

## An Individual's Right to Judicial Protection - Whether it Protects

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**Abstract:** The article critically examines the current point of view on the content and the legal regulation of the right to judicial protection of the individual. The author offers an extended legal interpretation of the right, based on the analysis of the international legal provisions, norms of the national law, jurisprudence and doctrine that would regulate this right as a combination of the right of access to justice, the right to a fair trial and the right of execution of judgment. The right to judicial protection is seen as a legal institute of substantive and procedural law; and the characters of the right to judicial protection as a subjective right of the individual are distinguished and analyzed. The right to judicial protection of the individual is assessed in terms of the requirements of international legal acts. The value of international judicial protection (access to international justice) is assessed as a general guarantee of human rights, as it is the most independent and objective. In the end, the author concludes that the existing legislative and international legal interpretations of the individual's right to judicial protection are obsolete and non-compliant with modern legal requirements.

**Key words:** The right to judicial protection of the individual • Access to justice

### INTRODUCTION

Protection of human rights should ensure, first of all, the state, through its judicial and other organs. The Western doctrine puts forwards the thesis that this provision is one of the basic principles of international law [1, P. 8]. In this case it is objectively evident that the effective functioning of the international system of protection of human rights, the international law provides certain guarantees that can ensure nationwide protection. The very idea of human rights as a legal concept is based on the principle of *ubi jus ibi remedium* - where there is a right to and should be a means of protection. These guarantees include human rights for legal protection vested in international legal acts, both from the side of the government and with the facilities that exist in the international law.

Assessing the traditional view on the concept of "the right to judicial protection" we are to admit only one fact - we either do not understand the importance of the right for the individual, or try to "shut our eyes" to the existing problem. The scope of the term "right to judicial protection" traditionally includes the right of access to justice, the right to a fair trial and the right of executions of the decision.

For example, in one of the reports on the British system of civil justice "Master Scrolls" (Master of Rolls) - Head of the State Archives, Chairman of the UK Court of Appeal, Lord Woolf - defined a set of principles, compliance with which can guarantee the right to effective judicial protection. The judicial system can provide such a right if it:

- Gives fair and legitimate results;
- Is impartial to litigants;
- Ensures due legal procedure with moderate costs;
- Considers the case as quickly as possible;
- Is clear to those who appeal to it;
- Is able to respond to the needs and requirements of those who resort to its help;
- Minimizes uncertainty and lack of confidence as much as the nature of the case allows;
- Is efficient, organized and has sufficient resources [2].
- Lüscher, evaluating the effectiveness of the French justice system, says that "the right to a legal defense is made up of the following components: a) free access to justice and b) the possibility of repeated testing and review of the taken decision and c) the right to appeal the court decisions and rulings in

higher courts" [3, P. 15]; and noting the features of free access to justice, he includes in the concept the right to go to court, the right to the best possible course of justice, the right of the two-stage trial, the right to appeal against court decisions in the supreme court, the right to an independent court, the right to an impartial judge and the right to a French judge [3, P. 288-304].

L.L. Zaitseva in the work "Fair trial: International experience and the legislation of the Republic of Belarus" writes: "The right to a fair trial is the universally recognized international legal norm directly related to human rights... So all authoritative international and legal acts secure above all, the very right to judicial protection, or access to justice" [4], thus identifying the right to judicial protection, the right to access to justice and the right to a fair trial.

In our view, the right of access to justice, the right to a fair judicial proceedings and the right to execution of the judgment are individual categories (although the latter for their implementation, of course, imply the presence of the first one). But the term "right to judicial protection," used by national and international law, means "access to justice".

In fact, the right to judicial protection acts as a sort of self-defense of the violated right, because legal procedure is the means, which use results in the restoration of law. While the guaranteed judicial protection of rights and freedoms is emphasized, the role of a will of a personality as the bearer of these rights and freedoms is often ignored. All this actually leads to a situation where a person begins to be perceived not as a subject of arising legal relations, but as an object of protection.

This interpretation is fundamentally unacceptable, as it is an individual who assesses the state and quality of personal rights and freedoms, as well as the need to protect them from abuse. The right to judicial protection should be regarded as an independent defense of the rights and not the protection of the individual by the state in the person of court.

In particular, an illustration of the violation of human rights to judicial protection (access to justice) is the problem of pre-trial proceedings or preliminary investigation. Thus, the grounds and motives for commencing a criminal case may be examined by prosecutor entitled in accordance with the criminal procedure. If commencing a criminal case is illegal, then it should lead to the termination of the case already at pre-trial stage, at the stage of investigation. However, the

right to judicial protection against unlawful acts and decisions of any government (Article 46 of the Constitution of the Russian Federation) in respect to the act on initiation of a criminal case by court examination after the end of the investigation and beginning of the trial can not be executed.

Justice (as a principle) is peculiar directly to the activities of the court. It does not relate to the activities of the court in the process of applying to court to protect the fairness of the proceedings, since there is no court examination yet and going to court, in turn, can neither be fair nor unfair.

The equality before the law and the courts is not related to the right to judicial protection. This is associated with self-assertion of rights and legitimate interests by the person who applied for the judicial protection in the course of the trial. In the case of advancing the established and persuasive arguments to explain the reasons for the violation of the rights and legitimate interests of the person applying for the judicial protection, the principle of equality allows making a decision in his favor.

Key part. International judicial protection (access to international justice) is a general guarantee of human rights, because it is the most independent and objective. Judicial protection within the national law can not be compared with the international one on the degree of independence, since it is an integral part of the machinery of the state and in democratic states, is officially proclaimed one of the branches of government.

It must be recognized that in the process of performance of the functions of justice, courts in varying degrees, may feel pressure from other branches of government or domestic political organizations and movements.

A characteristic feature of the international judicial protection is absence of the courts, which may affect the decision.

At the same time, the right to judicial protection under the international law is inextricably linked to the right to judicial protection under the national law. International legal protection is practically a continuation of the mechanism of self-protection of the rights and freedoms, which originates in the framework of national legislation. Moreover, the implementation of this right in domestic law is a prerequisite for the subsequent appeal to international courts.

Judicial protection of the rights and freedoms within the framework of the international law is both the means to secure these rights and the means to protect them.

In this regard, the right to judicial protection has both security and protective functions. Security function is typical for the right to judicial protection as a guarantee of these rights and freedoms. The protection function is peculiar as it is both a subjective right and is realized by the person in the event of a violation of his rights and legitimate interests.

The right to judicial protection in the international judicial institutions should be seen as a subjective right of the individual and not as the fulfillment of obligations by the state.

For all the diversity of approaches, until recently, most of the authors agreed with the fact that norms of the international legal instruments in the field of human rights do not contain the rights themselves, in other words, not subjective rights and freedoms of citizens and other individuals under the jurisdiction of the state. They contain only a certain amount of obligations of general democratic nature, assumed by the state, that for their exercise need extra implementation using the norms of internal constitutional law.

On the other hand, the jurisprudence assesses the position of the individual and the state in the framework of such agreements in different ways.

The International Court of Justice of U.N.O. in its Advisory Opinion in the case on the clauses in the Convention on the Prevention and Punishment of the Crime of the Genocide 1948 noted that "in such conventions the contracting States do not have their own interests; they have a common interest, namely, improvement of those high purposes, which are the cause of the adoption of the Convention. Conventions of this kind can not concern individual advantages or disadvantages for the states or maintaining a decent balance between the rights and obligations" [5, P. 21].

The Inter-American Court of Human Rights in 1982 in one of its advisory opinions drew attention to the fact that the purpose of the international treaties on human rights is not to establish mutual relations between the states, but to ensure that individuals enjoy the vested rights and freedoms [6].

Finally, the European Commission of Human Rights in the case *Austria v. Italy* noted that the obligations undertaken by the High contracting parties on the Convention have an objective character, being designed rather to protect the fundamental rights of individuals from the violations of any of the contracting parties than to create subjective and reciprocal rights for the Contracting States themselves [7].

In a traditional contract, according to D. Krassikov, each party benefits in return for the commitments it undertakes and if one party fails to meet its obligations under the contract, the other has the right to do the same, that is, there is a mutual incentive for performance of the contract by all parties. In this case, if the beneficiary of the contract (in this case, the individual) is not the party in the contract, according to a general rule, he has no right to claim under the relevant contractual obligations [8, P. 66]. In the framework of international agreements, regulating the individual's right to judicial protection, the latter one is provided with the legal capacity of "conventional type, i.e. the ability to advance claims to the states within the specific provisions of international treaties" [9, P. 279].

## CONCLUSIONS

So, our conclusion is that the concept of "the right to judicial protection" is actually identical to the right of access to justice. In favor of such an interpretation is the fact that the term used in the analysis of the right to judicial protection, "conditions of the right to appeal to the Court" denotes the conditions for realization of the right rather than the conditions of the right. In our view, the current "official" interpretation of the right to judicial protection has become infinitely obsolete; it does not allow the real use of rights and their implementation. There is a fair question - if in the law of ownership, we distinguish and furiously advocate three powers - the possession, use and disposal - why the right to judicial protection does not deserve the provision of the right of access to justice, the right to a fair trial and the right to execute the decision?

Moreover, the analysis of the term "right to judicial protection" in the inter-national law shows a similar result - it is identical to the concept of "the right of access to justice." For example, analyzing the criteria for admissibility of individual claims for annulment of acts adopted by the institutions of the European Union, the authors agree that they are very tough and jurisprudence is messy and not always consistent - in the end, the plaintiff never knows if his claim is accepted for consideration (*i.e. if he is allowed to the court or not - emphasis added by the author*) [10 P. 535, 11, P. 93].

As it was already noted, the right to judicial protection is rather regarded as the right to a fair trial, which implies the right of access to justice and the execution of the decision, or as their combination. For example, M.L. Entin, analyzing the issue, writes that the

system of elements that make up the right to fair judicial proceedings comprises four groups and the first of them, the organic one, includes such elements as access to justice and execution of court decisions [12, P. 477].

These elements, in his opinion, provide an effective enjoyment of the right to a fair trial and its implementation. In our view, access to justice is only an opportunity for consideration of the individual's case in court. This guarantees neither justice nor impartiality at consideration of his case, nor the honest work of a defender. Even the independence of the court in a particular context can be also called into question. In this regard, I would like to draw attention to the existing order in the appointment of judges in the Russian Federation. The judicial power under the Constitution of the Russian Federation is one of the branches of government, but the people who choose the President, participate in the election of representatives to the Legislative Assembly of the Russian Federation, has no relation to the appointment of judges and even the opportunity to discuss their candidacies. So who the judiciary is independent of?

In our view, we should pay attention to some basic distinguishing features of the application of the provisions providing for the right to judicial protection (access to justice) in international law.

First, the violation of the right of access to justice is an independent ground for appeal to the international judicial institutions with such jurisdiction, not bound with existing contentious legal relationship. In case of complaint on the violation of access to justice, an individual is not bound by the decisions of the national courts on the essence of the controversial nature of legal relationships or criminal prosecution. The meaning of his claim is not in the revision of the solutions and decisions of national courts, but in resolving the issue of non-proper access to justice in his country.

Any other rights established by international contracts, including the right to a fair trial, one way or another, necessitate that international judicial institutions consider the requirements of the individual from the point of view of the national law and thus far not always suggest the possibility of giving judgment in favor of the individual.

Violation of the access to justice is apparent without "understanding" of the essence of initial contentious relations.

Second, the presence of the minimum eligibility conditions, which performance is necessary for the implementation of the right to judicial protection, is also

the proof that the right to judicial protection is identical to the right of access to justice. In addition, these conditions of eligibility are applied in national legislation (the requirements for registration of petitions to the court, the availability of necessary legal capacity or authority, etc.), which confirms the already expressed point of view that in the intra-state law there is a need to distinguish between the right to judicial protection and the right to a fair trial.

Third, in the international law in relation to the right to judicial protection (access to justice) and the right to a fair trial, the opposite approaches are used. The right of access to justice as a universal category, which guarantees the protection of all other rights of the individual, requires the maximum simplification of procedures to achieve the main effect - the availability of rights for "everyone." Regulation of the right to a fair trial, to achieve its main effect - a "fair" consideration of the case - on the contrary, requires compliance with a large number of formalities and complexity of the process to avoid possible abuses and violations.

Finally, we come to a sad conclusion that the provisions of international treaties that require the state to guarantee the right to judicial protection can not be interpreted in a broad sense, because the state can not really guarantee a fair trial and execution of decisions.

The state can only provide them, as the activities of the Court and bailiffs, accurately regulated by the law, includes a set of principles which "one hundred percent" implementation is impossible to guarantee in advance (personal involvement of stakeholders, for example). How, for example, can one ensure the validity and fairness of investigation of the case, if the decision on the challenge in the courts of general jurisdiction is still considered by the judge, who is challenged? After all, the conclusion is obvious: if the judge supports his own challenge, he implicitly recognizes his interest in the case, so in 99% of cases, the right to challenge the judge does not work! The need for processing many of the provisions of procedural law is obvious.

The provisions of Article 18 of the Constitution of the Russian Federation regulate the rights and freedoms of a human and citizen are to be guaranteed by the law.

The above conclusion is supported by the existence of the procedural system of appeals and challenges that allow the individual at every stage of the judicial protection of rights to seek the very fairness of the trial and the effective execution of the court decisions. If the state could guarantee the fairness of judicial proceedings and enforcement of the judgment for the individual in the

same way as it is capable to guarantee access to justice, the purpose of cassation and supervisory authorities of national legal systems and the international justice, considering petitions from individuals, would be incomprehensible.

Determining the violation of the right to judicial protection, when these terms are mixed, we formally establish the deprivation of human right of access to justice and to a fair trial and execution of decisions. On the other hand, such a mixture entails a much more serious problem: it allows the state, which executes only one part of the so-called right to judicial protection, the guaranteed access to justice, to state about the guarantee for two others in its territory.

The state, taking care of the judges, investigators, police and "others alike", somehow has forgotten that they are all just "servants" of the people and the work for them is provided by us, seeking solution to our problems. In the context of legal insecurity of the individual, at any stage of infringement of the rights, there is a need in a revision of the legal regulation of the right to judicial protection. Perhaps it should be the appropriate powers of the rights of access, fair trial and execution of decision, perhaps - the more detailed regulation of each power (without a formal appropriation), or possibly other ways.

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