to health or death caused by an offense (Article 1207), is compensated at the State's expense, if the person who committed an offense is unknown or if he (she) is insolvent (Law and Regulation, 2003). According to Article 127, Paragraph 3 of the CPC of Ukraine, damage caused to a victim as a result of a criminal offense is compensated to him (her) at the State's expense at the cost of the State Budget of Ukraine in cases and in the manner prescribed by law.

It is worth paying attention to the fact that the provisions of the national legislation of Ukraine stipulates wider obligations of the State regarding compensation than the Convention, which enshrines such compensation only in case of intentional violent crime, which has caused serious damage to the physical condition or health of the victim or his (her) death. According to experts' opinion, European countries, the overwhelming majority of which have more powerful economy and, consequently, better financial and budgetary capabilities than Ukraine, however, are very cautious about the issue of assuming obligation to compensate for the damage that their citizens have suffered as a result of committing offenses. Such an approach in present circumstances is more justified for Ukraine as well. It will be better if the State assumes fewer responsibilities in this matter, but performs them completely (Law and Regulation, 2010).

We agree with this opinion and believe that the normative regulation of the issue of compensation for damage caused by an offense at the State's expense should be carried out after the comprehensive financial and economic analysis of the State's ability to fulfill such obligations. However, such a regulation is necessary, since victims of offenses have not received any state compensation for damage for many years, despite the state-enshrined guarantees. At the first stage, it should be damage caused to person's life and health as a result of intentional violent crime. At the same time, the State should strive for the gradual guarantee of full compensation for damage in all categories of crimes.

Despite the signing of the European Convention on the Compensation of Victims of Violent Crimes in 2005, Ukraine has not yet ratified this document. At the same time any special law on compensation for damage at the State's expense was passed, although draft laws on these issues have been repeatedly submitted to the Parliament. As of the end of 2018, the Ministry of Justice of Ukraine announced the drafting of three bill: the Draft Law of Ukraine On ratification

of the European Convention on the Compensation of Victims of Violent Crimes, the Draft Law of Ukraine On Compensation for Victims of Intentional Violent Crimes, as well as the Draft Law On amendments to the Budget Code of Ukraine, which provides for the creation of a State Fund for compensation for damage for victims of offenses. The bills envisage compensation for victims for such kind of losses: loss of income which is the result of significant damage to victim's health caused by an intentional violent crime; expenses for treatment, rehabilitation, purchase or reparation of all necessary auxiliary means for normal human activity and expenses for burial. However, presently there is no information on the prospects for their adoption.

According to researchers' opinion, the issue of compensation at the State's expense should be removed from criminal justice. The special agency with field offices should be created instead, which competence would be exclusively the issue of compensation for damage caused by an offence at the State's expense starting from consideration of appeals to the reimbursement at the State's expense (Fedorchuk & Nor, 2009). The institutional mechanism by means of which it is possible to provide compensation for damage caused by an offence at the state's expense is the establishment of a trust fund. The similar are currently successfully operating in many countries, particularly in Mexico, Germany, Norway, Poland, the USA, Finland, France, and others. Such a fund should accumulate funds and direct them to pay compensation to victims of offenses.

At the same time, the most problematic issues are, clearly, financial and economic factors, which is to find the sources of funds necessary for this aim. Taking into account the budget deficit in Ukraine, it is advisable not to form such a fund by means of taxes, customs duties and other main sources of filling the State budget, but using additional sources. Experts consider such kind of sources: fines collected from persons convicted of criminal cases; confiscation of property; fines for administrative offenses; court fees; wage withholding from convicts; charitable contributions; bails converted into State revenue and other (Fedorchuk & Nor, 2009). In particular, just in 2017, 326 300 people were fined by courts for a total amount of 2353677000 UAH (about 76 million Euros) through administrative proceedings (Law and Regulation, 2010). This amount appears to be sufficient to compensate victims of intentional violent offenses. Thus, the source of filling of the relevant fund can be the state justice system provided that the targeted use of costs for compensation for damage caused by an offense is adhered.

At the same time, State's expenses for compensation to victims of offenses may be partially compensated by persons who have committed a crime. In this context, it is important to note that compensation at the State's expense cannot be considered as social assistance for victims. It is more reasonable to consider it as subsidiary material responsibility, which involves the simultaneous acquisition of the right to bring a recourse claim (Fomenko, 2006). For that law enforcement agencies should intensify their efforts to define the perpetrator and property belonging to him (her). To such property sanction should be applied in the amount of compensation paid to the victim of an offense and the accompanying expenses of the State. As a result, a burden of reparation should be imposed on those responsible for crimes.

According to the study, the issue of compensation for damage caused to the victim is regulated differently in each country in accordance with particular situations of criminal proceedings. In forming the universal mechanism for compensation for damage caused by a crime one should take into account the best experience of foreign States, as well as the practice of the European Court of Human Rights. It is necessary to introduce amendments and supplements to the Criminal Procedural Code of Ukraine, to form a comprehensive legal

institution on compensation for damage caused to a victim, which will take into account the norms of criminal procedural law and other areas of legislation, as well as provisions of international treaties, ratified by Ukraine.

CONCLUSION

To sum up, it must be acknowledged that generally the state of compensation for damage caused to victims is extremely unsatisfactory in Ukraine. As the researchers rightly point out, basically there is no completed, effective compensation mechanism in Ukraine (from an enacted judicial act to a real restitution) (Holina, 2007). Therefore, the solution of the problem of compensation to a victim for damage caused by an offence requires a conceptual unity of legislative regulation of these issues and the enshrinement of an appropriate organizational mechanism. We propose to solve these problems by means of implementation of the main forms of compensation in the criminal procedural law: voluntary, compulsory and at the state's expense. Further, it seems appropriate to associate all these forms solely with the task of full observance of the victim's right to compensation. Accordingly, it should be foreseen as a general rule that if damage is caused to the victim, the latter will have the right to claim compensation, which should be considered as the only reason for compensation by means of all existing and potentially possible forms of compensation. The person's right to make a claim should be clarified simultaneously with granting of the victim status. The specified victim's right should be considered as having cross-cutting nature: in case of failure to satisfy this claim within one of the forms, it passes to the other and so on, up to the full compensation of damage caused by an offence and restoration of victim's rights.

At the same time, compulsory compensation to a victim of an offense should be enshrined in legislation as a fundamental principle, which will reflect the fact that damage will be compensated in each case and in full. Therefore, it is totally fair that if an ineffective activity of the state agencies facilitates the commission of a crime, and then these bodies fail to solve a crime or to collect damage from the perpetrator, the state will compensate for the damage.

Ensuring the completeness and timeliness of compensation for damage caused by an offense will have a positive social and economic effect, as it will help to eliminate social conflict caused by an offense, negative material consequences of an offense and will allow the State to approach the organization and functioning of law enforcement and judicial systems more rationally and responsibly so that they could grant compensation for damage at the perpetrators' expense.

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