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Rights Defence and Rights Protection Principles of the Legal Assistance in the Implementation of Rights and Legitimate Interests

Vladislav Yu. Panchenko*
*Siberian Federal University
79 Svobodny, Krasnoyarsk, 660041 Russia*

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The article substantiates the presence of rights defence and rights protection principles in all forms of legal assistance in the implementation of rights and legitimate interests based on the analysis of current views on the correlation of rights defence and rights protection in the law ensuring mechanism. The author studies the influence of such correlation to the legal regulation and rights defence as a distinguishing feature of the legal assistance in the implementation of the rights and legitimate interests.

Keywords: legal assistance in the implementation of the rights and legitimate interests, rights defence activities, rights protection activities, legal aid, public service.

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Legal assistance in the implementation of rights and legitimate interests can be defined as professional legal activities carried out by various stakeholders (public and local authorities, their officials, organizations and citizens) in the types and forms provided by positive law as the main or additional function that is non-compulsory for the recipient. It facilitates the implementation of legal opportunities (rights, freedoms and legitimate interests) by the means of a legal nature to serve the subject of law interests fully and without obstructions. There are diverse forms of legal assistance in the implementation of rights and legitimate interests: legal assistance from advocates,

notaries, private-practice lawyers and law firms, public legal assistance (participation of prosecutor, other public and local authorities, other organizations and individuals in the trial under the articles 45-47 of the Code of Civil Procedure, and also the activities of ombudsman, etc.), legal information and consultation in order to provide public services, mediation and etc.

The legal nature of one or another form of legal assistance as a mechanism to ensure the right is of fundamental importance for the legal regulation of the conditions and the procedure for its provision.

Law ensuring activities generally include defence and protection of the right (the rights,

freedoms and legitimate interests), while in the Russian and foreign legal literature the sufficient attention is paid to the issue of relationship between law enforcement and advocacy¹.

The main views of the scientists can be combined into three main groups: a) the identification of the “protection” and “defence” of human rights, b) the recognition of the rights defence as the wider concept which includes protection; c) the understanding of rights defence as an activity carried out prior to violation of rights aimed at preventing it and rights protection as an activity related to the violation of rights or the immediate threat of such violation.

An alternative view is that “the interrelations of legal defence and legal protection is more complex than simply the relation of specific and generic concepts. Otherwise the human rights institutions (i.e. those institutions that carry out human rights activities) would only act as the law enforcement agencies (i.e. the agencies responsible for the law enforcement), though in practice, as we know, this is not the case, and the activities of human rights institutions is not a type of law enforcement functioning at all”. “It is not a coincidence that there is a right of self-defence concept, but there is no right of self-protection concept”².

Law enforcement is to prevent and stop the violations of legal norms, i.e. law enforcement involves measures aimed at the effectiveness of objective law, including those provisions that establish the rights, freedoms and duties of individual. Law enforcement ensures the implementation of subjective rights at the extent to which it also creates the conditions for the implementation of the objective law provisions that includes the rights, freedoms and duties of individual. Therefore, objective law is primary for the law enforcement and subjective rights of individual and legitimate interests as their derivation are primary for the human rights

activities. Herewith the provisions of objective law are applied to defend subjective rights. Law enforcement and human rights institutions can be marked out depending on the nature of the principal activity. The elements of rights defence and rights protection can occur in various institutions in different correlation at that: rights defence or rights protection principles can substantially prevail or rights defence or rights protection are carried out about equally³.

Rights defence and rights protection in the ensuring of the law shall be considered as different “activity centres”, “power sources” in law ensuring mechanism. They exists in a dialectical relationship of unity and conflict of opposites and the analysis of their effect allows to distinguish legal assistance in the implementation of rights and the legitimate interests from the other types and measures of right ensuring in the first place, and more precisely clarify the legal nature of the various types of legal assistance in the implementation of rights and the legitimate interests, which determines the nature of their legal regulation in the second place.

Rights defence, taken as an ideal type and in its pure form, upholds only individual legal interests and specific person’s objectives even to the detriment of the interests and objectives of the others. Therefore, the advocate bothers with the prevention of a judicial error only to the extent of his client’s interests. Moreover advocate is not only entitled, but also in some cases obliged (of course within the law) to contribute judicial error as the only fair judicial act is the one most favourable for his client from the advocate’s point of view⁴.

Rights protection, considered as an ideal type, on the contrary will be either impersonal, impartial, independent of one’s legal interests and objectives, or will coordinate the interests and objectives of different stakeholders in specific situation. Hence the activities of the

public authorities, which are independent from the legal objectives and interests of the specific stakeholders that are objectified in the form of will expression, initiatives (for example, submission of application), cannot be regarded as a legal assistance in the implementation of rights and the legitimate interests as a general rule, although in fact the activities of the public authorities promote and help their implementation (judgment of court, decision to institute criminal proceedings, etc.). The exception is the activities in regards to persons with incomplete legal capacity; in this case, legal assistance can and shall be provided without the showed initiative.

From the standpoint of such rights protection and rights defence correlation in the activity of rights ensuring – all the forms of legal assistance in the implementation of the rights and legitimate interests can be aligned depending on the prevalence of rights protection and/or rights defence.

Thus, the maximum degree of “rights defence”, which is expressed only in the client-centred implementation of the rights and legitimate interests (including even the detriment of the rights and legitimate of the others, absence of impartiality requirement, but on the contrary biased upholding of the clients interests), dominates in the advocates and lawyers in private practice legal assistance. In this regard, only conditions, procedures and legal forms of assistance are a subject to the legal regulation, but not its strategy and tactics, which are left to the discretion of stakeholders with the general prohibition on the use of illegal means.

However, already in the notaries legal assistance there are elements that constrain their activities in being beneficial to the assistance requester (there is the requirement of impartiality); the notary is obliged to clarify the rights and

responsibilities, the possible consequences of legal actions to all participants. Law regulates notarial actions in this case.

Public legal assistance is based on the objective law provisions and the resulting need to harmonize the interests and objectives of all stakeholders and which do not necessarily comply with the interests of the requester (the procedural provisions are based on the consequences of the abandonment of a claim by the prosecutor and other officials in the process with the plaintiff). In these situations rights defence and rights protection are involved; the interests of the requester (rights defence principle) are put into the framework of objective law (rights protection principle).

Rights protection principle is showed more clearly during the mediation: the mediator shall not be a party’s representative and provide legal, consulting or other assistance to any party, he shall not be directly or indirectly interested in the outcomes or be a relative to any of the parties (article 15 of the Federal Law of July 27, 2010 № 193- FZ “On alternative dispute resolution with the participation of a mediator (mediation procedure)”).

In the public legal services rights protection principle shows in the standardization, commonality of their delivery in respect to each and every, regardless of the legal environment in which the subject is forced to request their provision.

The above leads to the following conclusions:

- Rights protection and rights defence principles are present in all forms of legal assistance in the implementation of the rights and legitimate interests though in various combinations;
- the element of rights defence as appliance for the assistance initiative is constitutive to facilitate the implementation of the

rights and legitimate interests as an independent unit in the mechanism of the right ensuring;

- the rights defence principle in the legal assistance in the implementation of rights and legitimate interest determines less

regulation of the legal assistance in the implementation of rights and legitimate interest, whereas rights protection tends to standardization and detailed resolution of all actions which constitute legal assistance.

¹ See, for example: Acting as fire alarms with law enforcement? Interest groups and bureaucratic activity on hate crime – Haider-Markel, D.P. (2006) American Politics Research 34 (1) , pp. 95-130; Nonprofit advocacy organizations: Their characteristics and activities – Child, C.D., Groønbjerg, K.A. (2007) Social Science Quarterly 88 (1), pp. 259-281; Impact of law enforcement activities on risk of firearm deaths in Brazilian cities – Tiedemann, K.H. (2011) Proceedings of the IASTED International Conference on Modelling, Identification and Control, pp. 179-184; How transparency improves the control of law enforcement authorities' activities? – Rajamaki, J., Tervahartiala, J., Tervola, S., Johansson, S., Ovaska, L., Rathod, P. (2012) Proceedings – 2012 European Intelligence and Security Informatics Conference, EISIC 2012, art. no. 6298881 , pp. 14-21; Law Enforcement Agencies' activities in the cloud environment: A European legal perspective Balboni, P., Pelino, E. (2013) Information and Communications Technology Law 22 (2) , pp. 165-190; Enforcement Activity in Consumer Protection Regulation in Croati – Josipović, T. (2013) Journal of Consumer Policy 36 (3) , pp. 287-314 etc.

² A. Avtonomov, Human rights, human rights and law enforcement activities. Moscow: "Liberal Mission" Fund, 2009. p. 36-37.

³ Ibid, p.38-39, 36-37.

⁴ N. Andrianov, Civil society as a medium for advocacy institutionalization. Moscow, Book House "LIBROKOM", 2011, p. 223.

Правозащитное и правоохранительное начала в юридическом содействии реализации прав и законных интересов

В.Ю. Панченко

*Сибирский федеральный университет
Россия 660041, Красноярск, Свободный, 79*

На основе анализа современных подходов к соотношению правоохранительной и правозащитной деятельности в механизме обеспечения права автором обосновываются выводы о наличии во всех формах юридического содействия реализации прав и законных интересов правоохранительного и правозащитного начал, влиянию их соотношения на правовое регулирование, правозащитности как отличительном признаке юридического содействия реализации прав и законных интересов.

Ключевые слова: юридическое содействие реализации прав и законных интересов, правозащитная деятельность, правоохранительная деятельность, юридическая помощь, публичные услуги.

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