

Regulatory Provision of the Passenger's Rights in the System of Warranties of their Compliance and Realization

Нормативне забезпечення прав пасажирів в системі гарантій їх дотримання та здійснення

Received: November 5, 2019

Accepted: December 25, 2019

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Abstract

The article deals with topical issues of securing the rights of the passenger. As violations of this kind of rights are frequent and the means of protection of their rights, except for air transport, are virtually absent under the transport law of Ukraine, except for the possibility of compensation for non-pecuniary damage, the presence and amount of which is determined by court procedure, there is an urgent need to determine and regulate this civil rights, how it is under EU law on new civilizational approaches; securing regulatory safeguards to enforce and exercise their rights. The authors conclude that according to the legislation of Ukraine there are practically no guarantees for the exercise of the rights of the passenger, which is unacceptable at this stage of civilization development. As the mechanism for securing this kind of civil rights under EU law, which is based on the concept of creating a competitive environment, regulating and securing the rights of passengers, establishing negative consequences for the carrier in the event of a violation of the passenger's rights in the form of compensation amounts, despite the fact that he is debatable and imperfect, however, it can be implemented into the national legislation of

Анотація

Стаття присвячена актуальним питанням забезпечення прав пасажирів. Оскільки порушення цих прав є непоодинокими, а засоби захисту їх прав, окрім повітряного транспорту, за транспортним законодавством України практично відсутні, окрім можливості компенсації моральної шкоди, наявність і розмір якої визначається в судовому порядку, існує нагальна потреба у визначенні та нормативному закріпленні прав пасажирів, як це має місце за законодавством ЄС на нових цивілізаційних підходах; закріпленні нормативних гарантій забезпечення дотримання та здійснення їх прав. За законодавством України практично відсутні гарантії здійснення прав пасажирів, що є недопустимим на даному етапі розвитку цивілізації. Оскільки механізм забезпечення прав пасажирів за законодавством ЄС, який ґрунтується на концепції створення конкурентного середовища, нормативному визначенні та закріпленні таких прав, встановленні негативних наслідків для перевізника у випадку порушення прав пасажирів у вигляді сум компенсацій, себе позитивно зарекомендував, попри те, що і він

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Ukraine. In addition to the right to require the carrier to deliver it to its destination, the basic rights of the passenger must be legally enshrined and guaranteed: security, human rights, mobility, non-discrimination, assistance in transportation, accessibility, full and reliable information, on the use of remedies, on compensation in case of violation of rights, etc.

Key Words: passenger; transportation; passenger rights; legal protection; mechanism of ensuring rights; legal regulation.

Introduction

The relevance of the topic is related to the transformation of the legal system, due to the globalization and anthropological processes of modern civilization. The person begins to be in the spotlight. A person's needs and interests come to the fore.

The contract of carriage of passengers, traditionally considered to be a design capable of regulating one of the spheres of private life, is beginning to rethink. The legal relationship that arises on the basis of its conclusion has a deeper meaning, content, than the fixing of the obligation to transport the passenger to the destination and the passenger to pay the fare.

The approach formalized in the outdated transportation legislation of Ukraine in the second half of the twentieth century, which provided for the functioning of the transport system as an element of defense capacity of a country, sphere or branch of the economy, which, *inter alia*, relied on the function of meeting the needs of the population in transportation, no longer meets the modern requirements. The interests of the individual, his rights, must be satisfied. Transport is no longer perceived as a "great good" where the passenger is satisfied with the mere fact of moving it in space by means of a vehicle. At present, transport must meet the needs of a person according to his or her conceptions of safety, comfort and quality.

At the same time, the issue of taking into account the interests of a large number of passengers and other participants in public relations remains open. Indeed, the exercise of the rights of one

є дискусійним та недосконалим, тим не менше, може бути імплементованим в національне законодавство України. Такими базовими правами, окрім права вимагати від перевізника доставити його до пункту призначення, мають бути нормативно закріплені та гарантовані наступні права: на безпеку, на забезпечення прав людини, на мобільність, не недискримінацію, на сприяння у здійсненні перевезення, на доступність, на повну та достовірну інформацію, на використання засобів захисту, на компенсацію у випадку порушення прав, бути почутим та ін.

Ключові слова: пасажир, перевезення, права пасажирів, правовий захист, механізм забезпечення прав, правове регулювання.

person should not interfere with the exercise of their rights by others. Therefore, the issues of the limits of exercising rights are relevant in law.

E.O. Michurin marked, that the restrictions are inextricably interlinked and contradictory in their essence regarding the freedom to exercise civil rights. At the same time, restrictions protect the right of a person, as they prevent the violation of this right by other persons (by limiting the rights of the latter); allow the authorized person to oppose this right to the rights of others; is a deterrent to the authorized person because his or her right is not infinite (Michurin, 2015).

At the legislative level, the legal definition of freedom was first recorded in Art. 4 of the French Declaration of Human and National Rights (Declaration des droits de l'homme et du citoyen) of 1789.

The nature of the legal position of the passenger under the contract of carriage does not allow him to exercise his rights as a party to the contract on the basis of the principle of freedom of contract. After all, he has no ability to influence the formation of the terms of the contract of carriage of such people, but only has the freedom to conclude the contract, that is, freely, without coercion or to conclude the contract on the terms of the carrier or not.

So how, under such conditions (public contract), to secure the rights of the passenger? Carriers dictate conditions. Passengers need moving and they have small choice (of course, if do not take into account walking or own transport).

Therefore, there is currently no way of securing this kind of civil rights other than the normative one. It follows that the legislature should influence the carrier's behavior so that these rights are secured. This can be achieved through: the normative fixing of the rights of the passenger and the obligations of the carrier, the peculiarities of exercising this rights in different modes of transport based on the rules of carriage of passengers, as well as the consequences of violation of this rights by the carrier, forms and methods of protection of the rights of the passenger, measures of liability of the carrier in case of breach of contract.

Theoretical framework

The study of legal relations in passenger transportation and the features of their civil law regulation in Ukraine has been given the attention of a small number of scholars. Among them, one should mention Kot, O.O. (2017); Lukasiewicz-Krutnik, I.S. (2019); Michurin, E.O. (2015); Nabrusko, I.Y. (2010; 2012); Pogribniy, S.O. (2009); Primak, V.D. (2005).

Freight relations have received greater attention due to economic factors.

However, attention was not focused on the issue of passenger rights, although scientists noted that the study of legal relations, determining the features of its civil law regulation, features of civil liability under the contract of carriage of passengers should contribute to ensuring the rights of passengers, but neither mechanism nor means or methods were disclosed.

The purpose of the article is to establish the state of normative regulation of passenger rights, compliance with the protection of human needs as an element of the mechanism of ensuring human rights; making recommendations on how to improve it.

Methodology

Based on basic philosophical approaches to methods of scientific knowledge, the authors used methods of theoretical knowledge. Theoretical knowledge is a reflection of the phenomena and ongoing processes of internal connections and patterns that are achieved by processing methods of data obtained from empirical knowledge.

In addition, it should be noted that theoretical methods of cognition combine a number of methods that are directly used in this study. Thus,

the method of analysis helps to study the texts of human rights legislation. Moreover, the method of synthesis demonstrated both interrelated human rights (as a general category) and passenger rights.

Besides, the methods of analogy and modeling were used to theoretically apply foreign law in the field of transportation of people in Ukraine. In addition, the comparative-law method helped to compare international, foreign and domestic legislation in the field of passenger rights protection. Furthermore, the historical method demonstrated the evolution of legislation on the issue of enforcement this find of rights.

Moreover, the empirical materials for this study were international, foreign, and domestic legal acts. Thus, the following legal acts were used:

- Civil Code of Ukraine (2003);
- Constitution of Ukraine (1996);
- Consumer Protection: Law of Ukraine (2006);
- Declaration des droits de l'homme et du citoyen du 26 août 1789;
- On approval of the Regulation on compulsory personal accident insurance on transport of the Cabinet of Ministers of Ukraine;
- On approval of the Rules for the provision of passenger motor transport services: Resolution of the Cabinet of Ministers of Ukraine;
- Regulation (EC) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in coach and coach transport and amending Regulation (EC) No 2006/2004;
- Rules of air transportation and service of passengers and luggage: approved by the Order of the State Aviation Service of Ukraine No. 1239 of Nov 26, 2018.

Results and discussion

The consumer, his/her needs, rights and interests were given the dominant, priority, why anthropological or human-centered approach served. There was a clear awareness, although not enshrined in the legislative acts, that transportation and its formalizing contract were only one way of satisfying a person's need for movement, one way of exercising a person's right to freedom of movement.

Until recently, in the civil literature, the object of the legal relationship for the carriage of

passengers was recognized as a transport service as an intangible good that the passenger consumes in the process of providing it (Lukasiewicz-Krutnik, 2019). Therefore, the provision of this service was considered to be a proper performance of the contract of carriage of the passenger. Since Part 1 of Art. 910 of the Civil Code of Ukraine (2003) states that “under the contract of carriage of passengers one party (carrier) undertakes to transport the other party (passenger) to the destination, and in the case of baggage handing over, also deliver the luggage to the destination and give it to the person entitled for receiving luggage, and the passenger undertakes to pay the prescribed fare, and in the case of luggage – also for carrying it”, and other conditions are not included in the essential or necessary conditions of this contract, the only condition for the proper performance of the contract of carriage the passenger is to carry him to his destination.

Neither security nor timely delivery, nor comfort and service are the criteria for the proper performance of this contract. Accordingly, the passenger, without the right to, say, be delivered on time, is not able to claim this from the carrier, as well as compensation for delayed flight or delayed delivery to the destination. According to the transport legislation of Ukraine, only air transport stipulates the conditions of proper performance of the contract and the consequences of their non-compliance, violation of the rights of passengers, including: refusal of the passenger in transportation, delay of flight, delayed delivery, injury or loss of the passenger. The legislator, in accordance with the international practice of air transportation and EU legislation, has developed the Rules of air transportation and passenger and luggage service, approved by the Order of the State Aviation Service of Ukraine No. 1239 (2018), which provides the grounds and amounts of compensation for the carrier in case of violations passenger rights.

Legislation governing the carriage of passengers by other modes of transport is currently being held captive by an outdated ideology. This is despite the fact that national private law acquires the characteristics of modern European law, which is based on the concept of modern private law, which recognizes the priority of human rights, the formation of civil society, etc.

This definition will be incomplete unless we point out a feature that has become characteristic of modern national civil law. This is a feature that can be described as a general legal orientation of

the means of legal influence in the regulation of public (civil relations).

If at the moment of Ukraine's transition from the administrative-command system of management of the Soviet era to the new one, which was already based on the private legal basis of legal regulation of public (including civil) legal relations, it was relevant to approve the principles of freedom (including freedom of contract) and the transition from the imperative method (dominant) regulation of civil relations to the possibility of self-regulation of their relations, in which the possibility of applying the prescriptions of the law only when the parties did not use the provided law the grantor the possibility of self-regulation (Pogribnyi, 2009), the rhetoric is now shifting towards human rights priority. This is the dominant anthropological or human rights priority at the moment.

In civil society, citizens are not the subjects of political-power relations and public law, but private individuals with their interests, subjects of private law, participants in civil-legal relations (Kharytonov, Kharytonova, Tolmachevska, Fasi, & Tkalych, 2019). The process of recoding Ukraine's civil legislation is currently underway. The question is what passenger's rights should be given to the regulatory framework and guarantees for their observance and enforcement. What should be the nature of the influence on the carrier's behavior in order to ensure the rights of the passenger and to preserve the functionality of the transport system?

They argue for the introduction of a "rigid" approach, which insists on the European Consumer Organization (BEUC), according to which the minimum compensation received by the passenger – 25% of the ticket price for a delay of 60 to 119 minutes and 50% of the ticket price for a delay of 120 minutes or more (Regulation (EC) No 181/2011 of the European Parliament and of the Council of 16 February 2011 on the rights of bus and coach passengers and Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on the rights and the duties of railway passengers (2007)) should be increased up to 50% of the delayed ticket cost from 60 to 119 minutes and 100% of the delayed ticket cost of 120 minutes or more. The main argument in this case is that on air travel the amount of compensation is often even greater than the cost of the ticket.

The opposite to her thesis is that, given the importance of the transport system in modern

civilization, it is unjustified to use the means of influence on the carrier, even in the event of breach of their contractual obligations, if this calls into question the ability of others to exercise their due to freedom of movement.

On the other hand, this system should not be too "soft" for the carrier, and provoke its "irresponsibility". Even with limited civil liability, the general prevention formula must act, prompt the carrier to properly discharge its contractual obligations, and provide at least a "compromise" model for securing the rights of the passenger and their civil protection in the event of a breach.

Another important issue underlying the protection of passenger rights is the application of the civil liability exemption of the carrier and the determination of the grounds for such exemption. This is very important, because liability is perhaps the most important tool for influencing the behavior of the carrier and compensating for the material loss of the passenger.

O.O. Kot (2017) recognized the possibility of protection as being already a guarantee of the subjective right itself. Even so, we believe that it is not the only guarantee, as civil liability is not the only way to protect civil law.

However, the paradox of the civil liability situation of the carrier under the transport legislation of Ukraine is that it is possible only with respect to the types of offenses and their consequences, which are expressly provided for by this legislation. The latter (except for air transport) contains neither the composition of violations nor the negative consequences for the carrier. Here, however, it should be added that tort liability for damage caused by injury or death of a passenger is provided for by Chapter 82 of the Civil Code of Ukraine (2003), not by acts of transport legislation. Therefore, it is possible to speak not about the responsibility of the carrier, but about its statutory "irresponsibility". The exception was the compensation for moral damages provided for in Part 2 of Art. 23 of the Law of Ukraine "On Consumer Protection" (2006), which is determined by the court.

Currently, force majeure, often referred to as force majeure in international practice, has been recognized as grounds for the release of a carrier from civil liability.

BEUC (The European Consumer Organization, 2019) insists that they should be excluded at all,

they are unnecessary, since their use leads to losses of passengers, inability to protect their violated rights. After all, the activities of carriers are covered by business risks. Therefore, of course, there is an insurance institute that covers possible losses and can become a reliable guarantee of the stability of the functioning of the country's transport system.

Instead, there are concessions in national law to carriers, which are grounds for dismissing a carrier from civil liability. The meaning of Art. 922 of the Civil Code of Ukraine (2003) stipulates that for a delay in the departure of a vehicle carrying a passenger or a delay in the arrival of such a vehicle to the destination, the carrier pays the passenger a fine in the amount agreed upon by the parties, transport codes (charters), if the carrier does not prove, that these violations were due to force majeure, the elimination of the malfunction of the vehicle which endangered the life or health of the passengers, or other circumstances beyond the control of the carrier.

It is unlikely that a carrier should be held liable for a breach of an obligation in which the passenger was delivered to the destination in a timely manner under conditions where the carrier took measures aimed at preventing the violation of the person's right to life and health. The above gives sufficient reason to admit that the content of Art. 922 of the Civil Code of Ukraine (2003) in this part meets the criteria of reasonableness and fairness.

Nevertheless, it would also be more fair to state the criteria and grounds, the conditions for the release of the carrier from liability. After all, the category "or other non-carrier circumstances" contains too broad a wording. Probably, the legislator in such a case would have to give at least an approximate, though not complete list of them, which would give a normal idea for further interpretation of the virtue or fair use of this circumstance by a dishonest carrier to prove the lack of grounds for holding him accountable. One of the basic rights-criteria-principles can be recognized as a passenger safety category, but in order to be able to apply it, it must be enshrined in positive law (Samoilenko, 2018).

EU law provides for the exemption of carriers from compensation if they can prove that the delay was caused by "severe weather or major natural disasters" that threaten the safety of the service and could not be predicted or prevented, even if all reasonable measures were taken (severe weather conditions or major natural

disasters endangering the safe operation of the service and could not have been foreseen or prevented even if all reasonable measures had been taken).

Objectively, the criteria for the "severity" of natural or weather conditions, or the danger of factors are blurred, which does not contribute to the security of the rights of the passenger, because the carrier can always rely on these conditions. Moreover, the passenger does not have information about the objectivity of such information. These exceptions may be used to avoid liability by the carrier, including in cases where he may have prevented delays in taking all reasonable steps.

V.D. Primak (2005) proposed to exclude guilt from the conditions of liability for civil offenses committed in the course of business activities by legal entities (both entrepreneurial and non-business) and natural persons-entrepreneurs, since due to the number of economic risk factors, there is an increased likelihood of increased likelihood of causing harm. This should be an additional guarantee for the protection of the creditors of the entity and the enhanced protection of the consumer (victim) lender as a weaker party to the contract with the entity or in tort.

The fact that consumption, and consumption of transport services by passengers, is now a component of socialization is being overlooked. It is differentiated depending on the development of society, culture, the development of civilization as a whole. When carrying a carriage of a passenger, he is interested not only in the fact of his delivery to his destination, but also in the quality of service, speed of transportation, service, quality and condition of the vehicle, safety, cost and other factors. In entering into relations with the carrier, each person strives for recognition of his or her dignity (which is absent when transported in old, rusty, torn, soiled, with debris, odors, etc. vehicles). It is connected with civilization needs, which no person wants to fall behind, since it is an element of its identification and recognition, recognition of belonging to a certain class, category of citizens (Nabrusko, 2012). Consumption is one of the main indicators of an individual's social status. In this context the position of I. Yu. Nabrusko (2010) on Recognizing Consumption Practices by the Imperative Society seems to be reasonable.

Due to the receptions of European private law, the choice of vector of adaptation of the legislation of Ukraine to the EU law, the

legislation of Ukraine has acquired the tendencies of anthropologization (based on the concept of private law), which in the sphere of civil and consumer law development has found its response in the following aspects: manifestation of human security in the exercise of rights; the need for awareness of the "essence" of the right through its carrier – the person; awareness of the right based on the understanding of the person as "the measure of all things" (Grigoryan, 1982); conscious understanding of the purpose of the right to serve the interests of individuals (Kot, 2017).

Since carriage is a way of exercising the natural right of the passenger to freedom of movement, the carriage itself is connected with the restriction of passengers to exercise individual rights or in the nature of such exercise, in addition to the carrier's primary obligation to deliver the passenger to the destination, the carrier must to entrust the obligation to create the conditions of carriage which would allow the passenger to exercise his rights, subject to the fair restrictions caused by the peculiarities of the operation of the various modes of transport and need of safety of passengers as life and health, the dignity of man in Ukraine, both on the basis of Art. 3 of the Constitution of Ukraine (1996), and in accordance with the norms of international law, in particular the Universal Declaration of Human Rights of 1948, is of the highest social value. Therefore, the obligation to ensure the security of these values and the rights of the passengers to them is the duty of the carrier, which can only be determined by regulation, and therefore ensured.

It is natural that every person, using public transport, counts on assistance in exercising the right to freedom of movement (which in modern civilization also covers timeliness, safety and comfort, convenience, awareness of the conditions of carriage – and not only as payment for the right to take a seat in vehicle).

However, despite the overall declarative nature of "assistance", it is not backed by any regulatory safeguards, but in the case of persons with disabilities (persons with disabilities), the opposite is true. For example, in Ukraine there is practically no infrastructure for the movement of people with disabilities, it, as well as transport in general, are unsuitable for use by such persons. The cases where carriers equip landing facilities or purchase appropriate transport are more solitary and serve more than a global solution to ensuring that such persons exercise their right to mobility, in the exercise of their rights, including

the right to freedom of movement on a non-discriminatory basis.

In addition, escorting a guide dog is complicated due to the lack of centers for training and certification of guide dogs in Ukraine). Nevertheless, even in the presence of such a certificate, the passenger is allowed to travel by rail only in a compartment and subject to the payment of the fare of all seats in one compartment. The novelty in this case is the cancellation of the cost of transportation of the guide dog.

The Law of Ukraine "On Consumer Protection" (2006) enshrined the consumer's right to information. As this law applies to any legal relationship involving consumers, including passengers, the right to information has arisen in the rights of passengers. However, it has remained largely declarative, since neither the content and the volume of information provided to the passenger carrier, nor the consequences of non-delivery or incompleteness of its provision, are currently insured with negative consequences for the carrier. In addition, the manner and quality of the information provided is not determined, and therefore there is no criterion for its "perception" by passengers, especially passengers with special needs (persons with disabilities).

Instead, Annex II to Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on the rights and obligations of railway passengers requires:

(i) pre-trip information and
(ii) information that is provided during the trip.
The first includes: general terms of the contract; timetable and conditions of the fastest route; the schedule and terms of the cheapest route; accessibility, rules of use and ability to use equipment for the disabled and persons with reduced mobility on board the train; accessibility and rules of use for bicycle passengers; accessibility of places for smokers and non-smokers, places of first and second class, as well as seat and sleeping cars; any action that may interrupt or delay the provision of services; accessibility of services on board the train; procedures for returning lost luggage; complaints procedures. The second includes: services on board the train, subsequent stops, and delays, main points of change, safety and reliability information.

Readers At the same time, the transport law of Ukraine does not sufficiently clearly stipulate the right of the passenger to "be informed" about the

ways of protection of the violated rights, and, including procedural issues, – the procedure of appeals to the carrier, filing complaints and their consideration.

There is a position that is sufficient regulation on this issue. However, in our opinion, the carrier must communicate this information to the passenger and specify the procedure for exercising his right of defense. Thus, the EU already applies an approach according to which in case of violation of the rights of the passenger, the carrier should inform the passenger by the announcement or distribution of the relevant forms about the procedure and the way of requesting the carrier. We believe that such an order is fair and should be borrowed in Ukraine. However, gaps and contradictions of the rules of the law sometimes lead to the impossibility of extending the separate rules of the transport and consumer legislation to separate legal relationships, in particular, arising from the labor law.

Thus, the question of the application of the Rules for the provision of passenger motor transport services (1997) to the legal relationship for the carriage of passengers-workers by employers and sportsmen of clubs having their own motor vehicles remains open. The point is that the Rules are geared towards commercial transportation, transportation provided by third-party carriers. This is also mentioned in clause 45 of the Rules governing the implementation of regular special carriage – the carriage of employees of enterprises, institutions and organizations, students and other organized groups of passengers, carried out by a carrier on a specific route and schedule on the basis of an agreement with an enterprise, institution, organization (paragraph 46 of the Rules). Amendments made to Clause 48 of the Rules provide for the obligation of the carrier to carry out passenger insurance in accordance with the legislation on passenger insurance) (On approval of the Regulation on compulsory personal accident insurance on transport of the Cabinet of Ministers of Ukraine..., 1996).

Legal relations for the carriage of persons (employees, athletes, etc.), too, by their very nature are the carriage of passengers, but are subject to labor law, which unreasonably limits the possibility of securing the rights of passengers of the specified category. We believe that in order to safeguard the rights of the passenger with regard to the safety of his or her life and health, to ensure the right to protection and compensation in the event of injury,

deterioration of health or loss of the passenger, uniform rules and means of security should apply.

Conclusions

In Ukraine, the approaches to ensure the rights of passengers on the basis of positivism, sociology of law, ideas of freedom (liberalism), utilitarianism, natural law, and the concept of private law (which integrates the above approaches) is substantiated at the theoretical level. However, the practical implementation of these ideas in the field of normative recognition for passengers of rights, both personal non-property character and rights inherent in the contract of carriage of passengers is far from practical realization. The passenger does not recognize the basic human right to safety, to human rights, to mobility, non-discrimination, to assistance in transportation, to accessibility, to complete and reliable information, to the use of means of protection, to compensation in case of violation of rights, to be heard etc.

That is why we recognize that the first step should be the recognition and regulation of these rights, the next step is to establish the mechanism and procedure for their implementation and the compensation to be paid by the passenger carrier in case of violation of his rights; a clear and comprehensible procedure for the passenger's treatment of the carrier must be established and a simple and comprehensible but effective procedure for the carrier's response to the legitimate requirements of the passenger in accordance with his right to be heard and to promote his rights; consequences of violation of the passenger's rights in the form of clear amounts of compensation and the procedure for their payment (in today's information conditions it is quite real automatic transfer of amounts of compensation to the passenger's accounts, even without the passenger's request, which is a prerequisite for satisfying his requirements).

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