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Non-jurisdictional form of civil rights' protection

The scientific article is devoted to consideration of self-defense right as unilateral actions of the interested party permissible by the law, directed to guaranteeing of the inviolability of right, its implementation, reinstatement and relieving the consequences of violations. It is specified in article that the self-defense of legal rights by its nature is a form and not remedy method; it is also the so-called sub-institute of civil law and should be considered as independent on its subjectivity civil right to protection. Self-defense, as a method of protection of civil rights, ranks definite place in the system of methods of protection of civil rights, established by the state. The necessity for such measures due to optionality of civil relations.

Key words: Self-protection, law-court, emergency, necessary defense, defense, civil dispute, measure operational impacts, protective measures, legal arbitrariness.

The modern state in recent decades has undergone major transformations in the sphere of civil relations. For a long time it was believed that the only form of restoration of violated civil rights was judicial protection. Self-protection occurred only in exceptional cases. However, the decrease of state influence on relations between subjects of the civilian circulation and the appearance of dispositivity in matters of contractual relations has put before the government the task of ensuring stability in the legal status of litigants. In the modern economic needs of developing relations on the basis of subjective initiative and legal equality, of great importance is the timely response to violations of civil rights and interests, as well as the use of effective and rapid measures on their restoration.

In Kazakhstan legal doctrine, the definition of protection of civil rights formulated as follows: it is envisaged by law measures to ensure the integrity of law, its feasibility, restoration in case of violation and liquidation its actual consequences. Physical and legal persons apply for protection to public authorities General and special jurisdiction. Article 9 of the RK civil code enumerates basic ways of protection of violated rights, namely: the recognition of rights; regain of position that existed before the law violation; interdiction of actions infringing the right or creating a threat of its violation; awarding the execution of a riot duty in kind; recovery of civil damages, default charge; recognition of the transaction as invalid; compensation of moral harm; termination or change of legal relations; the recognition as invalid or not subject to application not corresponding to the legislation of act of state body or local representative or Executive body; a penalty from a state body or official for obstructing a citizen or legal person in the acquisition or implementation of law, and otherwise as provided for by the legislative acts [1].

In the protection of the rights and freedoms of man a special place judicial occupies protection. Judicial regulation of the legal resolution of disputes stipulated in legal acts of the state. Legislative basis of civil law consists of the Constitution of the Republic of Kazakhstan, the laws and universally recognized principles and norms of the rights expressed in international treaties [2]. The state, represented by the law enforcement that ensures equal access to justice. Such form of protection of civil rights is called jurisdictional. It is expressed that the person, rights and interests were infringed, appealed for protection to the authorities or other competent authorities that are affirmatively authorized by law to apply the necessary measures to restore the violated rights and prevent violations. As a remedy acts, as a general rule, a bill that is directed to court the requirement about the administration of justice, on the one hand, and turned to the Respondent is material-legal requirement to perform its obligations or the recognition of the presence or absence of legal relationship, on the other hand. However, there is also non-jurisdictional form of protection, called the self-defense civil rights. This form involves the protection of violated civil rights by independent action of the affirmatively authorized by law part.

In the legal literature, there are two approaches to the understanding of the term self-defense. One of them, formed by V.P.Gribanov and consist in self-defense is acting solely factual, aimed at the protection of their personal and property rights [3].

Measures the actual character may also be fixed in the law, and positively accepted in the society-conservation measures. Actual measures of self-protection also includes actions committed in a state of nec-

essary defense or extreme necessity, this method of self-defense to compare with measures operational impacts of the implementation of measures for the protection of personal non-property and property rights. Another term created by Y.G.Basion, includes not only actual, but also legal action for civil rights [4]. In this approach to action of self-defense includes not only measures operational impacts, and the application of sanctions by the injured party in the direction of the offender, to bring him to justice for the restoration of violated rights. This approach was enshrined in the Civil code of the Republic of Kazakhstan, where the self « is presented as a particular way of restoration of violated rights, when civil rights is carried out directly by actual or legal actions of the person whose right has been violated (paragraph 3 of article 9 of the Civil code of the Republic of Kazakhstan) [1].

The law permits, under certain circumstances, citizens and legal persons whose rights have been violated, to restore the rights of their own efforts, without resorting to the assistance of the state police. Self-defense law is a valid law of the unilateral actions of the interested person, aiming to ensure the integrity of law, its implementation, recovery and liquidation of violations' consequences. Self-defense has of great importance for contractual and non-contractual relationships, as to full realization of their legitimate rights and interests of the interested party is responsible for ensuring that his rights and interests have been met, promptly take the necessary measures and to use permitted by law, the legal means of self-defense.

The civil code of Kazakhstan does not provide methods of self-defense, and no opportunity to address this gap by introducing a list or direct reference in the law [1]. This problem can be solved by specifying the criteria by which to deem the action to measures of self-defense.

It is considered that self-defense applies only in non-contractual relations, for example, at necessary defence, when the action is aimed at protecting legitimate interests from criminal assault by harm attacker (article 919 of the civil code of Kazakhstan) [1]. This was the opinion of M.I.Usenko [5] and V.A.Ryazantsev [6], explaining the actual and immediate response to a violation on the part of the victim. However, the breach of contract also involves the immediate adoption of sanctions to restore the violated rights, for example, holding deposit recipient have the Deposit for violation of the contract with deposit recipient (item 2 of article 338 of the civil code of Kazakhstan) [1]. In the content of the contracts expressly referred to a number of conditions, which the parties, without judicial compulsion, are obliged to observe. From the above it can be concluded that self-defense is equally used in contractual and non-contractual relationships.

Legal conditions of self-defense is that this is not jurisdictional form of protection. This form allows citizens and legal persons to take action to protect violated rights independently, without recourse to the court requesting resolution of civil dispute. However, it should be noted that self-defense is allowed when the victim has the capacity solely legitimate impact on the violator without resorting to illegal activities. To the means of self-protection include, first and foremost, the actions of the victim, addressed to the infringer to recover lost, whereas in the jurisdictional form of protection, restoration of violated rights shall be ensured, compulsory execution, a court decision.

A necessary condition is that the aggrieved party should resort to such means of self-defense, which will be proportionate to the offence and which will fully restore the lost benefit. To permissible actions include actions of a person in a state of defense (article 919 of the civil code of RK) and extreme self-defence (article 920 of the civil code of Kazakhstan) [1]. Also permissible is the use of sanctions against violators, for example, the refusal of further performance of its obligations under the contract (refusal of further payments, waiver of repayment of the Deposit, refusal to provide such things). The law allows such method of protection of contractual and non-contractual rights, but not refers to her however, neither self-protection nor other generalizing concept. In non-contractual legal relations it is enshrined in the law and in contractual conditions specified in the contract.

The possibility of resolving civil disputes in court is the most effective way to protect. However, you should pay attention to the fact that the reality of the implementation of specific rights directly depends on how effective its protection. If the right is not protected or enshrined in law, it becomes law is declared and can only count on the voluntary consent of its execution. It becomes only a moral right secured, while in self-defense, the party personally ensures and guarantees the protection of their rights. The peculiarity of self-defense is due in advance of the identified measures and the self-understanding of subjects, possible extrajudicial resolution of the conflict and the establishment of optimal conditions for both parties. That is, regardless of whether the right enshrined in regulatory legal acts, an aggrieved party has the opportunity to achieve the restoration of violated rights. Also, the right to self-defense can be implemented regardless of the possibility or impossibility of contacting law enforcement authorities.

Self-defense rights should be performed in accordance with the General provisions of civil legislation of the Republic of Kazakhstan. According to paragraph 1, article 8 of the civil code of the Republic of Kazakhstan, citizens and legal entities at its discretion dispose of them belonging to civil rights, including the right to protect them [1]. This finding indicates optionality, as one of features characterizing all civil relations between actors. The side of protecting its violated rights, at its own convenience, choose the method and means of their protection, but keep in mind that they should not go beyond the regulatory requirements and the protection should not exceed the measures that are necessary to prevent violation. The law does not limit the number of methods of self-protection that can be applied to the offender. They can be used both separately and in combination, but the prerequisite should be the legality in the implementation of measures of self-defense. In order to ensure effective and lawful implementation of self-protection should provide the conditions of its permissibility. In the study of normative legal acts and legal doctrine regarding the protection of civil rights, you can make the assumption that the legislator allows the use of self-defense in the presence of a combination of three conditions: the violation of rights or possibilities of violation; the necessity of restraint of the infringement; measures, commensurate with the nature and content of the offence.

These conditions are responsible protect the rights and legitimate interests of their own wrongful actions of an offender. However, in practice, may arise a disputable situation when the person will not protect a valid right, but expected, as, for example, recovery of property, which in reality is not. In this regard, you can add the fourth condition by formulating it thus: a person, self-defending their valid right, is the undisputed holder of that.

Based on the foregoing, the self-protection of civil rights is permitted in the case of a violation of a right that person has lawfully if its implementation was not apparent mismatch of means of self-protection the nature and severity of the assault and had not exceeded the bounds of the actions necessary to ensure the sanctity of rights, the prevention of infringements and elimination of consequences of such violation.

In many ways, self-protective measures similar to the measures of the operational effects — both inherent to the actual «immediate» execution. Under the retaliatory measures are defined as legal means of law enforcement nature that are applied to the violator of civil rights and obligations by directly authorised person as the party in civil legal relations, without recourse for the protection of the right to the competent authorities. In other words, legal measures are nothing but measures of self-defense rights in contractual relations. The main difference of these measures is that self-defense is legal, and actual actions, and measures for operational effects are the actions of a legal nature. Measures operational effects can be applied to the entitled subject only in cases when it is stipulated by law, whereas self-protective measures, apply to the entity when its rights were actually affected. In the planned contractual discipline measures operational impacts and self-protective measures are temporary in nature on the subject of conflict and can be used until such time as the dispute is not resolved between the parties. This means that the victim may waive those protective measures that were taken to address the offender, if the guilty party will reimburse fully brought her action damage. From this we can conclude that independent of the resolution of the conflict accelerates the process of restoration of violated rights, also eliminates costs and saves between the parties to a trust relationship [3].

The usage of measures of self-defense must not exceed the boundaries of its validity, and to be subject to the norms and principles of subjective civil law. Is invalid when self-protective measures dangerous to life and health of people, harm a person and the environment. For example, when a land owner has fenced it with barbed wire and passed through the electric fence current. The inadmissibility of such measures of self-defense due to the fact that not only aimed at protecting the owner's property, but also to cause significant harm to the offender. If in connection with the use of unlawful means, harm to others (not always the offenders), in the future, arise, enshrined in law, the obligation to compensate for the harm caused. The positive side by means of self-defense is that they can be subsequently challenged in court, which is a kind of guarantee of observance of legitimate rights and interests of the offender from a possible arbitrariness from the side of the victim.

Speaking about arrogation, it should be noted that in legal practice, there are cases of «offensive-defense», the essence of which, is that self-defense is not only protective measures or defence, but also permitted by arbitrariness (for example, the right of detention of things). Of course it should be used conditionally, as if it is legally permissible, so arrogation (as criminal offence) doesn't exist.

The nature of self-defense involves those actions that in normal circumstances constitute the offence, but in terms of cash violations of rights not prohibited by law. It should also be noted that self-defense is carried out by active action, since inaction is impossible to ensure the inviolability of the rights. These actions, in turn, can be expressed not only in action by the injured party in connection with the violation of rights, but

in the agreement between the parties with the conditions and requirements before the onset of the relationship, and to prevent civil conflicts in the future. For example, the creditor guarantees from third parties for the debtor, as a prerequisite for lending. Such action can be regarded as a measure to ensure compliance. Another feature of self-defense, is that protected only private interests. Public interests cannot be protected by independent civil-legal protection as this is outside of civil law regulation.

From the above characteristics, it is possible to draw up an exhaustive list of grounds of self-defence, as a separate independent forms of protection of civil rights: 1) self-defense is in cases where the right was violated or a real threat of its violation in the future; 2) self-defense is the party whose rights have been violated and without resorting to law enforcement agencies, i.e. unilaterally; 3) self-defense is made only by active actions; 4) the measures of self-defense must not be contrary to law or agreement; 5) acts of self-defense must be aimed at ensuring the integrity of, prevention of infringements and elimination of consequences of violations; 6) the right of subsequent recourse actions of individuals that protect their right, when arbitrariness or excess of measures of self-defense, in legal process.

To determine the legal nature of self-defense of civil rights, it is need to figure out what is the place of self-protection in the General system of protection of civil rights. Under a legal nature, you should understand the fundamental principles that lie at the basis of self-defense. As mentioned previously, the government significantly reduced its influence in the civil legal relations between subjects, giving them thereby greater dispositionally and allowing yourself to protect their civil right. In the literature there are different approaches to defining forms of protection of civil rights, depending on what the basis of their differentiation. In the Kazakhstan legislation on the basis of the distinction between forms of protection is the level and the nature of the protected rights. In this regard, the more successful will be the decision to consider self-defense as a form of protection and not as a way. Form of protection indicates who exercises the right to protection, and the way how different the subject of the protection it does and through what measures.

There is an opinion according to which can be allocated to non-claiming Statute and forms of protection of civil rights depending on procedural means, where the non-claiming form means the filing of a complaint in administrative procedure. This approach can not encompass independent actions of the person (self-defense), as the basis of the separation laid before the courts and other law enforcement agencies.

In Roman law there was also to be self-defense in the form of legal arbitrariness, it was determined arbitrarily as a reflection of someone else's wrongful attack, tending to change the existing relations, to put it simply — the violence is permissible to repel violence (*vim vi repellere licet*) [7]. From the above provisions it can be concluded that in Roman private law was permissible self-defense in the form of non-state forms of protection. The civil code of Kazakhstan allows for the protection of the violated rights of the injured person, protecting her belonging to the right: sets of factual circumstances; applies norms of the substantive law; defines the method of protection from attack and took a particular action, which the person itself embodies.

Quite logical in this case, will be to present self-defense as a form of protection of civil rights.

The next question in determining the legal nature of self-defense, is the place that self-defense is in the legal system. There is no independent Institute of protection in civil law. Legal implementation of self-protection occurs through the implementation of norms, which provide the opportunity to realize the individual self ways to protect the violated rights. As noted earlier, self-defense is self-education, because it has several features that distinguish it from other forms of protection. In legal doctrine has been put forward the view that in the legal framework there are a number of sub-institutions, which are the associations between norms and legal institution. Thus, self-defense can be attributed to sub-Institute of civil law and Institute of protection of civil rights to a more complex institution.

Another issue requiring clarification as to the legal nature it is what is the correlation of subjective self-defense and civil rights? In his writings, V.P.Gribanov considers the right of protection as one of the powers of the subjective rights [3]. However, the right to protection exists outside of subjective rights, such as actions in the necessary defence and extreme necessity, therefore, such a right cannot attach to a specific subjective right. Moreover, the implementation of the protection law is likely to encounter mutual rights and duties of subjects exercising this right, and persons undergoing adverse effects. Thus, highlight the need for consideration of protection of civil rights as independent of subjective civil law. Protection of civil rights is present in all areas of civil law, but it is only the violation.

In legal doctrine, the nature of self-defense is considered from the perspective of its place in the system. There are two points of view on the relation between the individual means of protection is a civil legal responsibility and civil penalties. The concept of civil penalties is broader than the concept of civil responsibility, as there is a possibility of application of sanctions, regardless of the subjective side of the offence

(guilty). The fault of the offender is a mandatory feature of civil liability. In addition, a mandatory feature of the liability is the occurrence of additional adverse consequences, and sanctions are not always associated with adverse consequences and may be restricted only by the laying on of the offender responsibilities to address the shortcomings of its interventions. From all the above we can conclude that responsibility is a kind of a kind of civil sanctions, and remedies include civil penalties, and civil liability. As noted by A.G.Didenko in his dissertation on the topic of «Civil-legal form of struggle against violations of commercial contracts», the protection measures can be implemented through the application of measures of responsibility [8]. Furthermore, protection measures include the possibility of using a wide range of funds, in addition to any sanctions. Also of great importance and the fact that penalties can not be implemented only if the fact of violation, as a measure of protection, there must be wine, as a mandatory feature of responsibility. Responsibility, in addition, can occur only after the violation of the right, whereas the protection measures applied to violations in the presence of a threat.

Thus, we can conclude that penalties always aim to protect rights, but such protection is not always done through the application of measures of responsibility, and consequently, to themselves and penalties. To determine the location of self-defense necessary to consider the fact that it is a form of protection and differs only in that it involves the independent action of the injured party. Accordingly, protection measures include measures of self-defense. Methods of self-defense depending on the specific situation may be and the measures of responsibility, such as the penalty payment for late delivery of the goods (article 474 of the civil code of Kazakhstan) [1], but cannot be in the absence of the subjective side of the offence, namely guilt. Self-defense also can be expressed in the establishment of barriers, i.e. measures to protect its rights to its violation, namely when there is a threat of an offence. For example, the establishment of the lessor, the leased vehicles, anti-theft devices.

Based on the above four disclosure questions regarding the legal nature of self-protection, it was found that the self-defense legal rights by its nature is a form and not a remedy; it is also the so-called sub-Institute of civil law and should be treated as independent of subjectivity in their civil right to protection. Self-defense, as a method of protection of civil rights, a place in the installed state, the system of methods of protection of civil rights. The need for such measures due to dispositionally civil relations.

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Азаматтық құқықты қорғаудың юрисдикциялық емес түрлері

Мақала мүдделі тұлғаның құқықтарына қол сұғушылықты, құқықбұзушылық салдарын тоқтатуды және қалпына келтіруді, оны жүзеге асыруды қамтамасыз етуге бағытталған заңмен рұқсат берілген біржақты іс-әрекеттері сияқты құқықтарын өзін-өзі қорғауды қарастыруға бағытталған. Авторлар заңдық құқықтарды өзін-өзі қорғау табиғаты бойынша құқықты қорғау тәсілі емес, азаматтық құқықтың субинституты болып табылады және азаматтық құқықтарды субъективтілігі жағынан дербес қарастырылуы керек. Өзін-өзі қорғау азаматтық құқықты қорғаудың тәсілі ретінде азаматтық құқықтарды қорғау тәсілі жүйесінде мемлекетпен бекітілген ерекше орын алады. Бұндай шараның қажеттілігі азаматтық құқықтық қатынастардың диспозитивтілігімен түсіндіріледі.

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Неюрисдикционная форма защиты гражданских прав

Статья посвящена рассмотрению самозащиты права как допустимых законом односторонних действий заинтересованного лица, направленных на обеспечение неприкосновенности права, его осуществление, восстановление и ликвидацию последствий нарушения. В работе указано, что самозащита юридических прав по своей природе является формой, а не способом защиты права, также она является так называемым субинститутом гражданского права и должна рассматриваться как самостоятельное по своей субъективности гражданское право на защиту. Самозащита, как способ защиты гражданских прав, занимает определенное место в установленной государством системе способов защиты гражданских прав. Необходимость такой меры обусловлена диспозитивностью гражданских правоотношений.

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