Global Journal of Comparative Law

Special Issue: Re-codification of the Civil Law of Ukraine

Guest Editor: Vasyl Tatsiy

VOLUME 10 • NO. 1-2 • 2021

Global Journal of Comparative Law

VOLUME 10 (2021)

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ISSN 2211-9051
E-ISSN 2211-906X

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GLOBAL JOURNAL OF COMPARATIVE LAW
10 (2021) 61-72

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A Pan-European Dimension to the Implementation and Protection of Civil Rights

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Abstract

The study of subjective law in the scientific and theoretical literature has a long history, which is conditioned by the crucial importance of this category for private law in general and legal relations in particular. The purpose of the article is to analyse the pan-European dimension of the exercise and protection of civil rights. Key methods of research used are the method of comparative legal analysis and the method of linguistic and systematic interpretation of legal texts. It was concluded that the court's method of protecting subjective civil rights must comply with the rules of law and their meaning, which should be understood on the basis of a systematic analysis of the mechanism for legal regulation.

 | DOI:10.1163/2211906X-10010006

Keywords

subjective law – codification of civil legislation – legal protection

1 Introduction

The legal categories of 'exercise of subjective civil rights' and 'protection of subjective civil rights' are inextricably linked, as they are based on the perception of subjective law as one of the basic categories of civil law. Despite the variety of definitions of the concept of 'subjective law', almost all of them boil down to understanding subjective law as the guaranteed possibility of certain behaviour. In itself, giving a person a subjective civil right does not in itself testify to the achievement of the goal of legal regulation for society as a whole or the achievement of its goal by the very subject of the relevant law in particular. In this context, the exercise of the subjective law takes priority, whereas the granting of this right is only a prerequisite, since the value of the subjective law lies in its exercise, in other words – 'the essence of the subjective law'.

In turn, the protection of subjective civil rights is an inherent feature of subjective law. If subjective law enables a person to act in a certain way, then it will only be effective if the person can take appropriate action – even if there are external obstacles to taking this action – overcoming the opposition of others. It does not matter if the subjective law holder has exercised the full range of their rights to defend the subjective actions. It is important for the state to provide them with such an opportunity if there is a corresponding expression of will on behalf of the authorised person. It must be admitted that the dynamics of legal regulation of civil relations have at all times been closely monitored by civilian researchers. And changes in civil law have only increased scientific interest in this area.

The latest codification of civil legislation ended as early as the times of independent Ukraine with the adoption of the Civil Code of Ukraine on 16 January 2003. It significantly changed the approach to determining the position of institutions in terms of the exercise and protection of subjective civil rights in the system of modern civil law. The Civil Code of Ukraine of 2003, unlike the previous codifications of the civil legislation of Ukraine, detailed the basic principles of the exercise and protection of civil rights. Changes introduced to Article 16 of the Civil Code ('Protection of Civil Rights and Interests by the Court') in 2017, together with the adoption of new procedural codes, led to an increase in the importance of problematic issues of protection of subjective civil rights.

2 Materials and Methods

The study of subjective law in the scientific civilisation and theoretical literature has a long history, which is conditioned by the crucial importance of this category for private law in general and legal relations in particular. Until now, the most common approach, with some differences in the use of terms, is the one that comes down to understanding the subjective law as a type and/or measure of the possible behaviour of an authorised person, secured by the duties of others.[1]

However, there are several other ways of determining the category of the subjective law in the civilisation doctrine warrants further investigation. First, many scientists interpreted the subjective law as the power conferred on an authorised person by the rule of law.[2] Second, subjective law was characterised as a sphere or measure of individual freedom in a particular sphere.[3] In this section, it is also worth noting that some researchers interpreted the subjective law both as freedom and power.[4] The subjective civil right is defined by the content of the rules of civil law and the type and extent of possible behaviour of the subject of civil relations generated by the relevant legal fact. This included the right to personal behaviour, the right to count on the appropriate legitimate behaviour of the obliged subject and the right to protection.

Despite some discrepancies in terminology, all of the above definitions should be recognised as successful to some extent, as the generic categories through which they are characterised offset the various aspects of the manifestation of subjective rights. In essence, all definitions of subjective law come down to the fact that it is a guaranteed possibility of certain conduct. The study will use different approaches to understanding subjective law, depending on which certain feature of the phenomenon is under focus. Hence, there is no need to formulate any personal definition of subjective law, since it has already been well accepted in the literature. Therefore, in line with the principle of 'Occam's razor', entities should not be multiplied without necessity for such multiplication. This principle is at the heart of all scientific modelling and theory building. According to the principle of simplicity, from a set of available equivalent models of any phenomenon, the simplest model should be chosen.

1 S.S. Alekseev, *Civil Law* (Moscow: Legal Prospekt, 1981) 440.

2 L.M. Alferova, *Insolvency (Bankruptcy) of Individuals: Development Trends of the Mechanism of Bankruptcy of Citizens* (Moscow: Statut, 2018) 269.

3 G.R. Gafarova, *Consumer Protection* (Moscow: Justicinform, 2018) 185.

4 M. Khomishin, K. Chizhmar, D. Zhuravlev, S. Petkov, *Procedural Documents in the Field of Civil Legal Relations* (Kyiv: Center for Educational Literature, 2018) 184.

In any given model, the principle of simplicity helps in rejection of those concepts, variables or constructs that are unnecessary in order to explain the phenomenon. Following these rules will make the development of the model much easier, and the occurrence of inconsistencies, ambiguities and redundancies will be reduced. At the same time, it is important for this study to conclude that provision of a person with a subjective civil right in itself does not in itself mean either achieving the purpose of legal regulation for society as a whole nor that the subject of the relevant law achieves its goal.

3 Results and Discussion

In the legal literature, it is noted that the exercise of the subjective right is perhaps even more important than the very fact of vesting it. In describing the exercise of the subjective right, scientists point out that this exercise is the prime value of the law itself, the purpose and core of the law, the most important moment of existence and the purpose of subjective law.[5] In any case, as Ye. Streltsova noted: subjective law as a juridical power (the possibility and security of certain conduct) is inextricably linked to the exercise of it.[6] Against this background, it is further appropriate to focus on the content and distinctive features of the exercise of subjective civil rights. From the statutory standpoint, the exercise of subjective law is considered to be the actual commission of such acts, acts of real behaviour of a person, the possibility of committing which is given to that person by assigning (acquisition) of subjective civil rights.

A similar conclusion can be drawn from the results of the analysis of scientific categories of private law. As U. Baron wrote, any right gives power to the authorised person; to exercise this power means to exercise the right.[7] Thus, if the subjective civil right is a guaranteed possibility (power, freedom) of certain conduct, then it would obviously be logical to assume that the exercise of the subjective civil right in the most general sense is the commission of certain acts of conduct by an authorised subject, which correspond to the given opportunity (behavioural models).

5 N.I. Miroshnikova, *The Mechanism for the Implementation of Subjective Civil Rights* (Yaroslavl: Publishing House of the Yaroslavl University, 2015) 316; E.V. Bogdanov, 'Socialization of modern Russian civil law as a development trend', *Modern Law* 1 (2018) 44 at 52.

6 Ye. Streltsova, 'International unification of individual institutions of procedural law', *Legal Bulletin* 4 (2018) 64 at 69.

7 U. Baron, *The System of Roman Civil Law* (St. Petersburg: R. Aslanov Publishing House 'Legal Center Press', 2005) 98.

According to V.P. Grybanov, if the content of subjective law can be characterised as a general type of possible behaviour of an authorised person, sanctioned by objective law, then the content of the process of its implementation is reduced to the commission of real, specific actions by the authorised person, which arise from the specificity of the given particular case. Therefore, the relationship between the behaviour that constitutes the content of subjective law and the behaviour that is the content of the process of its implementation is seen as the ratio of general and specific, the balance between the general type of behaviour and specific forms of its manifestation in the conditions of a specific case, as the right in a static state and the dynamic process of its implementation.[8] The above understanding of the phenomenon of the exercise of subjective rights has subsequently become axiomatic and has been adopted in almost unchanged form in the science of civil law, both in Soviet times and nowadays. The above suggests that the first feature of the exercise of subjective civil right is to recognise that in its essence and legal nature it constitutes an act of a person in terms of their behaviour.

At the same time, one of the current researchers of this problematic, E.V. Vavilin, proposes to consider the exercise of subjective rights as an act, that is, a certain behaviour of the subject aimed at achieving a factual and legal result, as well as the result of the activity innate in the right, that is, the achievement of a legal goal.[9] However, such a proposal confuses the exercise of subjective law (process, action) with the result of this activity. It is hardly possible to concur with such position, considering that the exercise of subjective civil right usually (but not always) allows to achieve the goal of the person concerned. Thus, the exercise of a property right through the disposal of a thing cannot achieve its purpose when such thing (or all the property of the owner) is seized. On this basis, it is important, in terms of the exercise of the subjective right, to understand exclusively the process of implementation of the legal and factual possibilities innate in the subjective law. As noted in the theory of law, freedom is the idea of law, its basic concept, the main and most essential meaning of law. In addition, it has been emphasised that the right is the protection and guarantee of only a minimum human freedom.[10]

The above point vividly manifests itself in the private law. As I.A. Pokrovsky noted, civil law, originally and by its very structure, was the right of the individual human personality, the sphere of their freedom and self-determination.

8 V.P. Gribanov, *The Exercise and Protection of Civil Rights* (Moscow: Statut, 2001) 112.

9 E.V. Vavilin, *Implementation and Protection of Civil Rights* (Moscow: Statut, 2009) 416.

10 N.A. Berdyaev, *The Philosophy of Inequality* (Moscow: Institute of Russian Civilization, 2012) 220.

This is where the idea of a person as a subject of rights was first born, that is, the idea of a person as something legally standalone and independent, even in relation to the state and its powers of authority.[11] Similarly, S.S. Alekseev argued that private law is a sovereign territory of freedom based on law, and the carrier of civilised freedom, if you will, its primordial, firstborn habitation, which has no alternative in a number of spheres of society.[12] Implicit in this argument is also the reservation: for those who see freedom as something insignificant, and those who need to merge all people into a single mass of one tremendous mechanism, private law not only has no value but is also something that needs to be overcome.[13]

In civilisation, the idea of civil law as the private law and, in particular, the peculiarities of its method, lies at the heart of ideas about freedom. Thus, it is widely recognised in science that civil law is based on the principles of legal equality of parties and dispositiveness. According to the apt statement of N.S. Kuznietsova, legal equality, free expression of will, dispositiveness, is the 'genetic code' of civil relations.[14] This genetic code certainly influences and manifests itself in the emergence, alteration, exercise and termination of subjective human rights.

The exercise of subjective rights cannot be represented without their assurance. According to scientists, the legal regulation of any public relations, associated with the process of transformation of legal prescriptions on the plane of actual social relations, provides that every subjective right in the event of its violation is guaranteed the possibility of its forced restoration or protection.[15] Precisely this function was performed by the Civil Code of Ukraine of 2004, which, unlike the previous codifications of civil law in Ukraine, provided a sufficiently detailed regulation of the Institute for the Exercise and Protection of Civil Rights.

Part 1 of Article 15 of the Civil Code of Ukraine establishes that every person has the right to the protection of their civil rights in the event of violation, non-recognition or contestation. There is reason to believe that the right of defence in the context of the specified article is considered a subjective right of a person participating in civil relations, which arises in the event of violation of that person's civil rights and interests (in particular, failure to perform or

11 I.A. Pokrovsky, *The Main Problems of Civil Law* (Moscow: Statute, 2003) 301.

12 S.S. Alekseev, *Civil Law* (Moscow: Legal Prospekt, 1981) 440.

13 *Ibid.*

14 N.S. Kuznietsova, 'Basic methodological foundations of modern civil law of Ukraine', *Law of Ukraine* 8 (2009) 13 at 15.

15 *Ibid.*

delayed performance of obligations, preservation or the acquisition of property without sufficient legal basis, etc.), the non-recognition of this right (for example, the non-recognition of the person by the successor of the reorganised legal entity, the non-recognition of the ownership of the certain property) or the challenge of the civil right (in particular, contestation of property rights, contestation of the right to inheritance, etc.).

However, what is meant by the right of defence in legal science? Defence differs from the concept of 'protection' in that the latter is broader and includes, unlike defence, taking steps to prevent the violation of subjective civil rights, including legal and educational rights, and the application of liability rules to the persons who violate or do not comply with the provisions of civil legislation acts. Accordingly, the right of defence is the statutory type and measure of conduct of the authorised person whose civil rights have been violated, involving the possibility of committing independent actions aimed at restoring the violated, contested or unrecognised right, as well as appealing to the judicial authorities for the exercise of the right of defence.

A special way of protecting civil rights, including property rights, is to apply to the European Court of Human Rights. It should be noted that in Europe and other leading countries in the world, property rights are considered one of the main human rights. That is why Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the protection of property rights.[16] According to this article, every natural and legal person has the right to peacefully own his property. No one shall be deprived of his property except in the public interest and under the conditions provided for by law or by the general principles of international law. Prior to the establishment of the European Court of Human Rights, several principles existed regarding cases concerning the protection of property rights. These included free use of property, equality, proportionality, etc.

Despite the fact that the right of defence in practice is most often exercised through procedural rules, there is no doubt that, in essence, it is primarily a substantive rather than a procedural category, albeit very closely linked to procedural rules. In view of the legislative regulation of the institution for the protection of rights in the civil law of Ukraine, there are grounds to believe that the methods of protection of civil rights stipulated in Article 16 of the Civil Code, the person's right to self-defence against offences and unlawful encroachments provided for by Article 19 of the Civil Code, and the right of a person to

16 European Convention of Human Rights, 'The First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Retrieved 15 October 2019, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

protect their rights at their own discretion, enshrined in Article 20 of the Civil Code of Ukraine, all undoubtedly testify that the protection of rights can be exercised both with the involvement of authorised bodies (in accordance with the procedure stipulated by procedural legislation), and independently by the right-holder without participation of such bodies on the basis of the relevant provisions of civil legislation (substantive law).

V.P. Gribanov noted in this regard that it is somewhat inaccurate to reduce the content of the right of defence solely to the possibility of requesting the protection of the right from the relevant state or public bodies. The right of defence, in its material sense, means the possibility to apply measures of coercive influence over the offender, and this possibility should not be understood only as the actuation of the apparatus of state coercion.[17] It is perceived that such a variety of scientific views on the legal nature of the institution for the protection of rights has led to the existence of a number of definitions of the right of defence, which, although not contradictory, do lie on different planes and co-ordinate systems. Thus, Yu.D. Prytyka believed that the right of defence mean the ability for an authorised person to behave in a certain way in a conflict situation, which is established by the secured legal provision. This ability is granted to such person for the purpose of protecting a regulatory subjective right or an interest secured by the law.[18]

Yu.D. Prytyka, in referring to the scientific works of V.P. Gribanov, notes that the substance of the protection of subjective rights lies in the removal of obstacles to the exercise of the rights of the subjects. Therefore, he believes that the conventional definition of the concept of protection of rights can be somewhat modified by establishing a category of activity that will reflect the inherent quality of this legal phenomenon in more detail. Thus, according to Yu.D. Prytyka, the protection of rights can be defined as a legal activity aimed at eliminating obstacles to the exercise of rights by the subjects, termination of the offence or restoration of the provision existing prior to the offence.[19]

An analysis of the above definitions suggests that the terms 'right of defence' and 'protection of rights' or 'legal protection' in the science of civil law are sometimes unreasonably equated. Even without delving into the debate about whether the right of defence is an independent subjective right, a secondary right or one of the competences of a civil rights subject, it is necessary to separate it from real actions directly aimed at protecting the violated right. Therefore,

17 V.P. Gribanov, *The Exercise and Protection of Civil Rights* (Moscow: Statut, 2001) 112.

18 Yu.D. Prytyka, *General Trends in the Modernization of Civil Liability in European Countries* (Kyiv: Civil Legal Liability, 2019) 224.

19 *Ibid.*

it is reasonable to conclude that the right of defence is a statutory opportunity to apply the compulsory measures established by law or contract aimed at ending the offence and restoring the infringed right or, in the event that restoration is impossible, to compensate for the damage caused by the offence and moral damages. At the same time, the protection of rights constitutes the actions of an authorised person that are aimed at achieving the specified goal.

Another disputable position was expressed by N.N. Vasylina, who states that legal protection includes the issuance of rules that: establish rights and obligations; define how such rights and obligations are exercised and protected; threaten the application of sanctions; list the activities of subjects in the exercise of their rights and protection of subjective rights, as well as the preventive activities of state and non-governmental organisations and the activities related to implementation of legal sanctions.[20] In this context, it should be noted that the category of protection of rights, in our opinion, should be considered, first of all, in the system/mechanism of civil rights, which in general includes the following main stages: formation or establishment of right; implementation of right; and protection of right. The stage of protection of rights is an optional stage of the mechanism by which subjective civil law is exercised. In the event that there are no grounds for the protection of the right, the right of defence is not transformed into a real activity carried out by the subject and aimed at termination of the offence and restoration of the infringed right.

Therefore, legal protection, as one of the stages of the mechanism by which subjective law operates, must be separated from the other stages, since it is characterised by features that make it impossible to integrate with both the stage of the formation of the subjective law and its implementation. Of course, there is no doubt that the application of any remedy will only make sense if the remedies chosen by the subject of the infringement are both effective and appropriate to its content and system of law.

In particular, in paragraphs 5.1–5.2 of the introduction to the Draft Common Frame of Reference (DCFR) 'Principles, Definitions and Model Rules of European Private Law', the efficiency is defined as one of the basic and top-priority principles. In particular, it is noted that the principle of efficiency was added due to the fact that it is not always covered by other principles (freedom, security, justice), although quite often it is a certain aspect of freedom (freedom from unnecessary obstacles and costs).[21]

20 N.N. Vasylina, *Workshop on Civil Procedure Law of Ukraine* (Kyiv: Dakor, 2016) 347.

21 Draft Common Frame of Reference, 'Principles, Definitions and Model Rules of European Private Law'. Retrieved 16 September 2019, http://www.dsg.univr.it/documenti/OccorrenzaIns/matdid/matdid197976.pdf.

Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, ratified by the Law of Ukraine No. 475/97-BP dated 17.07.1997 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention' (hereinafter referred to as 'the Convention') recognises the human right of access to justice, and Article 13 of the Convention recognises the right to an effective protection of rights, which means that a person shall have the right to bring to court a claim for the protection of a civil right that is appropriate to the content of the violated right and the nature of the offence. A direct or indirect prohibition by law of a certain civil right or interest cannot be justified.

The Universal Declaration of Human Rights of 1948 stipulates that everyone shall have the right to an effective remedy via the competent national courts in the event of a violation of the fundamental rights conferred on them by the constitution or by law (Article 8). The right to effective judicial protection is also enshrined in Article 2 of the International Covenant on Civil and Political Rights of 1966. Obviously, that is why the new procedure codes (first and foremost, this refers to the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine) set out the principle of effective protection of the rights of the person, with court as the prevailing objective of the judiciary.

Upon adopting procedural decisions and applying any procedural rules, the court must be guided, first and foremost, by the primary purpose of court proceedings, which is the effective protection of the rights and interests of the person. The same principle underlies the right of a court to apply, at the request of the appealing person, a method of protection of their right which is not stipulated by law or agreement, in the event that the methods provided for by law or agreement do not effectively protect that right. With the change of the procedure codes, so the provisions of the Civil Code of Ukraine also changed. From now on, in accordance with Article 16 of the Civil Code of Ukraine, the court may protect civil law or interests in other ways apart from those established by contract, by law or by the court itself in the cases identified by law.

In accordance with Part 1 of Article 2 of the Civil Procedure Code of Ukraine, in the wording that came into force on 15.12.2017 (with similar provisions contained in the new Commercial Procedure Code of Ukraine), the objective of commercial justice is the fair, impartial and timely resolution of disputes related to the implementation of commercial activity, and consideration of other cases within the jurisdiction of the commercial court, with the aim of effectively protecting the violated, unrecognised or contested rights and legitimate interests of individuals and legal entities, and the state. In that regard,

the court and the participants of the trial shall be obliged to be guided by this task of economic litigation, which prevails over any other considerations in the judicial process (Part 2 of Article 2 of the Civil Procedure Code of Ukraine).

Article 5 of the Civil Procedure Code of Ukraine in its new wording provides that upon the administration of justice, the commercial court shall protect the rights and interests of individuals and legal entities, state and public interests in the manner specified by law or agreement. In the event that the law or the agreement do not determine an effective way of protecting the infringed right or interest of the person that applied to court, then the court, in accordance with the requirement stated in such a claim, may determine in its decision such a way of protection that does not conflict with the law.

Paragraph 4 of Part 3 of Article 175 of the Civil Procedure Code of Ukraine provides that the statement of claim should contain, in particular, the content of the claim: the method(s) of protection of rights or interests provided by law or agreement, or other method(s) of protection of rights and interests, which do not conflict with the law and which the plaintiff requests the court to determine in the decision. It is important that the court takes the plaintiff's chosen method of defence into account upon deciding whether to consider the case in accordance with the simplified or general claim procedure (paragraph 3 of Part 3 of Article 274 of the Civil Procedure Code of Ukraine). That is, the court does not have the right, on its own initiative, to use an effective method of judicial protection unless it is specified in the statement of claim.

There is also reason to believe that a party may insist on applying a method of protection not stipulated by law or agreement, but only in the event that the law or agreement does not determine an effective way of protecting the infringed right or interest of the person that applied to court. The evaluation of the efficiency of the chosen method of defence of the civil right depends largely on the nature of the claim being made against the offender and the nature of the legal relationship that exists between the subject and the offender (the person who has counter-interests with regard to the subject matter of the dispute).

Another legal issue is the determination of the correlation of the applied method of protection to the criteria of efficiency and legitimacy. Can an effective method of protection be unlawful? The answer is obvious. It is necessary to understand the very ideology of modern law, which does not provide protection of the infringed law at any cost. In a particular legal construction, the law-maker seeks a fair balance between the interests of the different parties, factoring in all the circumstances, which must be objectively considered. Therefore, the court, using an efficient way to protect the infringed right, is obliged to determine whether it will lead to a violation of the meaning and

principles of the law governing the disputed relationship, its system and the violation of direct prohibition stipulated by law or agreement.

4 Conclusions

Subjective civil right is defined by the content of the rules of civil law and the type and extent of possible behaviour of the subject of civil relations generated by the relevant legal fact, including the right to their personal behaviour, the right to count on the appropriate legitimate behaviour of the obliged subject and the right to protection.[22] Legal protection, as one of the stages of the mechanism of subjective law, is separated from the other stages of the mechanism; this protection has distinctive features that make both its integration with the stage of the formation of the subjective right and its implementation impossible. It must be acknowledged that the prevailing legal doctrine in Ukraine presupposes that there is a correlation between the content and the legal nature (essence) of existing subjective civil law, on the one hand, and the methods and procedure for its protection on the other. Neglecting such a relation will lead to the exclusion or, ultimately, even the destruction of the system of private law as such, since systematic nature, first of all, presupposes the structure of this system, the hierarchy of its provisions and the rules introduced.

The content of a rule of law applicable to the protection of a particular subjective civil right cannot be artificially detached from the entire mechanism of legal regulation, 'plucked' from the legal plane. This leads to the conclusion that the court's method of protection of subjective civil rights must comply with the rules of law and their meaning, which must be understood on the basis of a systematic analysis of the mechanism of legal regulation, and in other words, such a method of protection should be legitimate. Therefore, any ideas and considerations behind the need to discover an efficient way of protecting violated subjective civil right must not lead to a breach in the principles and system of civil law as a structured system.

22 D. Pylypenko, 'Scientific way of the world cognition and its harmonious combination with the spiritual development of personality and society', *Astra Salvensis* 1 (2020) 5 at 6.

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