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FORMS OF PROTECTION OF LAND RIGHTS: THE THEORETICAL ASPECT

ФОРМИ ЗАХИСТУ ПРАВ НА ЗЕМЛЮ: ТЕОРЕТИЧНИЙ АСПЕКТ

The article is devoted to consideration of forms of protection of land rights. The author analyzes the views of both domestic and foreign scholars on the definition of the term «form of protection of land rights». Author's definition of the named concept is given. The content of this concept is investigated.

Key words: *land rights, protection of land rights, forms of protection of land rights, land disputes.*

Стаття присвячена розгляду форм захисту прав на землю. Автором проаналізовано погляди як вітчизняних, так і зарубіжних науковців щодо визначення поняття «форма захисту прав на землю», а також сформульовано авторське визначення названого поняття. Досліджено зміст зазначеного поняття.

Ключові слова: *права на землю, захист прав на землю, форми захисту прав на землю, земельні спори.*

Статья посвящена рассмотрению форм защиты прав на землю. Автором проанализированы взгляды как отечественных, так и зарубежных ученых относительно определения понятия «форма защиты прав на землю». Сформулировано авторское определение названного понятия. Исследовано содержание указанного понятия.

Ключевые слова: *права на землю, защита прав на землю, формы защиты прав на землю, земельные споры.*

Constitutional rights and freedoms of the person, participants in land relations, guarantee everyone the opportunity to be an independent subject of public life, exercising his subjective right within the framework of the relevant relations. According to the Basic Law of Ukraine, the state is obliged to ensure the realization and protection of subjective land rights. At the same time Article 152 of the Land Code of Ukraine provides that it guarantees citizens and legal entities equal conditions of protection land rights. The Constitution establishes and recognizes the right of everyone to protect their rights and freedoms, including encroachment made by authorities and officials.

The general theoretical legal doctrine states that any subjective rights of a particular person include three elements and encompass a number of possibilities (competencies). First of all, it is an opportunity for the active actions of the person, in the satisfaction of his needs, the realization of his powers in a relevant sphere. Subjective land rights include the ability to demand from other person proper conduct in the field of land relations. If there are any obstacles to the realization of subjective land rights, then the third element of subjective right enters into force – the person's ability to appeal to the competent authorities for the protection of his violated, unrecognized or disputed right.

It should be noted that the need to protect citizens' land rights arises in cases when they are disputed, violated or unrecognized. In this case, there is a need to commit actions aimed at protecting these rights. As we know, a person realizes his right to protection within the framework of the relevant legal relationship. In this way, the person reacts to the legal relationship, for example, the subject of the dispute. For example, coercive measures to terminate the violated subjective land rights of a person, act as a prerequisite for its exercising, as well as eliminate the consequences of its violation.

As a rule, the protection of violated, unrecognized or disputed land rights is realized in the process of law enforcement activities of law enforcement and other state bodies and is carried out necessarily within the framework of a certain procedure.

The forms of protection of land rights are an element of the mechanism of protection of rights, the components of which are the activities of the state, its authorized bodies and the person themselves in creating legal conditions that help to prevent the suspension of the process of exercising the right, and in this case, its restoration. A full and comprehensive scientific development of all elements of the protection of land rights can serve as a basis for the future modernization of Ukrainian legislation.

That's why studying of the concept, classification and legal regulation of forms of protection of land rights seems to be relevant in order to develop proposals for the improvement of the conceptual apparatus and directly foreseen forms of protection of land rights.

The issue of forms of protection of land rights in Ukraine remains poorly investigated. The study of the definition of category «form of protection» has engaged many scientists, among them: Andreytsev V.I., Karakash I.I., Harytonov Ye.O., Nosik V.V., Pidopryhora O.A., Shulga M.V. and others. The common opinion, unifying the definition of «form of protection» in the material legal sense, formulated by the authors, was that the form of protection – is a procedure for the protection of rights and interests by the relevant actors. In addition to the desire of scientists to come to a single point of view on this, there is also a purely practical need, since, with the improvement of forms of protection, the effectiveness of the exercising of the rights of the subjects of the land legal relations are directly related.

The study of the concept of «form of protection of land rights» should be conducted taking into account the philosophical significance of the category «form». The latter

is understood as an external manifestation of the essence of the content, the existence of which is historically and logically determined by the form. At the same time, the content of the form of protection will be the protection of subjective right itself. We should take into account the fact that the category «protection of subjective right» is used in material and procedural sense. The category «form of protection» should be defined in relation to each aspect of the category «protection of subjective right». The «form of protection of subjective right» with respect to the material aspect of protection is the nature of the restoration of violated law and / or legal interest or the prevention of the threat of violation. At the same time, it is possible to allocate such forms of protection as full or full and partial restoration of the excited subjective right and / or legal interest (prevention of the threat of their violation). The «form of protection of subjective right» as regards the procedural aspect of protection – the procedure in which one or another authorized body (entity) carries out protection as a special type of lawful activity [1, p. 14].

The legal form is interesting from two directions of research. The first demonstrates the connection between law and non-legal phenomena that require legal regulation. The second concerns the role of legal form in the structure of law. This role is quite significant, as the legal form can be used as an external form, for example, such fundamental legal phenomena as legal norm, legal relationship, legal procedure, legal fact and as a kind of transformation from one component of the system of law to another. For example, material law is transformed into procedural with the help of such a legal form as a procedure [2, p. 3].

As for understanding the concept of forms of protection of rights in science, one can distinguish a separate «activity» approach. According to it, the form of protection appears predominantly as a certain activity of the authorized bodies. For example, some scientists determine the form of protection as defined by the law activities of the competent authorities to protect the rights of citizens, including the definition of the way of protecting the rights [3, p. 12]. However, such a definition contains only one feature of the forms of protection – their definition by the law. As to the other, we would like to emphasize that protection of rights can be carried out not only by specially authorized bodies, but also by self-defense. Therefore, this definition cannot be regarded as universal, at least in terms of protecting the rights of citizens.

It should be noted that the approach to defining forms of protection as a complex of certain measures for the protection of the corresponding rights, freedoms and legitimate interests of a person and a citizen has also become widely used in science. Thus, the form of protection is understood as a complex of internally agreed organizational measures for the protection of the law-protected subjective rights and interests that take place within the framework of a single legal regime. Such a definition of forms of protection of the rights of citizens, first of all, proves positive in the complexity and consistency of such organizational measures, since each concrete form of protection actually represents

a separate, independent human rights mechanism whose effectiveness depends directly on the orderliness, integrity and systematic nature of its components.

A large number of modern scientists support the view that a form of protection is a complex of internally coordinated organizational measures to protect the subjective rights and legal interests [4, p. 529]. V. V. Butnev defines the form of protection as a complex of agreed organizational measures for the protection of subjective rights that take place within the framework of a single legal regime [5, p. 17]. In the literature, the form of the protection of law is also understood as a complex of internally agreed organizational measures for the restoration of the violated, unrecognized, disputed right, which is carried out by the authorized bodies or the authorized person in a certain order according to certain procedural rules [6, p. 191].

In other words, within the framework of this approach, the form of protection should be defined as a complex of agreed measures on the use and application of ways and means of protecting the rights of citizens. At the same time, following the above definition, it is not possible to precisely distinguish between the terms «forms of protection» and «protection», the content of which in fact form the appropriate human rights protection measures [7, p. 161].

Another approach should also be distinguished, including defining the form of protection as a specific procedure for the exercise of citizens' rights. Thus, some scientists see the form of protection as a certain order of protection of rights and interests exercised by one or another jurisdictional body depending on its nature [8, p. 7]. The form defines the procedure for the activities of the jurisdictional bodies which are not parties to the controversial legal relationship regarding the implementation of measures for the protection of rights [9, p. 20].

Sometimes it is believed that the form of protection of rights also includes the procedure for the implementation of actions relating to the protection of rights by the participants in the controversial legal relationship without appeal to jurisdictional authorities. In these cases, a certain procedure is adopted for the application of ways of protection of subjective rights [10, p. 409].

A similar point of view is observed by I.M. Vaganova, who notes that forms of protection constitute a certain procedure for the activity of protecting subjective rights, which includes a complex of internally coordinated organizational actions occurring within the framework of a single legal regime [11, p. 98]. Unlike previous approaches to understanding forms of protection of rights, this approach is not identified with protection, but rather considered as its outer shell, the sequence and the algorithm of the use of means of human rights protection. Thus, this definition combines to some extent the above approaches, reflecting human rights activities as an internal essence of the form of protection of rights, organizational measures as its elements. As a result, it is possible to allocate administrative, civil, criminal-law and other forms of protection in the modern system of protection of rights.

In turn, M.K. Suleimenov proposes to determine the forms of protection as prescribed by the law procedure for the protection of rights, that is, not the activity itself, but a certain procedure for the commission of actions to restore the violated, unrecognized or disputed right [12, p. 18.]. This approach is more successful, but it is worth noting that it also concentrates all the attention on the procedural aspect, since the order is the established procedural rules of such activity.

T.Y. Abova, who insists on the necessity to differentiate between forms and the procedure for the protection of subjective rights, follows another point of view. If the form of protection indicates who is carrying it out, then the order of the protection reveals how the protection is realized [13, p. 539]. It follows from the foregoing that, according to the author, the form of protection contains an indication of the subject of protection, in other words – who is using the way of protection chosen by an authorized person.

The foregoing makes it possible to conclude that the modern understanding of the forms of protection should include those principles which emerged from T.Y. Abova and M.K. Suleimenov. Consequently, the category «form» in the context of protection cannot relate only to the subject who applies the way of protection. Protection itself is an activity; therefore, the form of this activity is unlikely can indicate only the subject and not to characterize the order of the activity. In addition, description of the procedure cannot be complete without reference to the fact that the entity has adequate protection.

In such circumstances, it is reasonable to conclude that the category «form of protection» should characterize both the protection of the right and the entity, which directly carries out protection. However, it should be borne in mind that there are much procedural rules for the realization of the protection of rights than subjects of protection. Thus, in the case of an appeal by an author-

ized person to the courts of Ukraine, special procedural rules exist for a certain system of courts of the relevant jurisdiction (general, economic, administrative) and for courts within a separate jurisdiction (in particular, proceedings, ordering for general courts). But it is unlikely that it would be advisable to shred the forms of protection to the slightest differences in the procedural rules for the provision of protection, since in this case there is a risk of shedding light on the meaning of classification as a grouping according to a single criterion. Moreover, the global trend towards unification of disputes over civil jurisdiction should be taken into account – disputes that are currently considered in Ukraine under the rules of the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine.

The analysis shows the lack of a legal definition of the term «form of protection of rights», and there is also no consensus on this in the scientific environment. Thus, in the scientific literature the form of protection of rights is considered as: a separate «activity» approach; a set of certain measures to protect the rights, freedoms and legitimate interests of a person and a citizen; a certain procedure for the exercise of the rights of citizens. In connection with the above, we can summarize the existing works of theorists and practitioners, which will allow us to propose the proper definition of the term «form of protection of land rights».

We consider that the form of protection of land right is a determined by the law procedure for the implementation of a complex of internally agreed measures to protect subjective land rights that take place within the framework of a unified legal regime and is carried out by the authorized bodies, as well as by the authorized person (the bearer of the right), aimed at preventing and termination of violations, as well as restoration of rights, freedoms and legitimate interests of a person and a citizen.

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