

SECTION 1

CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

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CONSTITUTIONALLY LEGAL MECHANISM FOR ENSURING RIGHTS AND FREEDOMS OF A HUMAN AND A CITIZEN: CONCEPTS AND DIRECTIONS TO ACT

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Summary

One of the indicators of the fulfillment of international obligations by the state in the field of human rights is the perfect definition of the mechanism for ensuring the rights and freedoms of a person and a citizen. The purpose of this article is to clarify the concepts and directions of the constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen.

The methodological basis of the conducted research is the general methods of scientific cognitivism as well as concerning those used in legal science: methods of analysis and synthesis, formal logic, comparative law etc.

The rights and freedoms of a person are complex. Structural elements of the human rights protection mechanism are the mechanism of legal influence in the field of human rights, the mechanism of legal regulation in the field of human rights, the legal framework of human rights, the system of human rights guarantees, and the system of human rights protection. Such legal phenomena as the mechanism of guaranteeing the fundamental rights and freedoms of citizens and the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens are not identical. Only the mechanism of guaranteeing the fundamental rights and freedoms of citizens contains both social and legal conditions and means that ensure the realization, protection and security of citizens' rights and freedoms.

The definition of the concept of constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen has been clarified: this is the system of organizational and legal and legal means of influence, through which opportunities for the implementation of rights and freedoms of a person and a citizen are created, and in case of violation or threat of violation, their protection is exercised by the bodies which are not vested with jurisdiction and the protection of bodies vested with jurisdiction. The main activities of this mechanism are embodied into the forms of ensuring the constitutional rights and freedoms of a person and a citizen: ensuring the implementation, protection and security of these rights and freedoms.

Key words: the mechanism of legal influence in the field of human rights; the mechanism of legal regulation in the field of human rights; the legal framework of human rights; the system of human rights guarantees; the system of human rights protection.

1. Introduction

The preamble to the Constitution of Ukraine has been amended recently in its normative content: the irreversibility (inability to develop in a reverse way) of the European and Euro-Atlantic course of Ukraine has been fixed in it. The validity of democratic values and the rule of law creates a space in which only human rights are eventual and ultimate in modern world. The assertion and protection of human rights and freedoms is the main duty of the state (Part 2 of Article 3 of the Constitution of Ukraine). It is well-known that the fundamental right established by the Basic Law seems illusory unless effective Constitutional and Legal mechanism for its ensuring is applied (Buletsa, 2019; Deshko, 2018). In order of full implementation of the constitutionally determined rights and freedoms of a person and a citizen, the newly-established mechanism of their provision is to be necessarily introduced. As the researchers rightly point out, the state of human rights protection is an important indicator of the society's stability, and its democratic way of development (Buletsa, 2018; Deshko, 2014).

The questions of the constitutional and legal mechanism of ensuring the rights and freedoms of a person and a citizen were explored in scientific works by domestic and foreign scholars. At the same time, there is no unanimity among scientists about either defining its concept or direction of evolvement. At the same time, one of the indicators of the fulfillment of international obligations by the state in the field of human rights is the perfect definition of the mechanism for ensuring the rights and freedoms of a person and a citizen.

The purpose of this article is to clarify the concepts and directions of the constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen.

2. The concepts of “mechanism”, “provision of rights and freedoms for the person”, “mechanism for ensuring rights and freedoms of the person”

M. Marchenko rightly states that “... in jurisdictional literature the word “mechanism” is used to refer to various general theoretical categories verbally in the following phrases: “mechanism of legal regulation”, “mechanism of law-making”, “mechanism for formation of

lawful behavior”, “general mechanism of action of law” (Alston, 2000). L. Tigonova emphasizes that “... any mechanism is a highly organized system. The system is the unity of the elements, which are in certain connections and relations between each other; they characterize the essence of the object, constitute the whole and relatively independent phenomenon from the outside” (Alston, 2000).

As the protection of constitutional rights and freedoms the well-known scientist M. Vitruk understands as the prevention of violations, and the scientist I. Rostovschikov, analyzing the problem of protection and ensure of human rights by law enforcement agencies, does not make a clear distinction between these concepts (Buletsa, 2018; Deshko, 2019). Other scholars like I. Amelchakov and S. Prudnikova define the term “provision” as the system of special measures of legal, political, economic, social and other kind that induce the subjects of law to exact and impartial implementation of legal regulations established by the state (Volynka, 2000). A. Oliynyk and V. Zayets regard provision of right as “... conditions stipulating the performance of rights; protection of the rights against their violations by anyone; the process of their realization and protection of rights from the actual violation; restoration of violated rights at all stages of the right-performing process” (Deshko, 2018). K. Volynka formulates the following authorial definition of the mechanism for ensuring the rights and freedoms of person as the set of interrelated and interacting legal preconditions, legal means and common national conditions, which create a complex of possibilities for the full realization of rights and freedoms, their protection against potential violations of rights, ensuring rights and freedoms that have been violated (Volynka, 2000). At the same time, structural elements are, first of all, the normative and legal prerequisites for ensuring the rights and freedoms of a person (legal status of a person); secondly, legal and regulatory means of ensuring rights and freedoms (legal guarantees); third, the general social conditions for the realization, protection and safe of the rights and freedoms of person (the actual social macro-environment for the protection of rights and freedoms). Thus, the constituents of the mechanism for securing the rights and freedoms of the person are the same guarantees of securing the rights and freedoms

of the person” (Volynka, 2000). A. Mordovtsev, L. Silantyev affirm that justice consciousness can be included into the constituent elements of the human rights protection mechanism (Mordovtsev, 1999). However, justice consciousness is a subjective part of the mechanism for legal regulation (together with the legal culture). It is a form of social consciousness that introduces a set of views, representations, experiences, feelings, and that characterize the attitude of society to a desired and/or valid right.

The rights and freedoms of a person and a citizen are complex. It seems erroneous to confine their provision solely to legal influence in the field of human rights, or to legal regulation or protection of human rights. Structural elements of the human rights protection mechanism are the mechanism of legal influence in the field of human rights, the mechanism of legal regulation in the field of human rights, the legal framework of human rights, the system of human rights guarantees, and the system of human rights protection.

3. Mechanism for guaranteeing fundamental rights and freedoms of citizens and constitutionally legal mechanism for securing fundamental rights and freedoms of citizens

O. Pushkina defines the protection of the constitutional rights and freedoms of a person and a citizen as “... the mechanism that is a system of means and factors which provide necessary conditions for respect for all fundamental human rights and freedoms; his task defines the protection, secure and restoration of violated rights, the formation of general and legal culture of the population” (Pushkina, 2006). According to the scientist’s opinion, its constituent elements are the mechanism of realization, the mechanism of protection, the mechanism of security (Pushkina, 2006). Scientists like A. Kolodiy and A. Oliynyk emphasize on such legal components of the mechanism of realization of personal and citizen rights and duties through the legal norms and normative legal acts, individual legal documents, legal facts, legal relations, subjective rights, freedoms and duties, forms and methods of organizing the implementation of rights and duties (Gyrenko, 2001). V. Boniak notes that “... it follows from the Constitution of Ukraine (Article

92) that rights, freedoms, obligations, their guarantees are regulated by constitutional and other norms of laws. And by-laws can only establish the mechanism for the performance of individual rights, freedoms and obligations. It is known that, depending on the nature of the disposition of a legal provision, they distinguish between authorizing, prohibiting or binding” (Gyrenko, 2001). The scholar concludes that “... the mechanism of realization of the constitutional right of a person and a citizen... is characterized by: a) authorizing, binding and prohibiting legal norms, the leading role among which is precisely put onto empowered officials, enabling a person to exercise the right... without violating the rights and freedoms of other individuals and legal entities; b) the constitutional definition (Article 92) that the rights, freedoms of a person and a citizen, including the law under study, in particular, are determined exclusively by the laws of Ukraine; c) detailing of certain provisions in the by-laws, which establish the mechanism of realization of the constitutional right of a person and a citizen... and its guarantees within the limits of the Constitution and the Laws of Ukraine. Legal facts are important for the legal mechanism for the implementation... of law (specific circumstances of life, which are stipulated by the norms of law, which determine the origin, change and termination of legal relations). ... As A. Kolodiy and A. Oliynyk point out, they are formulated in the hypothesis of a legal norm and, depending on the volitional criterion are divided into actions and events.... Misconduct on the constitutional right of a person and a citizen ... are life circumstances that are contrary to the current norms of law ... They are the basis for the protection and restoration of the violated right. ... The next element of the legal mechanism for the realization of the constitutional right of a person and a citizen... is legal relations. They arise on the basis of the rules of law, where their participants are the bearers of subjective rights and legal obligations. Within the investigated mechanism the legal relations are characterized by specific subjects, objects, and content” (Gyrenko, 2001).

We may agree with V. Boniak sharing the opinion that “... legal forms of ensuring the constitutional right of a person and a citizen... should define law-making, law-establishing, law-en-

forcement, law-security, controlling-supervisory, law-interpreting ones” (Gyrenko, 2001).

E. Gorian rightly states that the mechanism of ensuring the fundamental rights and freedoms of citizens and the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens are different legal phenomena. The first contains all (both social and legal) conditions and means ensuring their realization, protection and secure of citizens’ rights (Gorian, 2005).

Y. Todyka and O. Martseliak point out that the constitutional and legal mechanism for ensuring the fundamental rights and freedoms of Ukrainian citizens is considered as it is determined in the Constitution and laws of Ukraine, united by the system of fundamental rights and freedoms of Ukrainian citizens, their guarantees, as well as state authorities, local self-government and other institutions of the state and society, where their activity is aimed at the proper realization of the rights and freedoms of the citizens of Ukraine, and in necessary cases – to their protection and secure (Todyka, 1998).

In its turn, the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens consists of the elements guaranteed by the Constitution and the constitutional and legal laws of Ukraine. The Basic Law of Ukraine does not separate any constitutional, organic or ordinary laws, as it is done in the constitutions of other countries. However, this is the practice that generally accepted to use the term “constitutional law” to define normative legal act that contains the rules of constitutional law. Therefore, it is worth emphasizing the peculiarity of elements of the constitutional and legal mechanism for ensuring the rights and freedoms of citizens, which are determined in the Basic Law and the Constitutional Rights Laws of Ukraine. These include the institutions empowered in the field of ensuring the rights and freedoms of citizens, fundamental rights and freedoms, as well as the constitutional and legal guarantees of these rights and freedoms enshrined in the Constitution of Ukraine and other legislative acts of Ukraine (Volynka, 2000).

Some scholars include the legal status of a person, legal guarantees of rights and freedoms and general social conditions to constituent elements of this mechanism, which exist in not just

simple unilateral relations, but their interconnections are common elements of the constitutional and legal mechanism for ensuring human rights, and they mutually affect each other (Glyshchenko, 1997). Thus, in fact, the scientist considers the system of interdependent social factors that mediate the translation of the requirements of legal rules and principles into legal behavior of subjects as the structural element of the constitutional and legal mechanism for ensuring human rights within social mechanism of law. At the same time, the social mechanism of law functioning is one of the three elements of the mechanism of law action (the legal mechanism of action of law (mechanism of legal regulation), the psychological mechanism of law functioning, the social mechanism of law functioning), but not the mechanism for ensuring the right.

O. Pushkina distinguishes the following two mechanisms for the protection of human rights like the national constitutional mechanism and the international one. Applying the concept of international human rights mechanism, the scientist implies a set of principles, rules, regulations and procedures that are established at the level of international law and adhered to by the countries in the process of their internal and external activities in the field of human rights, as well as the system of international institutions designed to facilitate the control of human rights, respect for human rights, their protection and secure. At the same time, the scientist emphasizes on the issue of the interaction of these mechanisms: a number of norms of international law in the field of human rights, as well as the system of institutions established on the intergovernmental level in the form of international authorities, commissions, organizations, etc. While such a formalized approach can be fruitfully applied to analyzing the substantive content of international human rights law, it does have a number of significant drawbacks when we examine specific mechanisms (especially when it comes to a constitutional mechanism) to ensure human rights, since the very existence of international norms and human rights standards do not mean that they are being implemented into national legal systems. If this does not happen, then we are witnessing the emergence of such a phenomenon as institutional gap between the mechanism of international security and protec-

tion of human rights and the corresponding national mechanism” (Pushkina, 2006). This situation was observed, for example, after Ukraine’s accession to the Council of Europe.

5. Conclusions

Such legal phenomena as the mechanism of guaranteeing the fundamental rights and freedoms of citizens and the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens are not identical. Only the mechanism of guaranteeing the fundamental rights and freedoms of citizens contains both social and legal conditions and means that ensure the realization, protection and security of citizens’ rights and freedoms.

6. Results

The definition of the concept of constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen has been clarified: this is the system of organizational and legal and legal means of influence, through which opportunities for the implementation of rights and freedoms of a person and a citizen are created, and in case of violation or threat of violation, their protection is exercised by the bodies which are not vested with jurisdiction and the protection of bodies vested with jurisdiction. The main activities of this mechanism are embodied into the forms of ensuring the constitutional rights and freedoms of a person and a citizen: ensuring the implementation, protection and security of these rights and freedoms.

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