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THE MAIN THEORETICAL ASPECTS OF ADMINISTRATIVE AND LEGAL PROTECTION

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In the article, based on the current legislation and opinions of scholars in the field of administrative law, the author examines the main theoretical aspects of administrative and legal protection.

The author presents the opinions of prominent scholars on administrative and legal protection and administrative and legal defence, their thoughts on the definition of these theoretical concepts, which of them include each other and which are broader or narrower.

Legal protection and protection of rights are not identical concepts: legal protection is an abstract, law-making and law-enforcement activity carried out with the help of legal norms and within the framework of legal norms; protection of rights is an activity aimed at observing rights and freedoms, protecting them from encroachments.

The content of administrative and legal protection is divided into three levels by the methods of administrative activity of public administration (application of administrative coercion measures): the first level of administrative and legal protection is provided by the public administration in the process of preventing and deterring offences: administrative and preventive protection or administrative and legal protection in the narrowest sense; the second level of administrative and legal protection is provided by the public administration when restoring the violated right: administrative and legal protection, or administrative and legal protection in the narrow sense; the third level is a combination of administrative and legal protection of the first and second levels, when the public administration comprehensively prevents and restores the violated right: administrative and legal protection in the broadest sense.

In order to bring domestic legislation into line with the requirements of the world community, so that they understand us, there is a need to use the words "protection" and "defence" in one sense, as synonyms, separating them for the needs of administrative and legal protection as follows: defence (protection) in the highest sense ("protection in a very narrow sense") – protection in the highest sense; defence (protection) in the narrow sense ("protection in the narrow sense") – protection in the narrow sense; defence (protection) in the broadest sense ("protection in the broadest sense") – protection in the broadest sense.

Key words: *protection, defence, legal protection, theory, legislation, administrative liability, administrative and legal protection, administrative and legal defence, public administration, administrative and legal relations, protection in the broad sense, protection in the narrow sense.*

Правоторова О. М. Основні теоретичні аспекти адміністративно-правового захисту

В статті на основі чинного законодавства та думок на цю проблематику вчених в галузі адміністративного права автор досліджує основні теоретичні аспекти адміністративно-правової охорони.

Автор приводить думки видатних вчених щодо адміністративно-правової охорони та адміністративно-правового захисту, їхні міркування щодо визначення цих теоретичних дефініцій, які з них включають одне одного, а які є більш «широкими» чи навпаки «вужчими».

Правова охорона та охорона прав не є тотожними поняттями: правова охорона – це абстрактна, правотворча і правозастосовна діяльність, здійснювана за допомогою норм права та в межах правових норм; охорона прав – це діяльність з дотримання прав і свобод, убезпечення їх від посягань.

Зміст адміністративно-правової охорони за методами адміністративної діяльності публічної адміністрації (застосування заходів адміністративного примусу) поділяється на три рівні: перший рівень адміністративно-правової охорони здійснюється публічною адміністрацією в процесі запобігання та попередження правопорушень: адміністративно-попереджувальна охорона або адміністративно-правова охорона в найвужчому розумінні;

другий рівень адміністративно-правової охорони здійснюється публічною адміністрацією під час відновлення порушеного права: адміністративно-правовий захист, або адміністративно-правова охорона у вузькому розумінні; третій рівень – поєднання адміністративно-правової охорони першого і другого рівнів, коли публічна адміністрація комплексно здійснює попередження та відновлення порушеного права: адміністративно-правова охорона в широкому розумінні.

З метою приведення вітчизняного законодавства до вимог світового товариства, щоб вони нас розуміли, є потреба вживати слова «охорона», «захист» в одному розумінні, як синоніми, розділяючи їх для потреб адміністративно-правової охорони таким чином: захист (охорона) у найвищому розумінні («protection in a very narrow sense») – охорона у найвищому розумінні; захист (охорона) у вузькому розумінні («protection in the narrow sense») – охорона у вузькому розумінні; захист (охорона) у широкому розумінні («protection in the broadest sense») – охорона в широкому розумінні.

Ключові слова: *захист, охорона, правова охорона, теорія, законодавство, адміністративна відповідальність, адміністративно-правова охорона, адміністративно-правовий захист, публічна адміністрація, адміністративно-правові відносини, охорона в широкому розумінні, охорона у вузькому розумінні.*

Statement of the problem. Human civilisation is developing in a globalised and urbanised world in the context of the information society. Our State of Ukraine cannot stay away from these global processes, it has chosen as its development vector the direction towards the European community, European values, and also aims to become a state governed by the rule of law with a civil society, especially now during a full-scale invasion. These humanistic ideals force the state to create new conditions for the development of many aspects of public life, especially in the legal field of our country.

Analysis of recent research and publications. Many scholars from various branches of law have considered in their works certain aspects of legal protection in general, and administrative and legal protection in particular. However, they usually pointed out the need to reform the legal framework, to create new means of administrative and legal protection of their social value (property rights – V. Galunko [1–3], intellectual property rights – E. Yurkova [4], the right to entrepreneurship – S. Sidak [5], atmospheric air – S. Vorushylo [6], fauna – V. Knysh [7], public order – M. Loshytskyi [9], V. Tsykalevych [10], the right to computer programs – R. Saunin [10; 11], etc, this list can be continued for a long time). However, an effective theory of administrative and legal protection, its latest model, and modern conceptual vision have not yet been scientifically implemented.

The aim of the article is to study the opinions of scholars on the theoretical aspects of administrative and legal protection and to develop an effective theory of administrative and legal protection, its latest model, and the current conceptual vision of this important issue.

Presentation of the main material. Before exploring the concept and content of administrative and legal protection, we should refer to the philosophy of law, and in our opinion, this will be appropriate. According to V. Nersesants, different definitions of law, which represent separate areas of specification of the content of the principle of legal equality, express the same (and only) essence of law. Each of these definitions implies other definitions in the general context of the principle of legal equality. This explains the internal semantic equivalence of such apparently different definitions as: law is formal equality, law is a general and necessary form of will in social relations of people, law is universal justice. After all, formal equality also implies freedom and justice [12, p. 35].

According to Hegel, law consists of the fact that existence in general is the existence of free will. The dialectic of this will coincides with the philosophical construction of

the system of law as the realm of realised will. The concept of 'law' is used in Hegel's philosophy in the following meanings: 1) law as freedom (the idea of law); 2) law as a certain measure and form of freedom (special law); 3) law as law (positive law) [13, p. 15]. In general, it should be noted that the philosophy of law is an important component of Hegel's entire philosophical system. The task of the philosophy of law, according to Hegel, is to reveal the idea of law and the idea of the state, and therefore a certain science should not, firstly, study positive law, and secondly, describe what law should be (according to natural law views), so its subject is the idea of law [14, p. 60].

Attention should also be paid to the value of law as a means of satisfying the fair, progressive needs and interests of society and its individual members. The essence of law is the main, internal, relatively stable and qualitative basis of law, reflecting its true nature and purpose in society [15, p. 33].

In the reasonable opinion of V. Kotyuk, phenomenon and essence are philosophical categories used to understand the social patterns of society's development. The analysis of a 'phenomenon' as a phenomenon makes it possible to identify and see its external features in practical life, usually visually. The category of 'essence' reflects the core, the main features of the phenomenon that do not lie on the surface, but require research and application of theoretical abstract thinking [16, p. 28–29].

Humanity is on the verge of significant changes. In the period of globalisation and the gradual deprivation of the monopoly of state power over citizens, only those countries that create better living conditions for people will have a future. States in which human rights are violated and states whose authorities pursue a long-term populist social policy will cease to exist [17, p. 9].

The ongoing reform of the political system in Ukraine and the implementation of administrative reform based on the balance between the interests of the state and the interests of citizens encourage administrative science to search for effective and qualitatively new ways to regulate administrative relations. One of the ways is to harmonise the conceptual apparatus used and to develop scientific categories that would reflect the realities of today [18; 456].

In the science of administrative law, there are no special monographic studies which would systematically reveal the theory of administrative and legal protection. Accordingly, there is no generally accepted approach in the national theory of administrative law to the content and concept of administrative and legal protection as a leading category of administrative law which reveals the statics and dynamics of public administration activities in restoring violated rights, freedoms and legitimate interests of individuals and legal entities.

At the same time, according to a prominent scholar in the field of administrative law V. Averyanov, the decisive role in the legal regulation of relations between the State and the individual belongs to the branch of administrative law, the rules of which should ensure the specific application of constitutional provisions on various rights and freedoms of citizens in their numerous relations with executive authorities, local self-government bodies, officials, because until now the national doctrine of administrative law, unfortunately, is dominated by the former Soviet or, relatively speaking, 'Neo-Soviet' doctrines. They do not reflect the true role of administrative law as the oldest means of public law regulation of relations between public authorities and individuals, which has long been a generally accepted standard in democratic countries.

According to V. Averyanov, it is crucial for the creation of a new national doctrine of administrative law to rethink the fundamental principles of administrative law theory, the basic place among which is occupied by the scientific interpretation of the subject

matter of regulation of this branch of law. After all, it is in view of its subject matter that administrative law is distinguished as an independent branch of Ukrainian law and the sphere of its regulatory effect is determined [19, p. 11].

The human-centred theory of administrative law, in which human rights and freedoms are given the main role, should become dominant in the theory of administrative and legal protection in modern Ukraine.

First of all, it should be noted that administrative law regulates various social relations involving a wide range of subjects of law, and the activities of public administration are multidirectional and regulated by all branches of law, including administrative law [21, p. 31]. It aims to regulate the relations between the ruling authorities and the public in matters of public administration (the word 'administrative' comes from the Latin administratio – 'management'). The task of administrative law is of great social importance. When organising society, the state authorities do not leave any sphere of public life, any important corner of this life is unregulated [22, p. 22].

In the opinion of R. Kaliuzhnyi, V. Shkarupa, and H. Zabarnyi, administrative law occupies a special place in the mechanism of legal regulation, as it is a necessary and important tool for managing social processes [23, p. 176].

The subject of administrative law is a set of social relations related to the power activities of public executive authorities in the implementation of laws and acts of justice, unless they have become the subject of regulation by other branches of law in the process of concluding and executing administrative contracts, as well as administrative proceedings established to ensure the exercise and protection of citizens' rights, and to create conditions for the normal functioning of civil society and the state [21, p. 38]. Administrative public law is a domestic public law, as it covers legal norms applicable to relations between the State and legal entities that do not belong to a foreign state [24, p. 5]. In our view, the subject matter of administrative and legal protection does not include issues of administrative activities of public administration carried out by means of methods of encouragement and persuasion. Therefore, there is no doubt that the prevention of offences (crime prevention) and restoration of violated rights, freedoms and legitimate interests of individuals and legal entities carried out by public administration are the subject matter of administrative law and form the basis for understanding administrative and legal protection.

In order to define the concept of administrative and legal protection, it should be clarified that a concept is a form of thinking that reflects objects in their essential features. A feature of an object is something in which objects are similar to each other or in which they differ from each other. Any properties, features, or condition of an object that in some way characterise it, distinguish it, and help to recognise it among other objects are its attributes. Not only the properties belonging to the object can be signs; the absent property (feature, condition) is also considered as its sign [26; 458].

In other words, the concept of administrative and legal protection includes the properties, main features and characteristics of a certain phenomenon, which can be used to distinguish it from other legal categories. One encyclopaedic dictionary defines the term 'judicial defence' as a set of procedural actions aimed at denying the accusation or mitigating the accused (defendant). In general, the term 'defence', as well as 'protection', has many varieties [25, p. 454].

Let us start with the fact that despite the fact that the definitions of 'administrative and legal protection' and 'administrative and legal defence' are used quite widely, there is no clear distinction between them. One of the key issues in the study of any legal phenomenon is the question of its content. In order to determine the content of the

concepts of ‘administrative and legal protection’ and ‘administrative and legal defence’, we should start with the distinction between the categories of ‘protection’ and ‘defence’. These definitions are very close in meaning, and therefore are sometimes used in the legal literature as identical words and do not have clear distinctions. For example, in one of the explanatory dictionaries the term ‘protection’ is defined as something that protects, is defence, and the term ‘protect’ means to guard, to fence against encroachment, against negative actions, against danger; to warn, to provide against something That is, a situation arises when ‘protection’ is defined by the word ‘’defence‘’, and ‘defence’ is defined by the word ‘’protection‘’. Some scholars consider the concepts of ‘protection’ and ‘defence’ as a terminological tool that helps to define one concept through the other [18; 27; 459].

Thus, in the opinion of I. Borysenko, in the modern legal literature there are different approaches to determining the correlation between the concepts of ‘protection’ and ‘defence’ of rights: from the ‘narrow’ one, when the protective function actually means the exercise of defence after the actual violation of a right, and the ‘broad’ one, when ‘legal protection may cover the entire range of means ensuring the exercise of subjective rights enshrined in legal norms both in their positive state and in case of violation’ [28].

A special group is made up of those researchers who generally deny the appropriateness of using any of these terms. For example, T. Shubina believes that the term "protection of law" has no legal meaning and is practically not used in legislation, in other words, the legal regulation of certain social relations, the consolidation of certain rights in legal norms has a general regulatory (non-law enforcement) character [29, p. 17].

A. Mordovets distinguishes between protection and defence of rights in a slightly different way. Protection of rights and freedoms, he believes, is a state of lawful exercise of rights and freedoms under the control of social institutions, but without their interference. Defence measures are applied when the exercise of the right to freedom is difficult, but the right to freedom has not yet been violated. If the rights of freedom are violated, they need to be restored rather than defended [30, p. 88]. As A. Smirnov points out in his works, this point of view of the researcher is flawless. According to the author's logic, the protection of rights and freedoms is not a protective but a regulatory function of law. Thus, one of the functions of law is excluded, which is contrary to the very essence of law [31, p. 123].

In his works, M. Vitruk, revealing the peculiarities of the legal status of an individual, drew attention to the guarantees of protection (defence) of his rights, duties and legitimate interests. At the same time, the concepts of ‘protection of rights’ and “defence of rights” were identified [32, p. 217–225]. The second approach is that “defence of rights” is considered as a component of the more comprehensive concept of “protection of rights”. This position is expressed by most scholars in their works, but they sometimes made such a distinction according to different factors [18].

According to the valid point of view of Y. Vavzhenchuk, who covered similar issues, but in labour law, the concepts of ‘protection’ and ‘’defence‘’ are not clearly defined and distinguished in their content and essence, and there are differences in the interpretation of these concepts: some researchers in Russian and Ukrainian believe that these terms are identical and can be defined through each other; others include the process of defence as one of its constituent elements. Accordingly, in the legal sphere, there is currently no clear definition of the relationship between the concepts of ‘protection’ of rights and ‘defence’. An analysis of many points of view and current legislation, provisions of the Constitution of Ukraine, labour legislation, and the draft Labour Code shows that protection is a broader concept that may in some cases include defence. The

current labour legislation defines protection of labour rights as a set of measures and means by which labour rights are established, the procedure for their implementation is determined, and their observance is ensured. Hence, the current labour legislation understands the protection of labour rights broadly, including direct protection of labour rights [33, p. 48].

In her works, D. Kusherets, who has studied the somewhat related issue of protection and defence of property rights in the field of contract law of Ukraine, notes that protection reproduces the statics of the contract, there are only means of control and prevention of violations. Protection is an active phase that occurs after the actions of the party that has breached the terms of the contract. Therefore, the protection of property rights is always an active phase in terms of the informative nature of the provisions or clauses in each contract. At this time, the category of property rights defense is passive [34, p. 16].

The fact that the simultaneous use of these concepts in a certain way complicates not only the understanding of the processes taking place within their content, but also impedes the proper exercise of rights, has already been noted in the legal literature, and as a result, it has been proposed to refuse one of the terms altogether: 'the legislator does not make a clear distinction between these two terms ('protection' and 'defence'). In view of this, the use of these two terms in legislation and their arbitrary interpretation by scholars in some way confuses law enforcement practice and causes confusion in the terminological apparatus of legal science [33, p. 48].

In R. Maksymovych's view, having analysed the terms 'protection' and 'defence', it should be noted that they have in common the legal nature and constitutional priority, primarily of a person and a citizen, as well as the activities of the State and its structures aimed at ensuring the rule of law. The main difference is in the functional purpose, namely, the object of protection is human rights, and protection is the activity that provides for the protection of the law, i.e. defence of the law [35, p. 105–106].

Therefore, within the framework of our work, we consider it appropriate to support the view that the concept of 'protection' is broader than the concept of 'defence' and is covered by the former [28]. Legal protection should be considered not only as the establishment of legal means aimed at exercising a subjective right and preventing its violation, but also as legal regulation of legal relations. Indeed, the norms on the defence of rights constitute only a certain part of the protective norms, which include the prevention of violations and those that establish a mandatory mechanism for their implementation [36, p. 62].It should be added that administrative legal relations have a clearly defined imperative character. At the same time, there are also separate horizontal relations, including those of an administrative-contractual nature, which in administrative law have a clearly expressed supportive and temporary nature [37, p. 588]. By regulating public relations, administrative law pursues two main goals. On the one hand, it determines the limits of possible interference of the ruling authorities in the sphere of personal amateur activity of citizens; on the other hand, it determines the attitude of citizens to the positive activities of the state authorities themselves [1, p. 64–65; 22].

Conclusions. Thus, administrative and legal protection is an administrative law institution consisting of homogeneous administrative law provisions whose legal effect is aimed at preventing offences (crime prevention) and restoring violated rights, freedoms and legitimate interests of individuals and legal entities, which are carried out by public administration on the basis of certain principles and with the help of administrative instruments.

It should be added that in each legal environment, law performs the appropriate functions, but their "regulatory" or "protective" effect is different in different societies

and different time frames. Therefore, law, as the most effective regulator of social relations, is also distinguished by its functional load, which is dominated by either regulatory or protective properties [38, p. 44–45; 460].

If we consider the functions of law as the areas of its impact on society, then with regard to administrative law, attention should be paid to the type of legal relations that are subject to administrative norms. The development of democratic ideas and their implementation in the activities of states shift the focus of understanding of administrative legal relations from exclusively executive and administrative, as well as intra-organisational relations to those that are mainly of a 'service' nature. Regulatory and protective functions should be aimed at creating favourable conditions for the effective exercise of rights and obligations of subjects of administrative and legal relations [39, p. 62].

According to A. Kolodiy and A. Oliynyk, the regulatory function is aimed at regulating social relations by securing the desired behaviour in certain branches or institutions of law. The protective function is aimed at protecting the relevant system of social relations, ensuring their inviolability by offenders, preventing offences, reducing or eliminating them from everyday life [38, p. 29–30].

In his works, V. Kopeychykov refers to the protective function of law as a special legal function. The protective function is aimed at defending positive social relations by eliminating socially harmful and dangerous acts of people and their associations, restoring violated rights of subjects [41, p. 111].

Therefore, administrative and legal protection is to some extent related to the protective function of law, but not identical to it, since the subject of administrative and legal protection includes issues of prevention of violation of law, and according to the classical rule, the protective function of law is activated after violation of a certain intangible or material benefit of a person.

The current laws of Ukraine regulating the protection of certain objects (e.g., protection of cultural heritage, protection of rights to inventions and utility models) have a separate section on ' Rights Defense' (in the Law of Ukraine on Protection of Rights to Inventions and Utility Models) and ' Defense of Traditional Character of the Environment and Cultural Heritage Objects' (in the Law of Ukraine on Protection of Cultural Heritage).

Laws regulating the protection of certain objects contain both rules establishing the rules of conduct of entities in relation to the protected object and the procedure for defending these objects from unlawful behaviour and encroachments. At the same time, laws regulating protection issues (consumer rights, economic competition, protection of the population from infectious diseases, etc.) are aimed at regulating the procedure for the actions of legal entities in order to prevent violation of guaranteed rights, to eliminate the possibility of such violation to the maximum extent possible, or to restore violated rights by establishing the relevant rights, powers of these entities and public authorities, NGOs, etc. [42; 33, p. 45–46].

In our view, legal protection and protection of rights are not identical concepts: legal protection is an abstract, law-making and law enforcement activity carried out with the help of legal norms and within the framework of legal norms; the protection of rights is an activity to respect rights and freedoms, to protect them from encroachment [42; 33, pp. 45–46].

The content of administrative legal protection according to the methods of administrative activity of public administration (application of administrative coercion measures) is divided into three levels: the first level of administrative and legal protection is carried out by the public administration in the process of preventing and averting

offenses: administrative and preventive protection or administrative and legal protection in the narrowest sense; the second level of administrative and legal protection is carried out by the public administration during the restoration of a violated right: administrative and legal protection, or administrative and legal protection in the narrow sense; the third level is a combination of administrative and legal protection of the first and second levels, when the public administration comprehensively carries out the prevention and restoration of a violated right: administrative and legal protection in the broad sense.

In order to bring domestic legislation into line with the requirements of the world community, so that they understand us, there is a need to use the words "protection" and "defence" in one sense, as synonyms, separating them for the needs of administrative and legal protection as follows: defence (protection) in the highest sense ("protection in a very narrow sense") – protection in the highest sense; defence (protection) in the narrow sense ("protection in the narrow sense") – protection in the narrow sense; defence (protection) in the broadest sense ("protection in the broadest sense") – protection in the broadest sense.

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