



соб оказания влияния на материальные отношения. Обеспечение надлежащего уровня взаимодействия между материальными и процессуальными отношениями требует реального функционирования судопроизводства в качестве регулятора общественных отношений. Поэтому содержанию верховенства права в гражданском судопроизводстве присущ функциональный аспект реализации, который воплощается через доступность суда и реальное исполнение принятых решений.

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KEY FEATURES OF THE CONCEPTS “LEGAL PROTECTION” AND “LEGAL SECURITY”

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Summary

The article specifies the characteristics and definition of “legal defence”, “legal protection”, their correlation with the terms “ensuring of human rights”, “protection of human rights”, “human rights protection mechanism”, “human rights defence”. This research was needed to determine: criterion/criteria for distinction between “legal protection” and “legal security”; determine the type of activity, in the process of which the state-law enforcement is used and the conditions under which such use occurs; determine the range of competent authorities authorized to apply coercion in the process of jurisdictional activities, including activities for the prevention or termination of human rights or fundamental freedoms violation.

Key words: legal protection, legal defence, ensuring of human rights, protection of human rights, rights protection mechanism, human rights defence.

Аннотация

В статье дополнительно аргументирован критерий разграничения понятий «правовая защита» и «правовая охрана», определен вид деятельности, в процессе которой применяется государственно-правовое принуждение, и условия, при наличии которых осуществляется такое применение, круг компетентных органов, уполномоченных применять принуждение в процессе деятельности по предупреждению, прекращению нарушения права/прав человека или основной свободы/свобод. Уточнены основные признаки понятий «правовая охрана», «правовая защита», соотношение терминов «правовая охрана», «правовая защита» с терминами «обеспечение прав человека», «защищенность прав человека», «механизм защиты прав человека», «охрана прав человека».

Ключевые слова: правовая охрана, правовая защита, обеспечение прав человека, защищенность прав человека, механизм защиты прав человека.

Introduction. The changes that have occurred in society and in laws of Ukraine indicate that the use of the term, the concept of “protection” became even more diverse and requires clarification of its legal content. In addition, as a synonym of the word they began to be used such notions as “ensuring the human rights”, “protection of human rights”, “human rights protection mechanism”, “securing the human rights” [1, p. 332–333; 2, p. 223–224].

The above mentioned, of course, has influenced on the concept and structural elements of subjective legal rights of individuals to legal protection. Therefore, primarily the concepts of “protection”, “legal protection” and their relation to ter-concepts of “ensuring the human rights”, “protection of human rights”, “human rights protection mechanism”, “securing the human rights” need to be clarified. This amendment is needed to determine:

– criterion/criteria for distinction between “legal protection» and «legal security”;

– determine the type of activity, in the process of which the state-law enforcement is used and the conditions under which such use occurs;

– determine the range of competent authorities authorized to apply coercion in the process of jurisdictional activities, including activities for the prevention or termination of human rights or fundamental freedoms violation.

The purpose of this article is to determine the criteria for distinction between “legal protection” and “legal security” and their relation to the concepts of “ensuring the human rights”, “protection of human rights”, “human rights protection mechanism”, “securing the human rights”.

There is no consensus in determining the balance of protection and defense



of human rights in general theoretical literature, the civil law jurisprudence, constitutional law.

Thus, according to G. Stoyakina, concept of protection in civil law include:

1) law enforcement activities of the state – the creation of laws that secured public relations, establish the rights and obligations of the parties, determine the procedure for implementation and protection of human rights and threat by use of sanctions;

2) activity of subjects to implement their legal rights and their protection;

3) activities of the state and public bodies to prevent possible violations, as well as the implementation of legal sanctions in case of appellation of interested parties for the protection of violated subjective rights [3, p.34].

Thus, the scientist widely understood remedy, including in its contents the activities of the State on ensuring the legal rights and legal conduct of empowered actors on use of their rights.

Z. Romovskaya believes that the protection of subjective rights includes protection. Their point of view the scientist argues as follows: "... the state carries out law enforcement functions with respect to law enforcement in general, which includes the protection of subjective rights. Protecting subjective right, the court and thereby provides security function with respect to the social system convincing at the social values of lawful behavior, justice and inevitability of the application of measures of state coercion" [4, p.10]. M. Vorobyev claims that protection is derived from a method of protection and is the way of realization: it is activity of the court, and this activity is related with the consideration and resolution of disputes about the specific rights and interests of certain persons; protection [5, p. 22–23]. A. Kozhukhar opposes Z. Romovskaya and M. Vorobiev stressing that "... tone can say about protection of right when it comes to the application of enforcement measures through appropriate intervention jurisdictional authority" [6, p.25].

Thus, Z. Romovskaya and M. Vorobiev refer legal protection of the exclusively to competence of the court. However, the review and resolution of disputes about the subjective rights as well as the interests are competence of other bodies with jurisdictional activity, but not just of the court.

Thus, legal protection associated with jurisdictional activity to restore subjective legal rights of person or his (her) freedom.

Foreign scientists, including J. Shelton notes that legal remedies (remedies) are included, among others, and means preventing violations of law. Among the types of legal remedies scientist distinguishes declaratory decisions (declaratory judgments). D. Shelton stresses that "...with these legal remedies certain behavior or condition proclaimed illegal and the decision about redress the situation. This protection is aimed at obtaining a particular solution before the injury, if it inevitably threatens". Scientist leads a fine example of the implementation of legal protection in the form of a declaratory judgment: it was applied in order to protect freedom of expression in relation to the person who was threatened with arrest. Besides, the scientist notes that in most states a declaratory judgment is not regarded as an adequate legal remedy, if the damage has already been done [7, p. 68–69].

Donna Gomien [8] emphasizes that Article 13 guarantees "an effective remedy before a national authority" for everyone whose rights and freedoms as set forth in the Convention have been violated. Although this formulation is quite clear legal concept, the interpretation of Article 13 of the Commission and the Court faced with considerable quantity of problems than the interpretation of other articles of the Convention. The Court concluded that the protection offered in Article 13 shall apply to all cases of substantiated statements about violations of the rights and freedoms guaranteed by the Convention (Klass and Others v. Federal Republic of Germany (1978) [9]). In the case Silver and Others v. the United Kingdom (1983) [10] Court gave the following explanation: "When a person giving arguments filing the claim of violations the Convention rights and freedoms it should have a remedy before a national authority for both to her question was settled, and to obtain, where necessary, compensation".

The scientist also gives the example of the European Court of Human Rights in the "Platform "Doctors for Life" (1988) [11] group of opponents of abortion complained that the level of protection

by the police during the two public demonstrations was insufficient, and thus, the Austrian government had violated the right to peaceful assembly under Article 11. The group also complained that the Austrian legal system does not provide remedies for the implementation of this law, which, consequently, violates the right to effective protection under Article 13. Court decided that the Austrian authorities had taken appropriate and reasonable measures to protect the demonstrators, and so the group had no "legitimate complaints" concerning a violation of Article 11, and without such a reasonable complaint the case could not be considered with reference to the violation of Article 13. The Klass and Silver case dealt with the violations of the rights protected by Article 8 of the Convention.

Donna Gomien stresses that in a few years Court has considered similar cases. In cases Calogero Diana v. Italy (1996) and Domenikini v/ Italy (1996) [12] people involved in prison complained that prison authorities reviewed their correspondence with lawyers. Having found a violation of Article 13, the Court noted that the issue is not only not adopted any decisions of administrative bodies, but even the Cassation Court recognized that the Italian legislation did not give any opportunity to appeal the decision to revise the correspondence of persons deprived of their liberty. In the case Halford v. the United Kingdom (1997) [13] the Court also found a violation of Articles 8 and 13, as the applicant's phone at his workplace (a police station) was auditioned.

In cases Valsamis v. Greece (1996) [14] and Efrastrathu v. Greece (1996) [15] the applicants, who belonged to the sect of Jehovah's Witnesses complained that their children were expelled from school for refusing through religious beliefs to participate in the school parade on occasion of the end of the war. Although Court found no violation of Article 9 and Article 2 of Protocol № 2 of the Convention, he found that the complaint of a violation of these two articles contained sufficient reasoning violation of Article 13, and as a result Court found a violation of this article. In a similar situation in the case Kamentsiyd v. Switzerland (1997) [16] the Court found that the implementation of the



search in the apartment the applicant is not in breach of Article 8, but at the same time acknowledged the lack of effective means for the applicant's appeal at national level on the implementation of search.

Another issue that needs solving is to define the concept of «protection of rights and freedoms» and «human rights protection mechanisms».

So, Yu. Rymarenko defines the rights and freedoms of the individual as a system of social mechanisms that provide a natural and inalienable rights and freedoms of the individual (person), with its emigration and immigration rights inclusively [17]. This definition does not reveal the content of the legal protection of human rights, the meaning of which is to create the conditions necessary for the implementation of human rights. Today it includes elements of state activities: promotion of human rights and fundamental freedoms, the protection of human rights and fundamental freedoms, defense of human rights and fundamental freedoms. Namely the promotion of human rights and fundamental freedoms provided by the positive impact on the formation of its general social preconditions and means to use [18].

K. Volynka defines the rights and freedoms of the individual as a special activity for the provision such rights and freedoms the real, inherent and indestructible nature, establishes certain conditions under which the rights and freedoms of the individual is the most smooth and effective, the protection prevents the slightest possibility of breach and protection of the offense, contributes to the restoration of violated rights and bring the perpetrator to justice [19]. This definition of the rights and freedoms of individuals match the concepts of legality, law enforcement, protection of human rights. So, when it comes to legal protection – usually it draws attention to a particular result, the state, the regime of human rights [20]. P.Rabinovych convinced that the legal protection of man and his rights – is one of the fundamental features of law that aims to consolidate, secure and protect the natural and inalienable human rights as the highest value [21].

The concept of the mechanism of protection of human rights and fundamental freedoms is broader than the

concept of protection and is a dynamic feature that includes several subsystems submechanisms or items. For example, according to M. Orzih the mechanism for the protection of human rights includes regulations (primarily substantive), procedural and institutional forms and human rights remedies [22, p. 117]. According to A. Nehodchenko the mechanism of legal protection is a dynamic system of legal forms, tools and activities, action and interaction which are aimed at preventing human rights violations or to restore them in case of violations. Thus, according to scientists the mechanism of legal protection contains the following elements: 1) protection of human rights; 2) protection of rights; 3) legal assistance to person [23].

The above analysis revealed a criterion distinguishing between the concepts “legal protection” and “legal defense” the fact of the use of any kind of state-legal coercion (restoration of already violated law, legal liability, warnings, preclusion) in the jurisdictional activity (in the process of solving legal dispute). It was found that this criterion is independent of a breach of subjective legal rights. Public law enforcement applies on condition that subjective legal right is already infringed, as well as on the condition that the subjective legal right has not yet been broken, but there is a threat of infringement.

Thus, the analysis allowed us to determine an activity in the course of which the state-legal coercion applies – a jurisdictional activity, and the conditions under which there is such application – when subjective legal right or already broken, or it has not violated, but there is a threat of violation. Jurisdiction is such law enforcement activity aimed at solving legal disputes only in the areas of both private and public law, not any legal issues.

The circle of the competent authorities which are authorized to use coercion in the process of jurisdictional activity, including activities to prevent or stop violations of human rights or fundamental freedoms is found: state agencies, local governments, non-governmental organizations authorized by the state (commission on labor disputes, the arbitral tribunal).

It was established that the legal protection is the subjective legal right

involves the use of a warning or stop the violation, but these types of coercion exercised without jurisdictional activity.

Conclusions. 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.

Signs of legal defense:

1) types of coercion used: prevention, preclusion;

2) activity, during which it applies out-jurisdictional activity;

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

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

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