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Human rights guarantees in the activities of law enforcement agencies of Ukraine

Гарантії прав людини у діяльності правоохоронних органів України

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Abstract

The article is devoted to the study of human rights guarantees in the activities of law enforcement agencies of Ukraine.

Our survey of prosecutors and investigators has shown that the most common reason for the incomplete implementation of guarantees of the rights and freedoms of suspects and accused persons is the failure of investigators and prosecutors to comply with the provisions of the CPC of Ukraine in terms of ensuring guarantees of rights and freedoms. This opinion was shared by 64.6% of prosecutors and 31.8% of investigators; 23.1% of prosecutors and 59.1% of investigators supported the reason that suspects and accused persons were not aware of their rights and freedoms; 12.3% of prosecutors and 9.1% of investigators drew attention to the conflict of provisions of the CPC of Ukraine regarding guarantees of rights and freedoms.

Анотація.

Стаття присвячена дослідженню гарантій прав людини у діяльності правоохоронних органів України.

Проведене авторами анкетування серед прокурорів та слідчих довело, що найчастіше причиною неповної реалізації гарантій прав та свобод підозрюваного, обвинуваченого стає невиконання або неналежне виконання слідчими, прокурорами норм КПК України в частині забезпечення гарантій прав та свобод. Такої думки дотримуються 64,6 % опитаних прокурорів, 31,8 % слідчих; незнання підозрюваним, обвинуваченим своїх прав та свобод – 23,1% прокурорів та 59,1 % слідчих; колізійне викладення норм КПК України щодо гарантій прав та свобод – 12,3% прокурорів та 9,1 % слідчих.

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The authors concluded that emphasise that the main task of human rights guarantees is to ensure unimpeded realisation, protection and defence of human rights regardless of their status and position in the proceedings, protection against arbitrariness of the investigating authorities, and exclusion of the possibility of accusatory bias and, as a result, investigative and judicial errors.

Keywords: human rights and freedoms, guarantees, principles, law enforcement agencies, criminal justice.

Introduction

A person, his or her rights and fundamental freedoms are the highest social value in a state governed by the rule of law, and all state activities, and especially those of law enforcement agencies, should be aimed at ensuring and implementing them. The reality of ensuring human and civil rights and freedoms is an important indicator of the level of civilisation achieved by the state.

Guarantees of fundamental human and civil rights and freedoms are a system of norms, principles, conditions and requirements that together ensure the observance of rights and freedoms and legitimate interests of a person.

The effectiveness of guarantees of fundamental human rights and freedoms depends on the level of development of legal principles and institutions of democracy, the state of the economy, the means of distribution of life's goods, the law-making atmosphere in society, the level of legal education and culture of the population, the degree of social harmony, and the presence of certain elements in the system of functioning of the state power. The latter include, in particular, the existence of a written constitution, which cannot be suspended arbitrarily, and a strict procedure for its formal operation; reliable legislative support for the exercise of rights and freedoms; recognition by the authorities of the constitution as the source of their power and the conditions for its legitimacy; constitutional guarantees to curb excessive executive power; competent and efficient representative bodies; and the enshrining in the constitution of fundamental human rights and freedoms that meet international standards; the existence of an independent judiciary in the form of courts of general and special jurisdiction; the existence of a competent, highly effective and authoritative constitutional control body.

Автори дійшли висновку, що головним завданням гарантій прав людини є забезпечення безперешкодної реалізації, охорони й захисту прав людини незалежно від її статусу та становища в провадженні, захист від сваволі органів розслідування, виключення можливості обвинувального ухилу і, як наслідок, – слідчих та судових помилок.

Ключові слова: права і свободи людини, гарантії, принципи, правоохоронні органи, кримінальне судочинство.

The system of guarantees of human rights and freedoms includes prerequisites of economic, political, organisational and legal nature, as well as protection of rights and freedoms.

Guarantees of human and civil rights and freedoms are the conditions and means, principles and norms that ensure the exercise, protection and defence of these rights, and guarantee the fulfilment by the state and other subjects of legal relations of the duties imposed on them in order to implement constitutional human and civil rights and freedoms.

The Constitution of Ukraine and the current legislation assign to the state, represented by the competent authorities, the function of protecting human rights and freedoms, which provides for the possibility to seek protection of one's legal rights and interests. It follows from the essence of law that the exercise of human rights and freedoms is impossible without the activities of state (including law enforcement) bodies and officials. Their activity is evidence of the reality of human and civil liberty, a necessary factor in the transition of legal opportunities enshrined in the current legislation into the practice of any person's life. That is why a rather important task facing modern legal science is to determine the role of law enforcement agencies in ensuring the exercise of human rights and freedoms.

The purpose of this article is to define the concept and importance of human rights guarantees in the activities of law enforcement agencies of Ukraine.

Materials and methods

To achieve the set goals and ensure the scientific objectivity of the results of the study, a set of modern general scientific and special methods was chosen, in particular:

dialectical - to study the structure and content of the human rights guarantees in the activities of law enforcement agencies of Ukraine;

formal-logical - to analyze the current legislation and existing theoretical provisions regarding the essence of the human rights guarantees in the activities of law enforcement agencies of Ukraine;

comparative law - for comparing constitutional, criminal law and criminal procedural norms and a number of legal norms of foreign states;

statistical - to study law enforcement practice in criminal proceedings and in the analysis of reporting, which made it possible to generalize the results obtained.

At the same time, all scientific research methods were used in interrelation and interdependence, which contributed to ensuring the principle of comprehensiveness, completeness, objectivity of the study and made it possible to lay the foundation for further possible directions for the development of theoretical knowledge about the human rights guarantees in the activities of law enforcement agencies of Ukraine.

The empirical basis of the study is the studied and generalized criminal proceedings for 2020-2023 (270 proceedings of the prosecutor's offices of Odessa, Lviv, Kharkiv, Kyiv regions and the city of Kyiv); interviews with law enforcement officials, judges, judicial assistants, attorneys (650 respondents).

Results

The task of a state that claims to be a state governed by the rule of law is not only to recognise the existence of basic natural human rights and freedoms for its citizens (since it is not the state that grants the latter, but it has the real ability to limit them or exclude them from society altogether), but also to ensure that, having proclaimed such rights and freedoms, it is possible to exercise them and ensure the security of the individual.

The level of development of freedom and democracy in a society is recognised not so much by the declaration of the value of human rights and freedoms, ratification of international legal instruments in the field of human and civil rights, but by the existence of an efficient, effective mechanism for the implementation of human rights and freedoms, which provides guarantees for their enforcement and protection.

As V Kovalenko rightly notes: "nowadays, everyone understands that the essence of their

rights and freedoms lies not so much in their declarative proclamation as in ensuring their implementation, what material, legal and other guarantees the state and its bodies provide for their consistent and comprehensive implementation" (Kovalenko, 2020). Among these guarantees, law enforcement agencies play a significant role.

The main task of the guarantees is to ensure the unimpeded realisation, protection and defence of human and civil rights, regardless of their status and position in society.

At the same time, the practical implementation of the guarantees of the rights and freedoms of suspects and accused persons specified in the Criminal Procedure Code of Ukraine is far from perfect, as evidenced not only by the numerous cases of unlawful procedural decisions made by investigators, prosecutors and judges in criminal proceedings, but also by the judgments of the European Court of Human Rights, which state systemic violations of certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The guarantees of human rights and freedoms enshrined in the Constitution of Ukraine remain mostly declarations. This is especially evident during investigative (search) actions and the application of measures to ensure criminal proceedings. The right to legal aid and access to justice is systematically violated.

The reasons for these phenomena are both the low level of training of investigative officers and the low level of legal education of suspects and accused persons, the fact that the scientifically based norms of workload per investigator are exceeded several times, and the lack of consistency in the actions of investigative bodies, which leads to violations of procedural rules, deadlines, and inadmissibility of evidence (Serhieieva et al., 2022).

In this research, we would like to draw attention to the fact that the ongoing reform of the criminal justice system of Ukraine requires a comprehensive understanding of the state of application of the ECHR case law in criminal proceedings.

The survey shows high rates of application of ECHR case law by participants in criminal proceedings. **89%** of respondents indicate the use of ECHR case law in their professional activities during criminal proceedings, in particular: prosecutors - **71%** of all prosecutors

surveyed; lawyers - **93%**; judges - **100%**; judicial assistants - **100%**. Also, all the interviewed scholars mention the use of the ECHR case law in the course of scientific research of the criminal procedure of Ukraine. Among the above data, attention should be drawn to the fact that only **71%** of prosecutors use the ECHR case-law in criminal proceedings, which is seen as a negative trend and causes objective concern, and therefore requires additional organisational and training measures in this area by the Office of the Prosecutor General and the Training Centre for Prosecutors of Ukraine, as well as further, including intra-agency, research and monitoring.

The frequency of use of the ECHR case law by respondents in criminal proceedings is on average **36.8%**, in particular: lawyers - **56.9%**; academics - **34.8%**; judicial assistants - **29.5%**; prosecutors - **24%**; judges - **20.4%**. The high rates of use of the ECHR case law by lawyers indicate that it is recognised as an effective tool for protecting human rights and freedoms in criminal proceedings.

At different stages of criminal proceedings, the frequency of use of ECHR case law by respondents differs: **74%** of respondents reported its use during the trial in the court of first instance, **52%** during the pre-trial investigation, **42%** during the trial in the court of appeal, **25%** during the trial in the court of cassation, and **5%** during the enforcement of court decisions. These results correlate with the general trend of completing a significant part of criminal proceedings during pre-trial investigation and trial in the court of first instance.

Our survey of prosecutors and investigators has shown that the most common reason for the incomplete implementation of guarantees of the rights and freedoms of suspects and accused persons is the failure of investigators and prosecutors to comply with the provisions of the CPC of Ukraine in terms of ensuring guarantees of rights and freedoms. This opinion is shared by 62 prosecutors out of 85 respondents, or **64.6%**, and 34 investigators out of 64 respondents (**31.8%**); ignorance of the suspect or accused of their rights and freedoms - 35 prosecutors (**23.1%**) and 46 investigators (**59.1%**); conflicting interpretation of the CPC of Ukraine provisions on guarantees of rights and freedoms - 28 prosecutors (**12.3%**) and 24 investigators (**9.1%**).

In order for the institution of guarantees to have the desired results, i.e. to ensure full and

unhindered exercise of constitutional rights and freedoms of man and citizen, it is necessary that it be aimed at solving a large set of tasks, namely:

- 1) creating favourable conditions for the full and unhindered exercise of constitutional rights and freedoms;
- 2) ensuring effective protection of constitutional rights and freedoms from unlawful restrictions and violations by any entities;
- 3) providing a suspect or accused person with an opportunity for effective defence against unlawful restrictions and violations of these rights and freedoms by any entities;
- 4) ensuring prompt and complete restoration of unlawfully violated constitutional rights and freedoms of a person and a citizen;
- 5) bringing to legal responsibility and freedoms of man and citizen (Matskevych, 2014).

The functional purpose of guarantees of constitutional human rights and freedoms is to address the above tasks. Persons who have the appropriate legal status in criminal proceedings, depending on their stage, are no exception.

Discussion

The term "guarantee" is derived from the French "garantie", which means a pledge, a condition that ensures something. To guarantee means to assume responsibility for something; to give a promise, a guarantee in the performance of something.

There is no single universal definition of the term "guarantee". In a broad sense, the concept of guarantees of rights is reduced to the basic conditions and means by which each person has the opportunity to exercise his or her rights. In a narrow sense, guarantees are the conditions under which full and comprehensive realisation of individual rights and freedoms is possible by means that effectively ensure the protection and defence of individual rights and freedoms in the event of their unlawful restriction. Their main purpose is to provide everyone with equal legal opportunities for the acquisition, exercise, protection and defence of rights and freedoms, and to create the necessary legal conditions for the transformation of rights and freedoms enshrined in legal acts from potential opportunities into actual practice in social relations. The concept of "guarantees" covers the entire set of objective and subjective factors aimed at practical implementation of rights and freedoms, at removing possible obstacles to their full or proper exercise (Zuev, 2013).

Guarantees of human and civil rights, freedoms and obligations are considered as a system of socio-economic, moral, political, legal conditions, means and ways that ensure their actual implementation, protection and reliable defence. In addition, it should be noted that protection of rights and freedoms is a state of their legitimate exercise under the control of social institutions, but without their interference. Protection of human rights means certain means of counteracting human rights violations and ways to restore violated rights, i.e. human rights protection is aimed at preventing human rights violations, and protection is aimed at overcoming the consequences of violations.

Human rights guarantees are a complex phenomenon, but it should be noted that the most important component of the system of human rights guarantees is legal guarantees. After all, the reality of human rights depends on how detailed the regulation of human rights is, how clearly the mechanism of protection and defence of human rights is established (Vasechko, 2010).

Despite the large number of views of scholars on the term "guarantees", their opinions converge in the fact that guarantees have certain features, namely: 1) ways and means that are considered in the aggregate; 2) availability of legislative consolidation; 3) aimed at achieving a particular goal (Vasechko, 2010).

A Cherkesova outlined the following main features of guarantees:

- firstly, guarantees are of a state nature, i.e. they are created by the state to fulfil its obligations to society as a whole and each of its members in particular. The state is the main subject of ensuring public welfare, the level and condition of which directly depends on the range, quality and effectiveness of the guarantees in force in the state. In addition, the implementation of these guarantees is supported and ensured by the power of state influence, even coercion;
- secondly, the basic guarantees are reflected in one way or another at the level of relevant legal acts. The formal definition of guarantees in the text of laws and bylaws endows them with such properties as generality, mandatory nature and legislative protection;
- thirdly, guarantees are universal and continuous. As a rule, they are not limited in time and territory, are permanent and apply to the entire territory of the state, and belong equally to all those to whom they are

addressed, both to society or its separate group (community) and to each of its members;

- fourthly, guarantees reflect the state and level of development of the main spheres of public life. The study of the range of guarantees in force in the state allows us to get an idea of the priorities of the state policy, the political, economic and social atmosphere in the country, and is an indicator of the level of development of the national system of law;
- fifthly, guarantees are realistic and appropriate. Guarantees are not an "empty sound", not a mere declaration, but conditions and factors that exist in objective reality and facilitate the process of exercising citizens' rights, freedoms and legitimate interests.

Appropriateness requires establishing guarantees in such a way that they are as consistent as possible with the level of state development and the urgent needs of society, i.e., establish a balance between public demands and state capabilities to actually meet them (Cherkesova, 2017).

In our opinion, guarantees in the criminal procedural area differ in their implementation mechanism, scope of application, which is usually somewhat narrowed, and also in their meaning.

In order to clarify the nature of criminal procedural guarantees and their essence, it is necessary to resolve the issue of the subject matter of the latter. The first component of the subject matter of criminal procedural guarantees is the procedural rights of citizens. They are of public law significance.

The rights of a person are his/her social opportunities, determined by economic and cultural conditions of society and enshrined in legislation, which indicate the degree of freedom that is objectively possible for an individual at a certain stage of development of society. In addition, subjective rights reflect not potential, but actual capabilities of an individual, enshrined in the Constitution of Ukraine and other laws.

Individual rights are diverse in content, scope, and methods of implementation. However, the enshrinement of a subjective right in legislation should also determine the real possibility of an individual to realise a particular benefit in the manner prescribed by law.

Criminal procedural guarantees should ensure not only the possibility for the subject of criminal proceedings to use the procedural right granted to him/her, but also the achievement of the interest reflected in the right to be exercised. Thus, the second component of the subject matter of criminal procedural guarantees of a person is legitimate interests. Legitimate interests are the interests of a person that are not covered by his/her subjective rights, but are generally recognised by law.

According to Gromovenko K V, the mechanism of ensuring human rights and freedoms in the activities of law enforcement agencies can be represented in the form of two subsystems. The first is the system of protection, which includes legal means that establish the limits of lawful restriction of individual freedom of citizens (means of guarantee) and ensure legality in the application of coercive measures that restrict such freedom (means of protection). The security system operates on a permanent basis and is aimed at preventing unlawful encroachments on the freedom of citizens by law enforcement officials. The second, the protection system, is a unity of legal measures that ensure the restoration of the violated right, prosecution of perpetrators, compensation for damage caused by the offence (guarantees), and organisation of law enforcement activities to implement legal remedies for the protection of human rights and freedoms (remedies). The need to apply remedies arises in the event of a violation of human rights and freedoms by officials. The use of these measures by law enforcement agencies is regulated by laws and other legal acts, which are supplemented by organisational and control and supervisory activities that allow the implementation of these legal acts and thereby prevent unlawful encroachments on human rights by individual officials (Gromovenko & Tytska, 2021).

An analysis of current legislation allows us to identify the main areas of activity of law enforcement agencies to ensure human rights and freedoms:

- protection of human rights, freedoms and legitimate interests declared in the Constitution of Ukraine;
- protection of a person, his/her life, health, rights, freedoms and legitimate interests regardless of age, gender, nationality, race, etc;
- ensuring conditions for a person to exercise their rights, freedoms and legitimate interests;

- preventing unlawful restrictions and violations of human rights and freedoms in their activities.

It is worth noting that the main areas of activity of law enforcement agencies to ensure human and civil rights and freedoms directly stem from the tasks assigned to these agencies by the current legislation. They are aimed at:

- protection of a person, his or her life, health, rights, freedoms and legitimate interests, regardless of age, gender, nationality, race, language, etc;
- creating conditions to facilitate the exercise of rights and freedoms by every citizen, in accordance with the Constitution of Ukraine, by protecting public order and ensuring public safety;
- elimination of causes and circumstances that threaten the process of realisation of constitutional human rights and freedoms, limit the possibility of full realisation of these rights or undermine existing guarantees of the exercise of rights in society;
- creating conditions and appropriate legal frameworks that make it impossible to violate constitutional rights and freedoms by ensuring proper security of every citizen, preventing and immediately stopping offences, strengthening law and order, ensuring legality in the activities of law enforcement agencies, etc;
- identifying those responsible for violations of human rights and freedoms and bringing them to justice in accordance with the current legislation and international human rights standards;
- restoration of violated rights through compensation for material and non-pecuniary damage, rehabilitation, restitution, compensation, etc. at the expense of the state or individuals;
- preventing unlawful restrictions and violations of the rights, freedoms and legitimate interests of citizens in its activities;
- ensuring the necessary conditions for citizens to exercise certain rights, freedoms and legitimate interests.

The provisions of the current legislation aimed at ensuring that the state realises, protects and defends human rights and freedoms require law enforcement agencies to consistently direct their law enforcement activities towards ensuring human welfare, adhering to the rule of law. The implementation of this principle is embodied in

the formula: "everything that is not prohibited by law is permitted".

It is quite clear that the effective protection of human rights and freedoms can only be proper if the structure, forms of activity, and attitude of law enforcement officials are optimal in terms of sensing and responding quickly to any negative aspects that hinder the practical implementation and exercise of human rights and freedoms. At the same time, it is important to realise that human and civil rights are fundamental, so ensuring the autonomy of the individual by law enforcement agencies is based on key axioms:

- any law enforcement agency has limitations to its activities;
- each person has his/her own sovereign sphere, in which no law enforcement agency has the right to interfere;
- every person may oppose the state or its bodies (including law enforcement agencies), officials in order to protect their rights.

In fulfilling their tasks, law enforcement agencies must protect human rights regardless of social origin, financial status, citizenship, faith, race, religion, language, education, political views, etc. Unfortunately, this is not always the case, and public trust in law enforcement agencies remains low, despite reforms. The main reasons that shape public opinion are high levels of corruption, low levels of legal culture, a formal approach to the implementation of legislative requirements in the field of human rights protection, etc. Numerous applications of Ukrainian citizens to the European Court of Human Rights provide grounds for a critical assessment of the level of protection of human rights and freedoms in our country.

Continuing the study, we propose to classify human rights guarantees by the criterion of procedural actions, namely: guarantees of rights and freedoms in the application of preventive measures; guarantees of rights and freedoms in the application of interim measures; guarantees of rights and freedoms in the conduct of investigative (search) actions; guarantees of rights and freedoms in the conduct of covert investigative (search) actions; guarantees of rights and freedoms of the accused during court proceedings. In addition, this classification should also include the principles of criminal proceedings, since it is in accordance with these principles that all criminal procedural actions should be performed.

It is proposed to classify them as follows: the principles of criminal proceedings; guarantees of rights and freedoms in the application of preventive measures; guarantees of rights and freedoms in the application of interim measures; guarantees of rights and freedoms in the conduct of investigative (search) actions; guarantees of rights and freedoms in the conduct of covert investigative (search) actions; guarantees of rights and freedoms of the accused during court proceedings.

The performance by law enforcement agencies of their duties is the main condition for the protection of human and civil rights and freedoms, but the results of this activity depend not only on the level of professionalism of law enforcement officers, but also on the degree of trust in them by the population. That is why one of the key areas of reforming law enforcement agencies should be a new vision of interaction between law enforcement agencies and the public.

For law enforcement officers, human rights should be an integral part of their legal culture and legal awareness. Effective enforcement of fundamental human rights and freedoms by law enforcement agencies depends on legal training. That is why an important task facing law enforcement officers is to improve their knowledge of the legal acts of both national and international regulation governing the protection of human rights and freedoms.

Among the urgent tasks that stand in the way of improving the activities of law enforcement agencies in protecting human and civil rights and freedoms is the problem of improving domestic legislation regulating this area.

Conclusions

Based on the results of the scientific study of the provisions of the current legislation, law enforcement practice, scientific approaches, as well as surveys, we conclude that the rights and freedoms of a person are of no importance if there is no mechanism for their implementation. Despite the fact that the number of legal acts regulating procedural activities during criminal proceedings is growing, the effectiveness of the organisational mechanism in the field of human rights protection and implementation of guarantees is not improving.

Reforming law enforcement agencies is the first step taken by our state on the way to approximation to European standards in the

protection of human and civil rights. However, today's situation requires new legal approaches from the state to ensure human and civil rights. This requires fundamental changes in the organisation of the legal framework for the functioning of law enforcement agencies, including improvement of forms and methods of ensuring human and civil rights and freedoms, raising the level of legal culture of law enforcement officials, humanisation of law enforcement activities and increasing the level of trust among the population, etc.

The main task of the guarantees is to ensure unimpeded implementation, protection and defence of human rights regardless of their status and position in the proceedings, protection against arbitrariness of the investigating authorities, and exclusion of the possibility of accusatory bias and, as a result, investigative and judicial errors.

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