

Artículo de investigación

Protection of civil rights and legal interests in Ukraine

Захист цивільних прав та законних інтересів в Україні

Protección de los derechos civiles y los intereses legales en Ucrania

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Vlada Goncharenko⁴⁸**Ekaterina Spasova**⁴⁹**Oksana Kalitenko**⁵⁰**Abstract**

The article is devoted to the complex analysis of general-theoretical and practical legal issues on the protection of civil right and interests, the essence of the legal interest as a specific object of protection, determining of the ways and forms of the protection of civil right and interests and the development of the grounded suggestions and recommendations as for the improvement and effective application of the legal norms in the sphere of civil right and interests protection.

The notion and essence of civil right and interests protection have been studied, the categories as "form", "way", "means" of protection have been determined, the peculiarity and possibility of the application of civil means of protection of subjective civil rights as for the protection of the legal interest have been outlined.

Keywords: Defense of rights and interests, the forms of protection, legal interest, the means of protection, protection of civil rights and legal interests, the right of protection.

Анотація

Стаття містить комплексний аналіз загально-теоретичних та практичних проблем захисту цивільних прав та законних інтересів, сутності законного інтересу як особливого об'єкту захисту, визначення способів та форм захисту цивільних прав та інтересів, розробку обґрунтованих пропозицій та рекомендацій щодо вдосконалення та ефективного застосування норм законодавства у сфері захисту цивільних прав та інтересів.

Досліджено поняття і сутність захисту прав та інтересів, встановлено розмежування між такими категоріями як «форма», «спосіб», «засіб» захисту, визначено специфіку та можливість застосування цивільно-правових способів захисту суб'єктивних цивільних прав щодо захисту законного інтересу.

Ключові слова: Право на захист, захист цивільних прав та інтересів, охорона прав та інтересів, законний інтерес, способи захисту, форми захисту.

Resumen

El artículo está dedicado al análisis complejo de cuestiones jurídicas generales, teóricas y prácticas sobre la protección de los derechos e intereses civiles, la esencia del interés legal como un objeto específico de protección, determinando las formas y formas de protección de los derechos civiles e intereses y el desarrollo de sugerencias y recomendaciones fundamentadas en cuanto a la mejora y la aplicación efectiva de las normas legales en la esfera de la protección de los derechos e intereses civiles.

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Se ha estudiado la noción y la esencia de la protección de los derechos e intereses civiles, se han determinado las categorías como "forma", "forma", "medios" de protección, la peculiaridad y la posibilidad de la aplicación de medios civiles de protección de los derechos civiles subjetivos. en cuanto a la protección del interés legal se han esbozado.

Palabras clave: Defensa de los derechos e intereses, las formas de protección, el interés legal, los medios de protección, la protección de los derechos civiles y los intereses legales, el derecho de protección.

Introduction

The implementation and effectiveness of norms on human rights and freedoms in any country depend on many factors, among which following can be distinguished: the degree of democracy of the state's power institutions; political, cultural, legal traditions; the existence of an effective mechanism for the protection and defense of civil rights, freedoms and interests. It is necessary to create a reliable mechanism of control of the observance of human rights and freedoms. The state has a responsibility to create such a mechanism, to guarantee the protection of the individual, to secure his/her rights within the framework of the law and order established in society and the country.

Although the constitutional provisions on the protection of rights and interests have been established in civil law, the further development of the provisions on the protection of civil rights and interests requires the creation of a real, effective legal protection mechanism, as well as the intensification of efforts to investigate it more thoroughly, to determine the conditions and factors that act as the social environment of the mechanism, the development of new theoretical provisions as for the whole institution and its components (forms, methods, means of protection). In this regard, the study of the problem of protection of civil rights and interests is becoming more relevant. The relevance of the topic is also increased due to the fact that the search for reserves of legal protection of rights and interests is an important and urgent task of the legal policy of the Ukrainian state.

Methodology

To determine the content of the institution of the protection of civil rights and interests it was used a system of both general philosophical (dialectical, historical), general scientific (method of systematic analysis, structural-functional, retrospective-comparative, method of modeling), and special (formal logical, comparative, statistical) research methods.

In particular, the historical method has allowed to investigate the emergence, formation and development of legal norms (from Roman law to the provisions of the current Civil Code of Ukraine) which regulate the relations related to the protection of civil rights and interests. The analysis of the concept and content of the right to defense, the dynamics of the legal relationship arising from the violation of the law and its protection were carried out using the analytically- synthetic method. The formal logical method is used to clarify the mechanism of implementation of the general principles of civil law when applying the basic forms, methods and means of protection and the principles of integrity, reasonableness and fairness as principles that serve as the basis for the legal protection of the infringed right or interest. The application of the system-structural method, which contributed to the determination of the relation between the right to protection, the methods and forms of protection, the remedies as a set of different legal phenomena of their interrelations, was of theoretical importance. The comparative legal method was used for comparative analysis of the relevant provisions of the institute for the protection of rights and interests established by the Civil Code of the USSR and the Civil Code of Ukraine, as well as in the comparative study and analysis of norms of civil law of some European countries. The modeling method was used to develop proposals and recommendations to improve the civil legislation of Ukraine and practice of its implementation.

Presentation of key research findings

Civil protection is a measure of possible behavior that is prescribed by law in order to restore a violated, unrecognized or disputed right (Kharitonov, 2003).

The authorized person has the right to independently carry out the restoration of the violated right within the limits and in the manner prescribed by law (self-defense) or to apply to the authorized by state body, self-governing or

public authority or a person for the protection of his/her right or interest. The subjective civil law and interest are subject to protect by law. Article 15 of the Civil Code of Ukraine points to three forms of infringement on subjective right, in which certain actions concerning its protection may be applied: violation, disputing or non-recognition.

Violation of the right involves the deprivation of its carrier's ability to exercise a right in full or in part. Disputing - there is a dispute between the parties about the presence or absence of subjective rights of the parties, as well as the possession of such a right by a certain person. Non-recognition - a denial in general or in a certain part of the subjective right of another participant in a civil law relationship, as a result of which the authorized person is deprived of the opportunity to exercise his right.

It is necessary to distinguish such objects of protection in accordance with civil law of Ukraine as legal interest and subjective civil law. The distinctive features of the mentioned concepts are in the fact that: 1) a legal interest in comparison with subjective law is nothing but a legal permission that has the character of intention where there are no instructions to behave in a certain strict way, established in the norms of law and which is not provided by the legal obligation; 2) legal interest is the need that is not yet subject to regulation by material law; 3) the concept of "legal interests reflects the least important and significant needs of individuals (Malko, 2001).

The interest protected by law is not prohibited by law and does not contradict the general principles of civil law regulation, the person's desire for the effective realization of his powers, which are not defined as subjective rights (Venediktova, 2011). The distinction between interest protected by law and subjective civil law is also that subjective civil law is not just an opportunity to act in a certain way, namely, an opportunity that has the backing obligation to ensure its implementation (Venediktova, 2014). An example of interest protected by law may be the interest of the creditor of the debtor - an individual who has been absent for a long time at his/her place of residence and no information about his/her place of residence, regarding the establishment of a regime for the absence of such a person. This interest consists in the fact that in the future a guardian will be appointed to the property of a missing person who would also carry out property performance from the property of a person with a decree of presumption of death.

According to Article 55 of the Constitution of Ukraine, everyone has the right, by any means not prohibited by law, to protect their rights and freedoms from violations and unlawful encroachments, including restoration of the impugned or disputed right on their own. Types of protection can be considered as depending on the methods and forms, and the subjects of realization of protection.

Depending on the subjects of protection of the rights or interests, the latter is divided into jurisdictional and non-jurisdictional. The given classification based on the definition of an authorized person for the protection.

Jurisdictional protection is carried out by a number of authorized state and public bodies and persons who may take measures to restore a violated, unrecognized or disputed right. Thus, according to Article 55 of the Constitution of Ukraine, Article 15 of the Civil Code of Ukraine, everyone has the right to court protection. In cases established by the Constitution of Ukraine and the law, a person has the right to apply for the protection of civil law and interest to the President of Ukraine, the state authority, the Crimean authorities or the local self-government body (Article 17 of the Civil Code of Ukraine). The protection of civil rights can also be exercised by the notary's bodies. According to Art. 18 of the Civil Code of Ukraine, the notary carries out the protection of civil rights through the implementation of an executive inscription on a debt instrument in cases and in the manner prescribed by law. In addition, the protection of civil rights by a notary may also be carried out in other ways. For example, according to Art. 1283 the Civil Code of Ukraine, a notary, at the place of the opening of the inheritance or at the place of location of the inheritance property, takes measures to protect such property, if it is necessary in the interests of successors, legators, creditors or the state (Maidanik, 2010).

Non-jurisdictional means to protect subjective rights and legal interests is the methods which consist in acts of the person, the rights and interests of which have been violated. The main non-jurisdictional mean of protection is self-defense. Self-defense is the use of countermeasures by a person, which are not prohibited by law and do not contradict the moral principles of society. Ways of self-defense can be chosen by the person themselves or established by an agreement or acts of civil law (Article 19 of the Civil Code of Ukraine). The main characteristic of self-defense is that the subject of civil law protects himself by his own actions

without petition to a court or other body that protects civil rights (Morozyuk, 2010). As an example of self-defense it can be mentioned the retention of property by the creditor (Articles 594-597, 856, 874, 916, 1019 of the Civil Code of Ukraine).

Self-protection can be provided both by natural and legal person. Self-protection can be carried out in different ways. The grounds for its application are violations of a specific right, the need to prevent the violation and compliance of the measures taken with the nature of the violation (Yarotsky, 2012).

Forms of self-defense are: 1) necessary defense; 2) causing damage in a state of extreme necessity; 3) other means not prohibited by the law.

The necessary defense is causing of a damage to the offender in order to stop the offense and protect own interests.

A state of extreme necessity involves causing harm to an innocent person in order to prevent danger, provided that the harm that was done is less than that which threatened.

The necessary defense as a means of self-defense of civil rights has its legal consequences. The damage caused in the state of necessary defense can not be compensated. If damage is caused in the absence of the conditions for the necessary defense, then such damage should be reimbursed in full.

Actions carried out in a state of extreme necessity are understood as those actions which are carried out by a person in order to eliminate the danger threatening the interests of the state, the public interest, the rights of a person, if this danger could not be eliminated by other means under the circumstances, and if the damage caused is less significant than the damage that could have been caused. In extreme necessity, the danger to the interests of the authorized person, the interests of the state, society or third parties arises as a result of natural disasters, malfunctions of mechanisms, a special state of the human body, for example, due to illness, etc.

An important role for the protection of civil rights and legal interests is played by the means of their protection. Means of protection are divided into general and special. General means of protection subjective civil rights are defined in Article 16 of the Civil Code of Ukraine.

Recognition of a right is a general mean of protection that applies in the case of a dispute between persons regarding the existence or non-existence of legal relationships between the parties of relationship, and, consequently, the presence or absence of civil right and juristic obligation.

Nullity of transaction - a method of protection that applies in case of a controversial transaction. In the case of the presence of the fact of making a void or voidable transaction, the methods of protection may be, for example, the application of the consequences of its invalidity or recognition of validity in the cases provided by civil law.

Termination of an action that violates a right - a method of protection that consists in the termination of a continuing civil offense.

The restoration of the situation that existed before the violation occurs when the recognition of the fact of violation of subjective right and bringing the guilty to liability is not enough, but it is necessary to renew the violated right in full (to apply the restitution).

Real execution is a way of protecting of civil rights which follows from the general principle of full and proper fulfillment of the obligation. This method consists in an obligation to act or refrain from action, regardless of the application of other measures of influence (compensation of damages or moral (non-pecuniary damage), fine, etc.).

Change of legal relationship - the evolution of one duty into another, the assignment of a new obligation to the debtor. For example, in case of violation of the preemptive right of the co-owner to the shares in the right of joint partial ownership, the court may decide to transfer the rights and obligations of the buyer to the co-owner whose rights were violated (Article 362 of the Civil Code of Ukraine).

The termination of the relationship is usually applied in the event of non-performance or improper performance by the debtor of his duties or unlawful use by the creditor of his subjective rights.

Damage compensation and other methods of compensation for property damage, as a rule, occur in the case of the presence of a civil offense, which includes the wrongful conduct of the debtor, the existence of negative consequences (harm), the causal link between the

wrongful conduct and the consequences and the guilty of a person (Podlubna, 2010).

The main form of compensation of a damage caused to a victim is compensation of losses (Article 22 of the Civil Code of Ukraine); the imposition of a penalty (fine) is in cases directly stated by the contract or by civil law.

Losses are: 1) the losses incurred by a person in connection with the destruction or damage to the thing, as well as the expenses that a person has suffered or should suffer for the restoration of his violated right (actual losses); 2) income that a person could actually receive under normal circumstances if his right was not violated (lost profits).

Damages are fully reimbursed if the contract or the law does not provide for compensation in a smaller or larger amount.

If the person who breached the right has received in connection with this income, then the amount of lost profits recovered by the person whose right is violated can not be less than the income received by the person who violated the right.

At the request of the person who is harmed and in accordance with the circumstances of the case, property damage can be compensated and, in another way, in particular, damage caused by property, may be reimbursed in kind (transmission of the same kind and quality of the same thing, correction of the damaged thing, etc.)

Losses are determined taking into account market prices that existed on the day of voluntarily satisfaction of the creditor's claims by the debtor at the place where the obligation can be fulfilled and, if the claim was not voluntarily granted, on the day the claim is filed, unless otherwise specified by the contract or by law. The court can satisfy the claim for damages, taking into account the market prices that existed on the day the decree was made.

Compensation for moral (non pecuniary) damage shall be applied in cases of causing the latter, which is understood as the physical and moral suffering experienced by the victim in the event of violation, non-recognition or contest of his subjective right.

According to Art. 22 of the Civil Code of Ukraine non pecuniary damage may be: in the physical pain and suffering that an individual has suffered due to injury or other damage to health; 2) in the mental suffering that an individual has suffered

due to the unlawful conduct to him/her, members of his/her family or close relatives; 3) in the emotional suffering that an individual has suffered in connection with the destruction or damage to his property; 4) in humiliation of honor, dignity as well as business reputation of a natural or legal person; 5) in other forms of causing injustice to a person.

Article 23 of the Civil Code of Ukraine specifies that the amount of monetary compensation for non pecuniary damage is determined by the court depending on nature of offense, depth of physical and mental suffering, degradation of abilities of the victim or deprivation of their feasibility, degree of culpability of the person, who caused non-pecuniary damage, if guilt constitutes sufficient ground for compensation, and taking into account other essential circumstances. When determining the amount of compensation, reasonableness and justice are taken into account.

In the absence of any reference points by which the court could determine the amount of compensation for non pecuniary damage, the judicial practice in Ukraine decided to establish proportionality between the amount of pecuniary and non-pecuniary damage.

Therefore, it should be stated that currently in Ukraine there is no legally regulated procedure that would help the courts in determining the amount of compensation for non-pecuniary damage, and accordingly would unify the case law in this regard.

In a case of violation of subjective civil rights, the possibility of compensation for non pecuniary damage should be explicitly stated in the law.

According to the Civil Code of Ukraine, the non pecuniary damage is compensated to the person whose rights were violated by unlawful actions (inaction) of other persons. Individuals (physical or legal) are exempted from liability for non-pecuniary damage, if they prove that they are not caused by their fault. From the above it follows that compensation for non pecuniary damage is carried out under the following conditions: 1) non pecuniary damage caused by unlawful actions; 2) the fault of the contributor; 3) the existence of moral harm in the forms prescribed by law (humiliation of honor, dignity, business reputation, etc.); 4) the existence of a causal link between the wrongful acts and its consequences (moral harm).

Undoubtedly, it is impossible to compensate for non-pecuniary damage in full, since there can not be exact criteria for the property expression of honor, the dignity of the person, therefore, any size of it will have a purely conditional expression.

The evaluation criteria that can be used to determine the amount of compensation for non-pecuniary damage are varied. The main thing - that with their help it was possible to measure the depth and duration of suffering (for people), to estimate loss of immaterial nature (for legal entities).

Non-pecuniary damage shall be compensated in monetary or other material form by a court decision regardless of compensation for property damage. In any case, the amount of compensation for non-pecuniary damage must be adequate to the damage.

Since non-pecuniary damage is indemnification for non-pecuniary loss, it is a lump sum payment. However, the law or contract may provide for a right to compensation in parts (for example, damage caused by injury - Article 1168 of the Civil Code of Ukraine).

Special methods of protecting of civil rights are provided by legal rules that regulate specific legal relationships. For example, for the protection of property rights or other proprietary rights, a claim for the recognition of property rights, vindication (the owner's claim for the recovery of property from another's illegal possession) and negatore (the owner's claim to eliminate the normal exercise of the property right) claims may be used.

Conclusions

The basis for the distinction between legal interest and subjective law is a correspondent legal duty. Legal interest, unlike subjective law, is a simple legal possibility that has a desire nature, in which there is no instruction to act in the manner prescribed by law and to demand appropriate behavior from others, that means, the possibility is not ensured by a specific legal obligation.

Legitimate interest is a particular object of protection, which should be understood as a legal possibility reflected in objective law, which is the

desire of the subject to enjoy a social good, which, unlike subjective law, corresponds only to a general legal duty.

Thus, subjective right is the legal means of realization of legal interests and legal interests interests that are not in contradiction with the rules of law, while being objects of legal protection and defense.

The jurisdictional form of protection is realized by involving specially bodies authorized by the state. The non-jurisdictional form of protection is, as a rule, exercised by the person whose right has been violated.

The main features of self-defense can be distinguished as following: 1. self-protection is carried out if the violation of subjective right has already occurred and continues or against an attack on the rights and interests of the authorized person; 2. self-defense is carried out, first of all, by the victim himself, which does not exclude the mutual assistance of a friend and assistance in the implementation of protection from other person, or the participation of legal entities; 3. self-defense should not go beyond the steps necessary to terminate the violation and must response to the size of the violation.

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