КОНСТИТУЦИОННОЕ И МУНИЦИПАЛЬНОЕ ПРАВО

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THE CONCEPT OF THE HUMAN RIGHT TO LEGAL PROTECTION

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SUMMARY

The characteristics of "Legal protection" and it's definition are brought out in the article. The definition of the subjective legal right of everyone to legal protection has been formulated. The concept of legal protection of human rights is specified – a jurisdictional law enforcement activities of state agencies, local governments, non-governmental organizations authorized by the state, aimed at the use of such types of state coercion as a remedy, legal liability, prevention or termination of right violations. At the article is clarified the term "Right of everyone to legal protection as a subjective legal right": it is enshrined by law and guaranteed by state the possibility of use in the process of national law applying jurisdictional activity of state agencies, local governments, non-governmental organizations authorized by state action to apply these types of state coercion as a restoration of the right, legal liability, prevention or termination of law violations.

Key words: legal protection, subjective legal right of everyone to legal protection.

АННОТАЦИЯ

В статье рассматриваются дискуссионные в юридической литературе вопросы признаков правовой защиты, соотношения понятий «правовая защита» и «правовая охрана». Методологической основой проведенного научного исследования стали общие методы научного познания, а так же методы, применяемые в юридической науке: анализа и синтеза, формально-логический, сравнительно-правовой, статистический и другие. В статье уточняются существующие в юридической науке признаки и определение понятия «правовая защита», выявлены структурные элементы субъективного юридического права каждого на правовую защиту, формулируется понятие этого субъективного юридического права.

Ключевые слова: правовая защита, субъективное юридическое право каждого на правовую защиту.

Formulation of the problem. Today in post-Soviet countries at the forefront the public human rights protection movement came out [1, p. 3]. This movement marked by the emergence of an active human rights NGOs, the value of which is undoubtedly significant. For example, in March 2014 the department of civil society development strategies of the National Institute for Strategic Studies under the President of Ukraine said: "The function of human rights protection in Ukraine is performed, in addition to government bodies, by the institutions of civil society (NGOs and movements, the media, etc.), making it "instead of" or even "against" the actions of public authorities, including – of law enforcement ones. Impact of NGOs on human rights sphere and the degree of "permeability" of their control, of course, are much lower than that of government, but the effect obviously tends to increase. Non-governmental human rights organizations, first, provide the assistance that can not be fully provided by public, social institutions, governmental human rights organizations, Parliament Commissioner for Human Rights, the justice authorities. Second, the non-governmental human rights organizations exercise public control and influence on the implementation of state policy in the sphere of human rights protection. It is noticeable that there is request for such activities at Ukrainian society. Thus, according to a survey conducted in May 2013 by the Fund "Democratic Initiatives" and the Razumkov Center, 57.4% believe that public organizations should first deal with the protection of vulnerable groups, 49.7% – to provide people legal and other assistance in defending their rights, 45.5% – to control the activity of powers, etc" [2].

Thus, now the concept of "legal protection" of human rights and fundamental freedoms, human rights activity is associated with the activity of non-state actors. It is called into a question even the "legitimate use of force in rights protection". Moreover, if earlier, scientists have stressed that, unlike law enforcement, the rights protection "excludes any compulsion" [3, p. 26–27], today it is a fact: it involves compulsion. At the same time, there is no doubt that the entire public (non-governmental) human rights activity mainly focuses on providing exactly state-legal protection. Consequently, the state-law can not be withdrawn from the concept of human rights or rights protection activity [4, p. 24].

The purpose of this article is to clarify the terms «legal protection», to formulate a definition of «the human right to legal protection».

Basic material. Article 13 of the Convention guarantees everyone the right to an effective remedy: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The European Court of Human Rights does not take its understanding of remedies exclusively to situations where the violation of subjective legal right has occurred. An example of this is the case "Jabari v. Turkey" of July 20, 2000 № 40035/98 [5]. In November 1997 the applicant escaped from Iran to Turkey because of fear of being condemned for adultery, a crime under the law of Iran, and be punished by stoning or flogging. The applicant was arrested at the Istanbul airport on the grounds that she had entered Turkey using a forged passport. She has not been charged in con-

nection with forged passport, but an order on her deportation was issued. Later the applicant lodged an asylum application, which was rejected by the authorities on the ground that the applicant did not submit it within five days of her arrival in Turkey. On 16 February 1998 the applicant was granted refugee status by the UNHCR. On 8 March 1998 the applicant lodged an application with the Ankara Administrative Court against her deportation. On 16 April 1998 the Ankara Administrative Court dismissed the applicant's petitions on the ground that there was no need to suspend her deportation since it was tainted with any obvious illegality and its implementation would cause irreparable harm to the applicant.

The applicant maintained that her removal to Iran would expose her to treatment prohibited by Article 3 of the Convention, which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

She urged the Court that she did not have an effective remedy under Turkish law to challenge the deportation, hence violation Article 13 of the Convention took place. The Court noted that in view of the fact that Article 3 enshrines one of the fundamental values of a democratic society and contains an absolute prohibition of torture and inhuman or degrading treatment or punishment, the application of a person who claims that his or her deportation to a third country may threatened his or her with behaviour prohibited by Article 3 should definitely be checked carefully. The Court was not convinced that the authorities of the respondent State conducted any full assessment of the applicant's statements, including their controversial nature. It appears that non-compliance with the registration requirements within five days according the Regulation on Asylum of 1994 deprived her of checking the actual causes of her fear of being returned to Iran. According to the Court, the automatic and mechanical application of such a short time limit for filing an asylum application should be regarded as contradicting the protection of the fundamental rights enshrined in Article 3 of the Convention.

The Court noted that in respect of the categories of cases which addresses the issue of the right not to be tortured, public authorities must implement an independent and in-depth analysis of individual applications about a possible violation of the law, and therefore the Court held that judicial validation mechanism Mrs. Jabari's application of not meets the requirements Article 13 of the Convention.

Therefore, the Court includes in the concept of legal protection preventive measures. In the Court's decision in the case of "Merit v. Ukraine" dated March 30, 2004 [6] the Court included terminating (stopping) remedies in the concept of "legal protection". According to circumstances of the case the applicant was under investigation for a long time, during which the applicant was held as a defendant, which significantly limited his legal status. In accordance with Article 6 paragraph 1 of the Convention the applicant complained on the unreasonable duration of the criminal proceedings against him. He also complained about the lack of effective remedies in respect of his complaint as required by Article 13.

The Court reiterates that Article 13 guarantees an effective remedy before a national authority in the case of violation of the provisions of Article 6, paragraph 1, with respect to the proceedings within a reasonable time (decision in the case "Kudla v. Poland", № 30210/96 [7]).The Court reiterated that the remedy is "effective" if it can be used either to accelerate the Court's decision in the case, or to provide appropriate compensation to the applicant for the delay, which was made.

Thus, the Court concluded that there was a violation of Article 13 of the Convention in this case because of the lack of effective and available remedies in domestic legislation in respect to the applicant's complaint about the duration of the criminal proceedings.

Hence the legal position of the Court is that a legal remedy considered to be effective if it is aimed at:

a) the acceleration of the trial or

b) to receive compensation for already committed delay in the proceedings.

Consequently, the requirement for interdict legal remedies in national law enforcement is a priority. In some of his other decisions the Court noted that preventive protection is a necessary component of legal protection emphasizing that this preventive protection applies when a violation has actually not happened, but there is real threat that it will be held [4, p. 78–80].

Article 55 of the Constitution of Ukraine guarantees everyone the right to challenge in court the decisions, actions or omissions of public authorities, local governments, officials and officers. Everyone has the right, after the exhaustion of domestic remedies to seek protection of their rights and freedoms in the relevant international judicial institutions or the relevant bodies of international organizations, member or participant of which is Ukraine.

Article 16 of the Civil Code of Ukraine, developing the provisions of the Constitution of Ukraine defines the following methods of protecting civil rights: the recognition of rights; termination in violation of any law; recognition of the illegal decisions, actions or omissions of a public authority, its officials or officers.

Legal literature (O. Nalivajko, P. Rabinovich, T. Pashyk, ect.) emphasizes that these means belong to the group of ways to protect civil rights, the application of which can prevent or stop infringement. Thus, the concept of legal protection includes measures to prevent violations of rights or interests, and terminating measures. However, in the legal literature there is no consensus among scientists about the concept of "legal protection" and its relationship with the concept of "legal protection", as well as the content of these concepts.

T. Pashyk [4] explaining at Dissertation for gaining the scientific degree of candidate of legal sciences "Right for Effective State Protection of Human Rights and Freedoms" that according to S. Alekseev, protection of the right is a public-compulsory activities aimed at implementing the "restoration" of tasks, i.e. restoration of violated right, and enforcement of legal obligations [8, p.280]. Thus, it comes to restoring already violated human rights, and therefore protection is reduced solely to the restoration measures. At the same time, according to the scientist, this activity does not include any measure of legal liability as damages, moral damages. At the same time, in their decisions, the European Court of Human Rights has repeatedly stressed that the non-pecuniary damage is one of the necessary "elements" of legal protection. The scientist does also not take into account that protective measures of law, which is based on the public interest, are responsibility measures. Though they have different object – law order, rather than aimed at the protection of subjective rights, but they are measures of protection of law as it is other object. This point of view was dominant in the Soviet Union, where was a priority of society, which was identified with the state, and only after the public interest was a man with his subjective legal rights. Therefore, to ensure law and order at that time it was reasonable to use the term "protection" as a synonym for "defence" and fill the term "protection" is the legal meaning of the term "defence".

Thus, the appointment of "legal protection" is that to use it as a kind of coercion when a subjective legal human right has been violated.

According to some scholars on the legal protection of subjective legal rights only covers legal liability and excludes the

following types of state coercion as a warning and stopping (termination) [9; 10, p. 13–21]). Accordingly, these scientists narrow the range of measures which relate to legal protection that is not due to the including the prevention and termination to legal measure.

Thus, T. Pashyk [4] explaining that according to E. Gida "... all measures aimed at preventing violation of subjective rights and which correspond to the following types of state coercion as a warning and termination is a legal security but not legal protection". Hence preventive and terminative measures are not included into the legal protection as they take place before subjective legal violations of human rights and, unlike remedies, not aimed at the restoration of the right already violated". Thus, says the scientist E. Gida "defence includes measures applied before the human rights violation, and protection – after the violation" [11, p. 759].

Omission of preventive measures to legal defence precludes the "evolution" of the national legal system within the European legal space- L.Luts convinced. [12, p. 3]. This has repeatedly underlined for several years by the Committee of Ministers of the Council of Europe in the following documents annexed to the Recommendation of 12 May 2004, which, inter alia, the Committee of Ministers stated: "... the Court faced the problem of an increasing number of applications. This situation threatens the long-term effectiveness of the system and therefore requires immediate response of the contracting parties" [13], resolution [cm / resdh (2008) 1] to implement the decisions of the European Court of Human Rights in 232 cases against Ukraine concerning the failure or substantial delay in the implementation of the final domestic judicial decisions delivered against the state and its entities, and lack of effective remedy on March 6, 2008 [14], Intermediate decision of the Committee of Ministers of the Council of Europe on 300 cases concerning the failure to perform or delay in the performance of essential public authorities or public undertakings of final judgments of 8 June 2009 [15], etc.

According to the A. Anisimov, Human Rights is a complex of guaranteed by the state and the international community, organizational and legal measures that ensure the human right to a remedy and are designed to eliminate obstacles to the realization of human rights and restoration of violated rights and punishment culprits who are guilty in the violating [16, p. 113–114]. Thus, "elimination of obstacles to the realization of human rights" is possible not only in the order of legal protection, but also through the adoption of a legislative act, in the manner of enforcement, using the right interpretive activities.

Conclusions. The above analysis allows us to reach such conclusions:

1. The signs of legal protection are those:

1) types of coercion used: state-legal coercion in the form of recovery already violated law, legal liability, prevention, preclusion;

2) activity, during which it applies – jurisdictional activity;

3) conditions of use: subjective legal right already violated, or it has not yet broken, but there is a threat of infringement;

4) range of the competent authorities which are authorized to use coercion in the process of jurisdictional activity: state agencies, local governments, non-governmental organizations authorized by the state.

2. The concept of legal protection of human rights is specified – a jurisdictional law enforcement activities of state agencies, local governments, non-governmental organizations authorized by the state, aimed at the use of such types of state coercion as a remedy, legal liability, prevention or termination of right violations.

Right of everyone to legal protection as a subjective legal right is enshrined by law and guaranteed by state the possibility of use in the process of national law applying jurisdictional activity of state agencies, local governments, non-governmental organizations authorized by state action to apply these types of state coercion as a restoration of the right, legal liability, prevention or termination of law violations.

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