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# GUARANTEE OF JUDICIAL PROTECTION IN CLAIM PROCEEDINGS

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## Abstract

Of special significance in the system of ensuring the personal rights and freedoms of man and citizen is the justice in civil cases in lawsuit carried out in civil proceedings and acting as the guarantee of judicial protection. In this connection, one of the central places in this work is occupied by the analysis of theoretical provisions of the concept and essence of the term “guarantee”. The problem of the meaning of the word “guarantee” used in a procedural aspect is studied. On the base of the analysis of views of leading scientists in the field of procedures, the conclusion is drawn out that guarantees are means and ways to achieve a specific goal. To guarantee means to achieve a goal in the form of judicial protection. Existing forms of protection of violated or contested rights were considered. Having identified and analyzed jurisdictional and non-jurisdictional types of protection, the conclusion was made that the effective and universal protection type is a jurisdictional one, i.e. the judicial protection of alleged violated rights and interests protected by law until something different is identified at considering and solving a civil case in court. While studying the judicial system of the Russian Federation, the author focused on courts of general jurisdiction considering civil cases in the course of lawsuit proceedings. Analysis of doctrinal provisions of civil proceedings, existing legislature and court practice allowed formulating the concept of guarantees of protection of rights and interests in adversary justice.



*Keywords:* Claim, claim proceedings, guarantee, judicial protection

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## 1. Introduction

Procedural science is the system of knowledge in the field of procedural norms and their application, i.e. the knowledge based on scientific facts which are collected by a special way, described, cross-checked, and generalized. Long before the separation of the science of civil procedural law as such, ancient Greek philosophers proposed using logic as a method of judgment applicable to any science.

The law of identity was first formulated by Aristotle, and it states that to have more than one meaning means not to have any meaning (Aristotle, 1969).

In fact, the study of any problem is associated with the definition, firstly, of the terms used. Having defined the terminology applied, it is necessary in the future to adhere to its meanings, otherwise, the meaning of the issue being studied will be incomprehensible, contradictory, and useless.

Speaking about concepts and terminology, we'd like to focus on concepts used in the field of law. Any juridical science deals with the variety of concepts which express its unity and internal essence. So, scientific development of a concept is caused by the need to provide an integrity of conceptual apparatus of the juridical science, as well as its practical value, since legal regulation of this or that phenomenon is secondary to its essence (Zdrok, 2017).

Taking into account the above mentioned, for the purpose of logical investigation, and understanding of the essence of guarantees of protection of rights and interests in claim proceedings, it is necessary to define what is meant by the word "guarantee".

## 2. Problem Statement

Guarantee is a universal, general theoretical and interdisciplinary term applicable to all branches of the Russian law, and any legal relations, including any scientific branches of jurisprudence. However, despite the popularization of this term, a single definition in the law doctrine does not exist.

Speaking about the guarantee, Russian scientists note that in jurisprudence there is no other category mentioned so frequently in different contexts and with so different contents put in its broad semantic form (Bobrova, 1984).

The famous English philosopher and law theoretician Hart (2007) believed that words the most difficult to be defined were those used constantly in everyday life, as the definition is a sort of code translating the word into other well-understood scientific terms.

Thus, in order to exclude the confusion, form a relevant idea of the term "guarantee'', formulate the definition of guarantees for protection of rights and interests in claim proceedings, it is necessary to solve the following tasks:

- to study a semantic concept of the word "guarantee";
- to consider ways of protection of violated or contested rights;
- to consider judicial protection as an effective way of jurisdictional defense;
- to study the judicial system of the Russian Federation;
- to give the idea of theoretical and practical understanding of guarantees of protection of rights and interests in lawsuit proceedings;
- to formulate the concept of guarantees of protection of rights and interests in lawsuit proceedings.

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## 3. Research Questions

Guarantee in its ordinary sense of the word is provision for something, warranty, security.

The word "provision" by itself is a synonym to the word "guarantee", i.e. these words belong to the same speech part, their meanings coincide completely or partly, but they sound, or are spelled differently, they serve to increase speech expressiveness, and avoid speech monotony. "To guarantee", i.e. "to provide for", means to make something quite possible, real, feasible.

"To make" means to do any actions for achievement of something. The question arises: to achieve what goal, since the desire to achieve something is expressed, firstly, in any goal achievement. Guarantees are established to achieve goals, obtain a result desired. While studying the goal problem in law, some authors consider the goal as a universal philosophical category, a phenomenon of some sort, characteristic of any conscious process, including that of legal regulation. Indeed, it is a goal analysis that allows understanding the essence and certain rules of law, its development, functioning, and impact on social relations.

If the guarantee means the process of achieving something, any goal, then the following question arises: how, with the help of what, by what ways or methods can the goal be achieved?

In his research "The Value of Science" the French scientist Jules Henri Poincaré indicated that the goal itself indicated the means to achieve it (Poincare, 1906).

Scientists in the field of procedures consider guarantees as means and ways significantly increasing the possibility to achieve the desired result. Using the term "means", authors had in mind that certain sets of methods and ways directed to achieving a definite specific result serve as guarantees.

The terms "measures", "means", "ways" used by scientists are synonymous and have the identical meaning. Summarizing the scientific judgments about guarantees, we may conclude that to achieve the desired result is possible by launching a certain mechanism, provided that definite conditions are available, and definite measures, means, ways and institutions are used.

To formulate the concept of guarantees for protection of rights and legitimate interests in claim proceedings, it is necessary to consider the concept "guarantee" in the context with the concept "protection", differentiate the area of research, focusing on claim proceedings, and define the object to be protected.

Protection of violated or contested civil rights is carried out by court, an arbitration court, in accordance with the competence defined by law (Art. 11 of the RF Civil Code). By means of administrative procedures, the protection of civil rights is carried out only in cases provided by law, as this is a specific judicial way of protecting the rights of non-power entities (Panova, 2017).

A literal interpretation of the civil law allows us to distinguish two forms of rights protection:

judicial protection;

administrative protection.

However, after analyzing the ways of protection of civil rights specified in Art. 12 of the Civil Code of the Russian Federation, it becomes obvious that there is one more protection form besides the two designated forms. In this connection, it is proposed that the forms of protection of violated or contested rights be divided into the following kinds:

- non-jurisdictional protection (i.e. without appealing to court or any other competent authority);

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- jurisdictional protection (i.e. with appealing to court or any other competent authority).

Many citizens choose, as a way of protecting their violated rights, self defense which implies the restoration of the violated rights on their own, without the help of the state or any other persons. The choice of this method of defense is due to defects of law psychology, law nihilism, disappointment in the law enforcement system (Smirnov, 2020). However, not everyone is aware of the limits of self-defense which can lead to the wrong way of rights protection.

The plaintiff arbitrarily dismounted a front door to the apartment of which he was an owner (shared property), and then asserted claims to the other owner about his obligation to repair the front door. The court rejected claims, pointing to the choice of a wrong procedure for protection of the violated (or allegedly violated) right which the plaintiff had chosen. The way of protecting the right must be adequate to the violation, and not exceed the necessary limits of law enforcement. The protection of the right of property and other owner rights must be carried out at the base of proportionality, in order to ensure a balance between rights and legitimate interests of all participants in the civil turnover.

Other common and well-known ways of protecting without appealing to court or any other competent authority are negotiations, a claim procedure, as well as appealing to a mediator to resolve a dispute, a relatively new and less known way.

The claim method to resolve a dispute is an established traditional, long known in the science, institution aimed at resolving the conflict without a recourse to court or other authorities. This institution is an effective means of settling a dispute between adversaries independently and voluntarily.

In paragraph 7 of Article 132, the Code of Civil Procedure of the Russian Federation indicates the need to attach to the claim statement a document confirming the commitment by the party (parties) of reconciliation actions if they were carried out (claims, letters, appeals). Herewith, it is necessary to distinguish paragraph 7 of Article 132 of the Code of Civil Procedure of the Russian Federation from paragraph 3 of the same Article which indicates the need to observe the obligatory claim way of dispute settlement provided for by the existing law for definite categories of civil cases (Shesternina, 2019). Paragraph 7 refers to the voluntary will of parties to take actions aimed at reconciliation, and paragraph 3 refers to the mandatory pre-trial procedure for dispute settlement by submitting a claim. Meanwhile, in both the first and the second case the procedure of settling a dispute before appealing to court is spoken of.

However, today the indicated way of protection is not common enough to settle a conflict situation, if compared with the jurisdictional protection. This fact is due to the low law consciousness of participants in civil relations, the lack of positive communications, and of the desire of a peaceful conflict resolution, as well as the fear of more serious financial responsibility, if the matter is resolved in court (e.g., in cases of protection of consumer rights into benefit of the consumer, a fine is awarded in favor of the consumer in the amount of 50 % of the sum of satisfied requirements). A person in a conflict situation cannot assess it adequately from the point of view of reality and illusion (Timoshina, 2020).

In recent time, actions of the legislator are aimed at promoting a peaceful dispute settlement. Federal Law of 26.07.2019 № 197-FL “On Amending Certain Legislative Acts of the Russian Federation” amended the Code of Civil Procedure of the Russian Federation, in particular, Article 2 of the Code of Civil Procedure of the Russian Federation, in which another task of civil proceedings was added – a peaceful dispute settlement.

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No doubt, procedures for settling conflicts without appealing to court are aimed at, firstly, reducing the burden on the judicial system, secondly, at forming in society legal consciousness. There is a different way to settle disputes, without appealing to judiciary. For example, mediation is aimed at settling disputes with the help of a mediator on the base of the voluntary consent of the parties to achieve a mutually acceptable solution. The results of a pilot project on the implementation of mediation in civil proceedings indicate a positive trend (Zagaynova & Tarasov, 2014).

However, in the Russian Federation mediation is not so popular, if compared with Germany (Kreissl, 2012) or the USA (Lebovits & Ramirez, 2010), where the mediation procedure is common and actively used. There are a variety of reasons why mediation is not used in Russian courts. They include ignorance of the meaning of the word "mediation", the lack of information among concerned people about the procedure itself, and the high cost of mediator services.

Non-jurisdictional methods of resolving conflicts play an important role in the system of rights protection, nevertheless, the most effective and universal form of protection is a jurisdictional one: the judicial protection.

A person, his or her rights and freedoms, are proclaimed to be the highest value in the society of any developed state, and when needed, they are provided by the possibility to obtain the fair judicial defense (Pankova & Migachev, 2020). Guarantees of legal and fair justice in civil matters contribute to the formation of a positive image of the court and increase the authority of the judicial power (Nan, 2017).

The Constitution of the Russian Federation guarantees the state protection of human and civil rights and freedoms, including the judicial protection, in this connection in the science the judicial protection is regarded as a constitutional guarantee of rights and interest's protection.

Protection means "to defend", "to keep safe from harm". The word "judicial" is derived from the word "jury", the latter implies any state body, which is competent to give a verdict in a legal case in court.

Literally, the word combination "judicial protection" means that a person demanding the protection of his or her violated or contested rights and interests provided for by law appeals to a state body, i.e., to court, which is obliged by the law power to solve a dispute in the procedural order provided for by the existing legislature (Maleshin, 2016).

Using the term "guarantee" in the Constitution of the Russian Federation, the legislator underlines that implementation of these or those civil rights is ensured by the state, if necessary, using coercive measures.

The state must create conditions and give necessary means for free and unhindered implementation of civil rights, freedoms and interests provided for by the Constitution of the Russian Federation, and in case of violation, restore them.

Implementation of the right of a concerned person to contest decisions of various authorities, contest or establish rights, judicial facts, etc., in court by means of judicial procedures and rules provided for by the existing legislature guarantees judicial protection.

Appeal of citizens and organizations to court is due to the need to obtain judicial protection, as a result of which a person expects to receive the restoration of his or her violated right or to transform it (e.g., in case of divorce), and to get the desired result. In this situation justice acts as a guarantor of human and civil rights and freedoms. Since the Constitution of the Russian Federation guarantees judicial protection

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to everyone in our country, we should note that in order to receive appropriate protection, it is necessary for the state to create definite conditions for receiving it.

One of the main conditions to obtain judicial protection for concerned parties is an effective judicial system created by the state.

Article 4 of FKZ (Federal Constitutional Law) "On the Judicial System of the Russian Federation" lists courts operating in the Russian Federation and administering justice. Judicial protection of violated civil rights is carried out by arbitration courts, courts of general jurisdiction (part 1 of Article 11 of the RF Civil Code).

Today, courts of general jurisdiction are involved in claims with the participation of citizens, organizations, state power authorities, local authorities, on the protection of violated or contested rights, freedoms and legitimate interests in disputes arising from civil, family, labor, housing, land, environmental and other legal relations (Art. 22 of the Code of Civil Procedure of the Russian Federation).

Judicial protection of violated or contested rights of interested parties is carried out in civil proceedings which are divided into types. One of the common types is lawsuit proceedings. A lawsuit form for protecting violated rights is of fundamental inter-field significance (Nikolajchenko, 2019).

Alongside with the fact that lawsuit proceedings are the commonest method of protecting a violated right, it is the most ancient kind of civil proceedings as well. In Roman law the term "action" (actio) was used and defined as a means which helped to obtain, by a court decision, a certain interest for an interested person. Modern procedural doctrine defines a lawsuit (an action) as a procedural means for protecting rights of a plaintiff appealing to court.

## 4. Purpose of the Study

The purpose of this study is to develop new scientific theoretical provisions on guarantees of protection of rights and interests in lawsuit proceedings as one of the most common and popular types of civil proceedings in which the largest number of consideration and resolution of civil cases is carried out.

The need for such a study is due to the fact that the science of civil procedural law demands fundamental studies devoted to guarantees of protection of rights and interests in lawsuit proceedings, since the dynamically changing world causes the appearance of new realities to be thought over and reflected in the form of protection guarantees at administering justice.

## 5. Research Methods

Materialism allowed considering the guarantees of protection of rights and interests through the concept of matter as the primary source of all things. Skepticism made it possible to objectively evaluate the developed scientific views on the concepts of "guarantee", "protection", "lawsuit form of protection", and to deny the knowledge that went against the ideas of scientific examination.

Empiricism method based on the experience of sensory impressions allowed studying the effect of procedural norms ensuring the guarantees of protection of violated rights and interests in practice, revealing positive aspects as well as negative ones of their practical application.

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## 6. Findings

The Russian law provides citizens with a wide range of democratic rights and freedoms, protects legal interests. The primary purpose of the state is to protect rights and legitimate interests of citizens, to create conditions for these rights and interests to be implemented freely. The property of inalienability of fundamental human rights and freedoms, inherence of rights and freedoms in everyone from birth implies the need for the state to guarantee them adequately.

It is difficult to imagine that the subjective right belonging to a citizen could be lost by him or her with the termination of any legal relationship. For example, the right to protect in court rights and freedoms belongs to everybody, the implementation of this right is carried out by the way of appealing to court in the procedural order provided for by the existing legislature, and a final judicial resolution on the case, i.e. the termination of civil procedural relations, does not mean that the person cannot appeal to court any more.

The right to judicial protection guaranteed by the Constitution of the Russian Federation (Art.46 of the Constitution of the Russian Federation) by making a lawful and informed decision is universal, since the right to judicial protection is guaranteed for each subject of civil procedural relations. The right to judicial protection in a civil case is guaranteed by the fact that the court is called upon to equally protect the rights of both the plaintiff, and the defendant, and the third party in the lawsuit proceedings.

## 7. Conclusion

The foregoing allows concluding that at present the vast majority of civil cases are considered in lawsuit proceedings in courts of general jurisdiction. Consequently, the guarantee of the right to judicial protection is, inter alia, a lawsuit. There would be no lawsuit, protection of a violated right guaranteed by the Constitution of the Russian Federation would not be possible.

The reason for applying to court includes certain legal consequences caused by violating or contesting rights, freedoms, or legitimate interests of a person, as well as a threat to violate them.

Having analyzed the procedural norms, as well as the judicial practice, we may conclude that the object of protection in lawsuit proceedings is the right to judicial protection guaranteed by Art. 46 of the Constitution of the Russian Federation by making a lawful and informed decision in order to protect violated rights, freedoms and legitimate interests, and in case there is a threat of violating them.

Thus, it appears possible to formulate the definition of guarantees of protection of rights and interests in lawsuit proceedings.

Guarantees of protection of rights and interests in lawsuit proceedings are procedural institutions, measures, means and ways provided for by norms of civil procedural law, which ensure to all interested persons accessible, unhindered implementation of their subjective right to judicial protection by way of applying to court in the procedural order of lawsuit proceedings for protecting violated rights, freedoms and legal interests of citizens, organizations, constituent entities of the Russian Federation, as well as in case there is a threat of violating such rights.

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