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RIGHT ON APPEAL OF CITIZENS – ONE OF THE MAIN FACTORS OF A DEMOCRATIC SOCIETY

ПРАВО НА ЗВЕРНЕННЯ ГРОМАДЯН – ОДИН ІЗ ГОЛОВНИХ ЧИННИКІВ ДЕМОКРАТИЧНОГО СУСПІЛЬСТВА

The article shows the nature and content of the right on appeal, as one of the main factors of a democratic society which is guaranteed ability of a citizen with the Constitution and laws of Ukraine to declare in the prescribed manner of the complaint about prevention of violations of rights, freedoms and legitimate interests of human and citizens. It is determined that effective protection of the rights of citizens through the realization of the right on appeal requires overcoming of formalism in the consideration and resolution of administrative complaints, the involvement of the public, introducing the mechanism of mediation as a progressive method of resolving disputes.

Key words: *rights of citizens, consideration and resolution of administrative complaints, the duties of the subject of the complaint, the improvement of enforcement adopted decision on the complaint.*

У статті розкрито природу та зміст права на звернення як один із головних чинників демократичного суспільства, яке гарантує можливість громадянина, згідно з Конституцією і законами України, оголосити в установленому порядку скарги про запобігання порушень прав, свобод та законних інтересів людини і громадянина. Встановлено, що ефективний захист прав громадян через реалізацію права на звернення вимагає подолання формалізму в розгляді і вирішенні адміністративних скарг, участь громадськості, впровадження механізму посередництва як прогресивного способу врегулювання спорів.

Ключові слова: *права громадян, розгляд та вирішення адміністративної скарги, обов'язки предметом скарги, вдосконалення правоохоронних рішень по скарзі.*

В статье раскрыта природа и содержание права на обращение как один из главных факторов демократического общества, которое гарантирует возможность гражданина, согласно Конституции и законам Украины, объявить в установленном порядке жалобы о предотвращении нарушений прав, свобод и законных интересов человека и гражданина. Установлено, что эффективная защита прав граждан через реализацию права на обращение требует преодоления формализма в рассмотрении и разрешении административных жалоб, участия общественности, внедрения механизма посредничества как прогрессивного способа урегулирования споров.

Ключевые слова: *права граждан, рассмотрение и разрешение административной жалобы, обязанности предметом жалобы, совершенствование правоохранительных решений по жалобе.*

Appeal of unlawful decisions and actions of public authorities on the level of regulatory activity, a large extent lays the foundation of the system of rule of law in public administration. Besides, the construction of legal state is closely connected, first of all, with such basic rights as the right on free elections and a referendum, the right on compensation damages, which were done with the state and the right on appeal decisions and actions of public authorities and their officials[4, p. 14].

The institution of appeal provides active and proactive participation of citizens in the protection of their rights in the administrative order. The right of citizens to appeal acts of authority-is regarded in science as an indispensable attribute of a democratic polity [8, p. 12; 10; 14].

However, despite the prospects of an appeal mechanism, for today it still has not received due development wearing mostly formal nature and it does not protect the rights of citizens, unlike justice.

First of all, the Constitution of Ukraine [6] defines as a right on appeal of citizens, including the right on administrative appeal (article 40) and the right on appeal in court the decisions or actions of public authorities and their officials (article 55). In accordance with this general notion of the appeal is covered with the administrative and judicial appeal. The value of the adminis-

trative appeal is reflected in the fact that it acts as an additional mechanism of protection of rights, freedoms and legitimate interests of human and citizen, in particular, V. B. Averyanov [2] tells that Institute of administrative appeal is an important guarantee of citizens' rights and strengthening the rule of law. In this case, an administrative appeal must be distinguished from judicial forms of protection which is complementary, not mutually exclusive mechanisms. A characteristic feature of coexistence of judicial protection and administrative appeal is freedom of choice forms, methods and means of protection of rights by the person. From these positions we have to disagree with V. P. Tymoshchuk [15, p. 12], who proposes to consider «the establishment of the administrative appeal as a condition to appeal to the court», as an administrative appeal, as judicial protection have their advantages and disadvantages, resulting in the most optimal there is a plurality of any legitimate ways of protection of rights, freedoms and legitimate interests of citizens.

So, in relation to the administrative appeal should call the main advantage of judicial review, which is manifested, at first, in the greater expertise of the judges, secondly, in greater independence and disinterestedness of the judges in the third, according to A. J. Osadchiy

[11], in the finality of a judicial decision for the administrative resolution of a legal dispute. Generally I agree premise, we note that more qualification and independence of the judges than officials of public authorities who are authorized to consider an administrative complaint, it is only presumed and in no way it does not mean less «skilled» administrative complaints. In addition, judicial review is not only last judicial decisions, but also some related disadvantages of proceedings (a complicated procedure of production and casastart). But, according to many scientists, the administrative appeal has such advantages as low cost and efficiency, availability, ease of implementation, evaluation from the standpoint not only of legality, but also expediency. It allows to speak about the prospective effectiveness of the Institute of administrative appeal as a form of protection of the rights of citizens. However, today the legal mechanism of realization of the right on appeal does not fully provide a valid performance of administrative appeal, against the judicial form of protection has mostly a formal nature.

At the same time, in our opinion, the establishment of the system of administrative appeal as a full-fledged human rights mechanism will complement other forms of human rights protection, will allow to unload the proceedings and will facilitate dialogue between society and public administration. However, we do not agree with V. P. Tymoshchuk [15, p. 16] regarding the establishment of a mandatory of the stage of administrative appeal before going to the court. It will contrary to the principle of diversity of forms, methods and means of protection of the rights of citizens, creating artificial barriers for the citizens to justice. Provided parallelism of the appeal of decisions and actions of public authorities in administrative and judicial procedures with the decision of the constitutional Court of Ukraine [13] should be seen not so much as a lack of protection system, but as its extension and an additional guarantee of the reality and of protection of the rights of citizens.

The purpose of this paper is the analytical analysis of right on the appeal of citizens, as one of the main factors of a democratic society, study of the effectiveness of the administrative appeal in protect the rights of citizens in the science contacts with the issue of forming a holistic complex of normative-legal base of the organization and implementation of administrative appeal.

The task of the article is the study of the properties of administrative appeal such as, efficiency, cheapness and ease of implementation particularly it is actualized in the aspect of protection of citizens' rights that requires urgent, timely, and complete application of all necessary measures to prevent, combat and eliminate violations of rights, freedoms and legitimate interests of human and citizen. Justification of the position that the right on appeal does not protect the rights of citizens, however, is the legal phenomenon, which leads human rights mechanism and is the necessary authority-administrative influence over the protection of rights, freedoms and legitimate interests of human and citizen in Ukraine. This human rights mechanism, which is based on an administrative-legal method as the right on appeal is the appeal. To identify in general terms that the appeal rep-

resents an independent form of protection of the rights of citizens as a legally defined procedure for the exercise by authorised persons of the set of multilaterally agreed measures to prevent, combat and eliminate violations of citizens' rights.

Presentation of the basic material. It should be noted some ambiguity in understanding the place and significance of administrative appeal in the system of the means of enforcing the law. So, I. L. Borodin among administrative-law methods of protection of the rights and freedoms of human and citizen at the level of judicial control and Prosecutor's supervision separately allocates the constitutional right of citizens to appeal [1], however, protection of the rights of citizens includes also other kinds of Supervisory activities. From these positions more precise is the position of D. N. Ovsyanko [9, p. 145], which includes the control, supervision and review (the implementation of the right on appeal) to the ways of ensuring legality in activity of bodies of Executive power. However, specified detects the ambiguity of understanding as a legal and administrative method of protection of the rights of citizens at the same time the right to appeal and the appeal. In our opinion, in this case it is necessary to clearly distinguish between the notion of forms, methods and means of protection of the rights of citizens.

In this regard, we have to disagree slightly with the definition of N. V. Karaseva appeal as an appeal (active steps) of a citizen or group of citizens to the competent authorities for the purpose of protecting personally his (their) rights and legitimate interests [5, p. 20]. Note that such a definition is too abstract, unnecessarily referring to the appeal in General, any appeal of citizens to the competent authorities in order to protect their rights, the definition of which, in addition to the administrative appeal procedure will also fall as judicial protection and the current activities of all other entities of public authorities. Thus, from the aspect of understanding the appeal by the scientists overlooked such important characteristic as the subject of the appeal, which is the decisions, actions and inaction of public authorities and their officials who should also be displayed in the determination of the appeal. Besides, the essence of their appeal is not limited by only one appeal of citizen (the realization of the right on appeal), including also the activities of the competent authorities for consideration and resolution raised question of legitimacy (appropriateness) of the decisions and actions of public authorities, including public authorities in the citizen complaint.

In addition, I. A., the Fungus offers a different approach to the definition of the category of administrative appeal, namely, as legal institute, which represents the totality of legal norms, which regulate public relations, which arise in the implementation of the physical or legal person the right on appeal against decisions, actions and inaction of the Executive authorities by filing a complaint to the Executive authority (officials), which is authorized to carry out the consideration and decision [3, p. 4–5]. A significant advantage of the foregoing definitions is the reflection of the relationship of the Institute of administrative appeal with the right on

appeal, which is its basis. However, the determination of the administrative appeal only as legal norm is somewhat narrower and does not show fully its essence as a form of protection of the rights of citizens in the activities of public authorities.

In General must indicate that administrative appeal as a complex legal phenomenon can be viewed from different perspectives – as a mutual activity of a citizen and the competent authorities of protection (law process); legal institute (the totality of legal norms); legal protection of the rights of the citizen; the procedure for activities of a citizen and the competent authorities of protection. In particular, G.V. Fedotova says that appeal (though not administrative, and criminal procedure) defines as founded in law activity with the submission, receipt, registration, consideration and resolution of complaints about violations of citizens' rights with the decision or action of the police as a body of inquiry [17, p. 6]. In our opinion, given the correctness of each of these approaches in the characterization of the administrative appeal arises their optimal consistent combination. Therefore, interpreting the above regarding protection of the rights of citizens in the activities of public authorities, we define administrative appeal as legislatively defined procedure of realization of the right on appeal against decisions, actions and inactivity of public authorities, as well as consideration and approval of the competent authorities filed complaint by a citizen with the aim of preventing, combating and elimination of violations of rights, freedoms and legitimate interests of human and citizen.

In addition, the characteristic of the right on appeal substantive does not only with the category of administrative appeal, but also with the concept of complaints, which is the main external expression (means) of the right on appeal. According to the current legislation, the complaint is the appeal with requirement for the resumption of the rights and protection of legitimate interests of citizens, which are violated with actions (inaction), decisions of public authorities, their officials and other organizations [12].

In addition, today, in accordance with the position of A.E. Luneva, the complaint is given only «in connection with violations of the rights of citizens or dissatisfaction of their legitimate interests» [7, p. 153]. At the same time, it seems to guide mechanism of appeal to the prevention of violations of citizens' rights in activities of public authorities, but the complaint must relate not only the protection of the already violated rights of citizens, but also cases of eliminate the threat of such violation.

We should also stress the inadmissibility of implementation of the right on appeal by filing a petition, which, though for the «recognition for the person with the appropriate status, rights or freedoms», however, is essentially not so much a legal requirement of the citizen, as it is a request to contribute to the realization of rights, freedoms and legitimate interests which is served outside of the context of the relevant administrative-legal dispute.

Thus, in the aspect of protection of the rights of citizens we can say that the administrative complaint is an

oral or written request of a citizen (citizens) to the competent authorities for the prevention, suppression and elimination of violations of rights, freedoms and legitimate interests of human and citizen decisions, actions and inaction of public authorities.

Elaborating on the outlined definitions of administrative appeal and administrative complaint, have to emphasize that the realization of the right on appeal decisions and actions of public authorities is not confined to the submission of the complaint. So, R. S. Miller in the structure of appeal rights allocates such powers as the right of a citizen to petition, the responsibility of the competent authority to consider the complaint and promptly give a response, and the right to state protection of the right on appeal [8, p. 6].

The right of a citizen to appeal against the acts of public authorities directly determined with the nature of administrative legal relations, which show the legal inequality of the parties. In addition, the right on appeal is integral and has an absolute nature, guaranteeing to the citizens of Ukraine, stateless persons and foreign nationals the opportunity to protect the rights of citizens in the activities of public authorities. In this case, the right on administrative and judicial appeal, and the right to appeal and the right to redress and self-defense, V.G. Fathudinow [16, p. 6] defines as a common fundamental right of citizens. It is stipulated with the human rights focus rights on appeal that virtually ensures the reality and the protection of other rights, freedoms and lawful interests of individuals.

We emphasize that the key value in the effective implementation of the right on appeal acquires adequate administrative-legal regulation of administrative procedure, which should ensure not only the possibility of filing administrative complaints, but timeliness and completeness of their consideration with the competent authorities.

In addition, consideration of citizens' complaints is fairly time-consuming process which requires professional and careful examination of all the circumstances of the case and prepare a well-grounded conclusion that in a significant number of complaints is unlikely to be effectively and faithfully implemented in fact appointed by the administrative body of citizens in a free time from the main occupation on a grant basis.

Unlawful decisions and actions of public authorities, can result to significant violations of the rights, freedoms and legitimate interests of human and citizen. In this context, and given a sufficiently long period of consideration of citizens' complaints, which can be forty-five days, the question of the suspension of the contested decisions is actual.

We note that the significant place in the administrative appeal is a citizen's right and duties of the subjects of complaint. Except considered possibility to give a complaint, in the interest of full realization of the right to appeal at first a person also must be given the right to participate in the verification and the consideration of complaints filed, to provide the necessary documents and explanations, and to engage counsel or other representative. Named elements of the right on appeal are in

article 18 of the law of Ukraine [12], however, to ensure the reality and effectiveness of administrative appeal to protect the rights of citizens this list should be supplemented with another right to require performance of decision which is accepted by results of consideration of the complaint.

The right to demand the execution of the judgment on the complaint directly is fixed responsibility of the subject of the complaint to provide a remedy and the actual execution which are taken in connection with the complaint decisions.

At the same time, the real implementation of the mechanism of reconciliation in administrative appeal requires further approximation of extrajudicial administrative appeal in the process model.

In our opinion, the deepening of legal regulation of Institute of administrative appeal with a clear definition of the rights of citizens, duties of the subject of complaints and legal guarantees of protection of citizens' rights is certainly a positive shift in the organization of the realization of the right on appeal. However, it is impossible not to take into account the fact that the approach of administrative appeal in procedurally way to the judicial process in a certain extent, deprive it of advantages such as efficiency, availability and ease of implementation, not anticipating the typical procedure finality of judicial decisions.

Thus, we can emphasize the following. The right on appeal plays an important role in the protection of rights, freedoms and legitimate interests of human and citizen, acting through an administrative appeal. Administrative appeal is substantially complementary to judicial and other protection of citizens' rights, providing, in comparison with them, assess not only the legality but also the expediency and cheapness, speed, accessibility and ease of implementation of the protection of the rights of citizens. Administrative appeal is a legally defined procedure for the implementation of the right on appeal decisions and actions of public authorities, as well as consideration and approval with the competent authorities filed complaint by a citizen with the aim of preventing, combating and elimination of violations of rights, freedoms and legitimate interests of human and citizen.

The right on appeal is a comprehensive protection of the rights of citizens, which provides for broad participation of citizen in the process of reviewing his complaint and during the monitoring of compliance with the requirements of the legislation. The right on appeal includes the following substantive rights: to appeal; to participate in the verification of the complaint; to attend the review; to judicial review of the decision; to require reimbursement of losses incurred; to require the execution of the decision on the complaint.

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