FEATURES OF CIVIL LAW GAURANTEES

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SUMMARY

The article describes different features of legal guarantees, particularly, civil law guarantees as actual behavior, especially as an interaction act with other members of civil relations (social connection), specific psychological processes that stand for the actual behavior, especially due to a source.

Key-words: features, civil guarantees, legal guarantees.

SUMAR

În articol sînt analizate particularităţile garanţiilor juridice, şi anume: particularităţile garanţiilor civile ca un comportament real; particularităţile ca un act de interacţiune cu alţi actori ai relaţiilor juridice (raportul social), particularităţile proceselor psihologice care determină comportamentul real; particularităţile determinate de sursă.

Cuvite-cheie: particularităţi, garanţii civile, garanţii juridice.

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У статті розглянуті різні особливості юридичних гарантій, а саме: особливості цивільно-правових гарантій як фактичної поведінки; особливості як акт взаємодії з іншими учасниками цивільних правовідносин (соціальному зв'язку); особливості психологічних процесів, що стоять за фактичною поведінкою; особливості, зумовлені джерелом.

Ключові слова: особливості, цивільно-правові гарантії, юридичні гарантії.

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В статье рассмотрены разные особенности юридических гарантий, а именно: особенности гражданско-правовых гарантий как фактическое поведение; особенности как акт взаимодействия с другими участниками гражданских правоотношений (социальной связи), особенности психологических процессов, которые стоят за фактическим поведением; особенности, обусловленные источником.

Ключевые слова: особенности, гражданско-правовые гарантии, юридические гарантии.

Relevancy of the research issue is determined by investigation of features of civil law guarantees. In civil law literature it is offered to arrange the guarantees into groups, particularly:

1) features of civil law guarantees as actual behavior;

2) features as an interaction act with other participants of civil law relations (social connection);

3) features of psychological processes that stand for actual behavior;

4) features stipulated by a source.

Thus, analyzing interconnection of law and human behavior we mean overt and essentic behavior, therefore it affects physical and social events, processes and phenomena [1, p. 17]. The civil law guarantees are a subject of civil law regulation, accordingly they bear relevant signs of the subject of this field. And even if they are fundamentally new social legal relations, they exist within limits of a system, that has arranged, and principles of legal regulation.

The first sign that allows segregating them from other legal guaranties is their object – legal right of a natural person. All authors that devote their works to essence of civil rights can be divided into several groups. The first one sees claims in legal rights. The second group considers the legal right as a will of an eligible person restricted by the legal right ("will theory"). For the third group the legal right is a legally protected interest ("interest theory"). Representatives of the third group combine in the legal right both "will theory" and "interest theory". The fifth group understands the legal right as a measure of permitted behavior of the eligible person and a possibility to require a certain behavior from liable persons.

At the end of the nineteenth century Birling [2, p.202] was one of the first to consider the legal right as the claim. In the Soviet doctrine M.M. Agarkov developed a concept of the legal right as the claim and characterized it as provided to a person opportunity to actuate a state apparatus of coercion. This opinion was supported by M.P. Karev and A.M. Eisenberg. They deemed "the legal right to be an established legal norm, opportunity of a person to use the state apparatus to make the liable person perform its obligation" [3, p.84]. L.A.Lunts [4, p.84] and S.F. Kechekyan [5, p.59] indicate that the definition of M.M. Agarkov is very close to opinion of German lawyer A.Thon. Probably, such identification is not quite correct because Thon writes: "The legal right is not identical to the claim; it can exit and most often exists before the claim matures and "de-

velops". However just laying of an eventual claim by a legal order raises a condition against already the right of the protected (person) by a protected norm. The legal right receives a basis due to promise of eventual claims; it exists in a hope for such. Or, to be exact, it develops for the protected person by norms from directions of the legal right according to which means are guaranteed, particularly the claim in case of rule breaking to implement the required and eliminate prohibited" [6, p.218].

M.M. Agarkov criticizes A.Thon for a fact that the German lawyer sees in the legal law the claim that arises in a moment when obligation is breached, because according to M.M. Agarkov, it is not a possibility of the claim, but the claim itself that arises together with legal relations and terminated when the legal relations are finished. Logically continuing the opinion expressed by M.M. Agarkov, M.P. Karev and A.M. Eisenberg, it should be inevitably made an inference that if the claim is absent, one cannot speak about availability of the legal right. But in this case it is not clear what to do, if there is no need in the claim because the obligation is performed voluntarily.

Therefore we should agree with the opinion that "the legal right is wider" than a "possibility to force". It is expressed both in a possibility to use property by itself and in a possibility to use acts of other persons, not having resorted to force using state assistance to do something or not to do. The possibility to "force" accompanies the legal right but it make its essence" [5, p. 59].

Windscheid advances a popular formula of the legal right – *Wollenduerfen* (to desire – to be able). Thus according to Windscheid, the legal right is will permissiveness [7, p. 251]. Basing on the fact it is possible to desire infinitely, Binder slightly changes will permissiveness for *Handelnkoennen* or *Handelnduerfen.* In a word, according to Binder the legal right is a possibility to act under cover of objective right expressing counteractions of other people [2, p. 195].

In Russia at the end of the nineteenth century this opinion was supported by prominent lawyer and political scientist N.M. Korkunov. He meant "a possibility to implement an interest caused by a relevant legal obligation" by the legal right or competency (according to Korkunov it is equal notions) [8, p. 151].

Critics of this theory fairly draw attention to a fact that the legal right also exists without the protected interest. Thus G.F.Shershenevich underlines that interests are ensured by force of the objective law in cases when the legal right is absent [2, p. 197]. Therefore, it is evident a conflict between the legal right as the legally protected interest, and at the same time permissibility of legally protected interests without the legal right [9, p. 578].

S.M. Bratus supposed that the legal right cannot be identified through an interest as the latter is a prerequisite and purpose of the legal right but not its essence [10, p. 19-21].

Due to the fact that neither with the help of the "will theory" not the "interest theory" it was not possible to create a perfect notion of the civil right, at the end of the nineteenth century lawyers gave a new definition that included both will and interest at the same time. Scientists that are included in this group, including Gold von, Fernek, Mishu, Saleil [2, p. 198], Shuppte [11, p. 37-44], Regelsberg [12, p. 74], Merkel [13, p. 159], consider that the legal right is power to implement interests ensured and limited by regulations of the objective law. The abovementioned opinion still dominates in German legal doctrine. Thus, in "Introduction into German law" A. Zhalinskyi and A. Rericht indicate that the legal right is "peculiar legal power provided by an existing legal order to right holders to meet certain interests" [14, p. 304].

However in literature it is noted a fact that a notion of power is sociological but not legal. On this basis C. Larenz underlines that being applied to the law it poorly reflects a lot of legal rights, including a right of person protection. We should agree with Larenz that the legal right definition through power is not the most exact, but it only reveals a need to search for another, more correct.

Modern science of law is characterized by a concept that rights and freedoms of a natural person exist in two aspects:

1. legal rights which mean opportunities, authority of a particular person;

2. objective rights that are interpreted as fleshed-out legal powers that are fixed in regulations, acknowledged by the state, and secured by judicial power [15, p. 247; 16, p. 285].

The legal right means a measure of possible behavior of a person that enables to perform independently acts aimed at achievement of objects connected with satisfaction of its interests and requiring specific behavior from liable persons [17, p. 42]. So, it takes place classification of rights into objective and subjective within scopes of positivistic understanding of law. A question whether such classification is possible within scopes of a naturally legal conception is still open and debatable.

Majority of civilists of the Soviet times could not imagine existence of the legal right beyond legal relations. Such position in combination with a static theory of legal capacity allowed asserting that in case when a legal rule fixes only relations with the state, legal

regulation does not go beyond the scopes of legal capacity, and once the legal relations between particular persons are established, the legal rights and relevant obligations of these persons arise.

If to abstract away from an object (of civil rights and obligations) that are guaranteed, then it is possible to state that directly or indirectly civil law guarantees exist apropos of material benefits. They are directly connected with the object when acts of members of social and economic relations are performed in relation to material benefits, and indirectly when acts of the same members exist apropos of intangible benefits. But these guarantees also serve civil rights and obligation that have still property content.

The second feature of the civil law guarantees of the first block is connected with a subject. The subject of the civil law guarantees is a property independent member of civil turnover. Just as the civil law regulates property relations in their statics so they are characterized by typical property isolation of their members as opposed to other subjects. An extend of property isolation of subjects of the legal relations, regulated by the civil law, reaches a level of property dispositive independence according to which property is not only "personally" allocated to certain persons, but allocated to such extend that these subjects should treat each other as persons whose will is aimed at disposal of such things [18, p. 34].

In this case it should be taken into account that the legal guarantees are not an element of person's legal status. Vitruk N.V. considered the legal status as a system of rights, legal interests and obligations of a person guaranteed by the state [19, p. 8]. In addition, a key point that allows differentiating correctly between such categories as "legal personality" and "legal status" is that it is necessary to acknowledge the system of exactly legislative guarantees as an aggregate of objective conditions that allow properly exercise competences belonging to a natural person.

So, in my opinion, inclusion of the legal guarantees in a structure of person's legal status is illogical as the legal guarantees are a mechanism that secures rights, and lies beyond the legal status. If to agree inclusion of the legal guarantees into the structure of the legal status, as a result notion of the "legal status" will become extremely wide by its content and cover majority of legal phenomena. "Legal guarantees of the legal rights" and the "legal status" are two independent and closely connected legal categories. Their interconnection becomes apparent, first of all, in a fact that the legal status that has no relevant guarantees will be formal and not able to be actually exercised.

Subjects of the civil law guarantees are mostly members of a guaranteed legal bond. Introducing the civil law into economics the state really makes its role weaker as it brings back the economy to beginnings of self-righting to a large extend. Exercise of a right is executed by performance of an act making its content, hence it follows that the civil law guarantees make the content of particularly legal rights and obligations of natural persons.

Examining the subject of the civil law guarantees, it should be taken into account that the man himself is not a subject of law, as he is represented by legal institutions including by a notion of "natural person". In modern law the natural person is a citizen who has an opportunity to have civil rights and incur relevant obligations. Meanwhile, we will not come across the "subject of law category" in the modern Civil Code as this legal instrument is a mediator between the real world and world of law. Thus the objective law acknowledges each individual only as a potential holder of rights and obligations. An individual becomes a valid and complete subject of law after it enters into particular legal relations to implement its needs.

Volkov A.V. defines the subjective civil law, established in this or that legal norm, is efficiently implemented only in unity of other legal means, purposes, values that form the civil law system [20, p. 69]. According to their essence and content civil rights are not just an integral element of the civil law system but it is a pivot around which other components of the system form, structurize, and develop. In their turns, legal rights themselves are susceptible to influence of the civil law system that does now allow leaving the law to outrage requiring relevant guaranteeing for actual exercise of such rights.

It should be admitted that in case of objective but ideal law the subject as a person in its complete sense does not exist. Rules of the civil law handle ideal categories according to which it is developed different legal regimes and structures. All these components, that form they, play a role of "operating" objects for a lawmaker who issues these rules of law for these of those legal relations. It its turn, it is related to the subject of law, though we admit that it is a special, nonstandard "operating" object: it is endued with legal capacity and ability, has relevant connections with similar "special objects". Under such conditions it is not impossible to speak about subjective, i.e. conscious civil law, as the object cannot distinguish and assess another object. Only a natural person (man) is able to perceive and assess not only external objects but also itself, and to control itself as the object.

As a real person – subject in ideal modeling rules of law – can be absent, then it is possible to make an inference: in fact, in the objective civil law the legal rights are absent, there are only civil rights. However legal science uses the "right" notion applied to positive civil law correlating its belonging with the subject. Thus, describing law in objective and subjective meaning Krokunov N.M. considered that the legal relations are called the right in subjective meaning as the right and obligations form belonging of the subject. They cannot exist without the subject [21, p. 136].

Another block of features of the civil law guarantees includes the following characteristics. Social relation established by the civil law guarantee is always characterized by definiteness of subject composition. If in management relations the state represented by its bodies is a member, and in civil procedure relations a compulsory member is a court, then the legal relations that are the subject of the civil law members are mostly subjects of civil turnover – natural persons. Therefore, subjects of social relation connected with the civil law guarantees are mostly subjects of civil turnover.

This relation is characterized by quality of subjects. Equality of members of property relations regulated by the civil law means, first of all, absence of noneconomic dependence, power, enforcement, absence of any other social relation, except for property relations. Equality of legal relation members consists in identity of an economic role which is played by them in the legal relations regulated by the civil law: each of them acts as a subject that has property dispositive independence. The civil law guarantee has a nature of substantive claims but not orders; a liable person is not dependent on a legally competent person, but it is only functionally connected with it be means of the claim [22, p. 30].

Te third block is connected with such side of behavior as consciousness. Law deals with only a conscious parson who realizes meaning of its acts and is able to control them. The civil law guarantees are characterized by optionality in that case when subject have a possibility to exercise their rights and perform obligations at their discretion. Moreover, optionality finds expression at stages of further development of civil law guarantees – their alteration, termination. By its nature the civil law guarantees are initiative. They are always characterized by goal-seeking acts.

The most important core element of exchange relations is an interest. In the civil legal relations it is the interest of particular persons of the legal relations. Essence of civil interest is that it expresses property and personal non-property relations connected with property. Subjects of these legal relations form the basis of civil interests [23, p. 83].

The forth block of features is stipulated by a different nature of legal means of guaranteeing. Permissiveness that presupposed the below mentioned characteristics is peculiar to civil guaranteeing. "Self-guaranteeing" is inherent in relations of property turnover. One of rules of civil regulation is flexible combination of means and ways of regulatory and sub-regulatory mediacy of social relations. The civil law leaves much space to use means of individual (sub-regulatory) nature. In a mechanism of legal regulation actions performed according to self-determination and within limits of the law, to some extent, exercise a function similar to that is performed by riles themselves, - it is the function of a controller of social relations, the same can be told about guaranteeing. "Self-guaranteeing" is predetermined by optionality that consists in a fact that subjects have a possibility to choose a particular way of right acquisition, obligation assumption at their discretion,to define content in established limits, to dispose of available right, to resort to and do not take protective measures of a violated right, etc. that presupposes availability of free operation ability as to civil conditions of guaranteeing by members of property turnover.

Initiative as its component characteristic is peculiar to "self-guaranteeing". The initiative is based on ability of civil law subjects to exercise rights and obligations, to change or terminate them by their goal-seeking acts. A lot of other fields of law are characterized by assigning of a significant or decisive part in guaranteeing dynamics to authoritative regulations of public agencies. But a mechanism of civil guaranteeing is based in goal-seeking acts of civil law subject themselves.

The next feature of civil law guarantees is in priority of guaranteeing related to development of relevant legal means. It its regulation of relations the civil law creates a particular priority for that party in favor of which regulation activity is carried out. A new Civil Code of Ukraine expands opportunities of a lender to exercise its rights under an agreement. The lawmaker cares about arrangement of favorable conditions for persons that enter into relations with those who assumed any obligation [24, p. 15]. Thus a holder of guaranteed right is a pivotal figure of civil guaranteeing.

Examining essence of legal guarantees it cannot be neglected a notion of "guarantees of exercising civil rights and performing obligations". In respect to this issue there are different opinions of civilists. Thus, according to Gribanov V.P. implementation of a principle of actual obligation performance can

be deemed the guarantee of exercising rights and performing obligations [19, p. 228-229].

Maksimenko S.T. insists on a fact that the principle of actual obligation performance is an expression of a general principle of guaranteeing. Defining a priority according to the guaranteeing principle she noted that actual obligation performance is one of conditions of guaranteed exercising of rights and performance of obligations. Indeed, if to take into consideration that actual performance relates only to one of performance parameters (namely, a subject), that there are fixed by law exceptions from this requirement, and finally, scope of this order is local (performance of obligations), then we should agree: actual performance of obligations is the separate expression of right exercising guaranteeing [25, p. 214].

As it was mentioned before notions of guaranteed and actual performance of obligations do not coincide but actual performance is one of possible conditions of guaranteeing.

Taking into consideration the above specified, it should be made an inference that the civil law guarantees are not breakthrough formations in the system of law, but taking into account problems that exist around law duality – its objective and subjective essence – the civil law guarantees should be considered as law conditions.

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