

**Zoryana Yaremak**

*Candidate of Juridical Sciences, Lecturer, Department of Labor, Environmental and Agricultural Law, Law Institute of Carpathian National University named after V. Stefanyk (Ukraine)*

## **THE RIGHT TO ACCESS TO JUSTICE ON ENVIRONMENTAL RIGHTS**

According to the Article 1 of the Constitution of Ukraine<sup>209</sup>, Ukraine is the legal state, the state which is based on the recognition and guarantee of the human rights and freedoms, supremacy of law, mutual responsibilities between the state and an individual. The mandatory attribute such State is the independent judicial power, which is a form of justice that provides protection and restoration of human rights and freedoms.

The key criterion for evaluating the efficiency of the judicial power and justice in a legal state is the availability of judicial protection of rights, freedoms and interests of individuals and legal entities<sup>210</sup>. The Constitution of Ukraine entrenched the right to judicial protection as unlimited and inalienable right. This right is stated in the part 1 Article 55 of the Constitution of Ukraine where it is stated that human rights and freedoms are protected by the court. The mentioned constitutional provision is fully applicable for protection of the environmental rights and is reflected in the special legislation. The legislation regulates the relations in the field of environmental protection. In particular, the Article 11 of the Law of Ukraine “On Environmental Protection”<sup>211</sup>. states that violated citizens’ rights in the field of environmental protection should be renewed, and their defense is carried out in court in accordance with the laws of Ukraine.

---

<sup>209</sup> The Constitution of Ukraine [Electronic recourse]. — <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

<sup>210</sup> Сакара Н. Ю. Проблема доступності правосуддя у цивільних справах: монографія / Н. Ю. Сакара. — Х.: Право, 2010. — С. 5.

<sup>211</sup> On Environmental Protection: the Law of Ukraine 25.06.1991. [Electronic recourse]. — <http://zakon1.rada.gov.ua/laws/show/1264-12>.

The protection of environmental rights in the field preservation and rational use of a particular type of natural resources are regulated by Resource Codes and special laws, though a common legal position has not been created. Thus, the Land Code of Ukraine<sup>212</sup> defines the methods of protection of land rights (article. 152), Forest Code of Ukraine<sup>213</sup> contains just a general rule, which provides that the rights of forest owners, forest managers and citizens are protected by law (article. 24).

The national scientists investigated some questions of legal protection of environmental rights in the field of environmental law. (Kravchenko S., Krasnova M., Koetska N., Malysheva N. Shemshushenko U.). The works of the scientists — processualists, as to the defining the features of the judicial procedures for handling this category of cases. (Komarov V., Sakara N., Yarema A. and others).

The right to judicial protection of environmental rights is understood as a subjective right, which has an independent place in the system of environmental rights of citizens of Ukraine. It is the legal possibility of the citizen of Ukraine by the using the methods of the existing norms of legislation, forms and remedies, in the manner stated by the laws of Ukraine, perform the actions aimed at restoring the subjective environmental rights, the elimination of obstacles to their implementation in the case of their violation, non-recognition, contestation, or the threat of committing such acts in the future, as well as the presence of other negative consequences<sup>214</sup>.

As it is stated in the scientific literature, the right to apply to court to protect one's violated rights (the right to access to justice), being, on the one hand, an independent environmental law, while the other hand defines the mechanisms for protecting other environmental rights.

The following forms of access to justice in defense of environmental rights are presented:

---

<sup>212</sup> The Land Code of Ukraine 25.10.2001. [Electronic recourse] – <http://zakon0.rada.gov.ua/laws/show/2768-14>.

<sup>213</sup> The Forest Code of Ukraine 21.01.1994 p. [Electronic recourse] — <http://zakon2.rada.gov.ua/laws/show/3852-12>.

<sup>214</sup> Kaluschuk L. Legal means of protecting the environmental rights of citizens of Ukraine.: thesis. ... Candidate of Juridical Sciences: 12.00.06, Donetsk, 2011. — 20 pages.

- appeal against decisions, actions (inaction) of state authorities and other entities that violate national environmental legislation;
- claim form of protection, which is implemented by means of complains as to the termination of a dangerous for environment activities, compensation for damage, etc.)<sup>215</sup>.

Taking into the consideration the constitutional provisions that, firstly, the jurisdiction of the courts extends on all legal relations which arise in the state. (part 2 Article 14). Secondly, the court procedure is carried out by the Constitutional Court of Ukraine and the courts of general jurisdiction (part. 3. Article 124). Thirdly, the system of courts of general jurisdiction is created basing on principles of territoriality and specialization (part 1 Article 125) (the specialized courts are economic and administrative courts — author's note). To conclude, an individual may realize the right of judicial protection of environmental rights, using various types of fixed procedural codes, procedures of the judiciary (judicial forms), namely, civil, economic, administrative, criminal and constitutional litigation.

The activity of general, commercial and administrative courts is delimited by a defined set of legal empowerments to hear cases referred to their competence — jurisdiction. The courts' specialization creates problems in delimitation of competences between them. Experience shows that, the most acute problems of affiliation arise from the separation of administrative jurisdiction and the separation of civil, criminal and commercial (the last is the most frequent)<sup>216</sup>.

Timely and accurate determination of the appropriate court directly affects the effectiveness of judicial protection. Regarding the division of competence of the courts to protect environmental rights, in this case it is necessary to proceed from the general provisions of jurisdiction distinction of the courts in general.

In *civil proceedings* the general courts deal with cases of protection of violated, unrecognized or disputed rights, freedoms and interests arising from civil, land, family, labor relations and other relations, unless such cases are ruled by other legal proceedings. The consideration of

<sup>215</sup> Kobetska N. The ecological Law of / Kyiv. : Urinkom Inter, 2007. – p. 56.

<sup>216</sup> Belkin L. Effective protection of the rights of businesses and / or individuals as a factor in determining the administrative jurisdiction. Administrative Law and Procedure. — № 1 (1). — 2012. — p. 88–95.

other cases under the rules of civil procedure may be provided by the law. (Article.15th of the Civil Legal Code of Ukraine)<sup>217</sup>.

In view of the mentioned above, the courts should proceed from the fact that the criteria for distinguishing cases from other civil jurisdiction is first of all the that they have a dispute about the civil right (cases for claims arising out of any legal relationship, except when reviewing of such cases is performed according to the rules of other legal proceedings), secondly, the subjective part of such dispute (one of the parties is usually an individual) (article 3 of the Resolution of the Supreme Court of Ukraine for Civil and criminal Affairs “On some issues of general jurisdiction courts and determining jurisdiction in civil cases” of 03.01.2013 p. № 3)<sup>218</sup>

Enterprises, institutions, organizations and other entities (including foreign), citizens engaged in entrepreneurial activities without forming a legal entity and acquired the status of a business entity, as well as government and other agencies, citizens, non-business entities have the right to address to the Commercial Court in accordance with the established jurisdiction of economic affairs for the protection of their violated or disputed rights and legally protected interests, in cases stipulated by legislative acts of Ukraine (Article. 1 the Commercial Procedural Code of Ukraine). Affiliation of cases to the commercial courts is determined by 12of the Commercial Procedural Code of Ukraine<sup>219</sup>.

The Resolution of the Plenum of the Supreme Commercial Court of Ukraine of 24.10.2011 p. № 10 “On some issues of jurisdiction and jurisdiction over cases of commercial courts”<sup>220</sup> determines that the commercial dispute is subordinated to the Commercial Court under

---

<sup>217</sup> The Code of Civil Procedure of Ukraine 18.03.2004. [Electronic recourse] — <http://zakon2.rada.gov.ua/laws/show/1618-15>.

<sup>218</sup> Some question the jurisdiction of the courts of general jurisdiction and the definition of civil cases: Resolution of the Plenum of the Supreme Court of Ukraine for Civil and Criminal Cases 01.03.2013 p. № 3. [Electronic recourse] — <http://zakon2.rada.gov.ua/laws/show/v0003740-13>.

<sup>219</sup> Commercial Procedure Code of Ukraine on 06.11.1991. [Electronic recourse] —: <http://zakon4.rada.gov.ua/laws/show/1798-12>.

<sup>220</sup> On some issues of jurisdiction and cases in commercial courts: the Resolution of the Plenum of Higher Commercial Court of Ukraine of 24.10/2011 # 10. [Electronic resources] – access regime: <http://zakon2.rada.gov.ua/laws/show/v0010600-11>.

the following conditions: business entity in dispute; the existence between the parties, firstly, economic relations regulated by the Central Committee of Ukraine, Ukraine GC and other acts of commercial and civil law, and, secondly, the dispute about the rights arising from the corresponding relations; the existence of law rules provided directly to dispute the commercial court; lack of law rules which provides resolution of such dispute by a court of another jurisdiction.

The task of administrative proceedings is to protect the rights, freedoms and interests of individuals, the rights and interests of legal persons in public-law relations from violations by state authorities, local authorities and their officers and employees and other subjects while performing the management functions on the basis of legislation, including delegated powers. Any decision, action or inaction of government authorities may be appealed to the administrative courts, unless such decisions, actions or inaction Ukraine have another order of proceedings according to the Constitution or Laws of Ukraine (Article. 2 The Code of Administrative Proceedings of Ukraine<sup>221</sup>). Jurisdiction of administrative courts to address administrative matters is regulated by Art. 17 of The Code of Administrative Proceedings of Ukraine.

The Plenum of the Supreme Administrative Court of Ukraine in the provision dated on 20.5.2013 part. № 8 “On some issues of jurisdiction of the administrative courts”<sup>222</sup> through a systematic analysis of the provisions of the Code of Administrative Procedure of Ukraine established the general rules of administrative jurisdiction separation from other jurisdictions: conceptual and functional (determination of proceeding is specified in item. 1 h. 1 tbsp. 3 of The Code of Administrative Proceedings of Ukraine); definitions of types of public relations (relationship management and relationship related to the formation of a public government entity) specified in part 1 article 17 of The Code of Administrative Proceedings of Ukraine; establishing the list of public law disputes within the jurisdiction

---

<sup>221</sup> The Code of Administrative Proceeding of Ukraine of 06.07.2005. [Electronic resource] — Access regime: <http://zakon4.rada.gov.ua/laws/show/2747-15>

<sup>222</sup> On some issues of jurisdiction of administrative courts: resolution of the Plenum of Higher administrative court of Ukraine of 20.05.2013 № 8. [Electronic resource] — Access regime: <http://zakon4.rada.gov.ua/laws/show/v0008760-13>

of administrative courts (including. 2 tbsp. Ukraine 17 Code of Administrative Proceedings of Ukraine); establishing the list of public law cases which are beyond the subject of administrative jurisdiction (including. 3. Ukraine of The Code of Administrative Proceedings of Ukraine 17).

The objectives of the criminal proceedings are to protect an individual, society and the state from the criminal offences; the protection of rights and freedoms and the legitimate interests of the criminal proceedings participants. Ensure prompt, full and impartial investigation and trial, so that every participant committed crime is brought to responsibility, an innocent individual has not been accused or convicted, no one has been a victim of a procedural infraction and the correct process of law was applied to each member of the criminal proceeding. (Article 2, of the Criminal Procedure Code of Ukraine<sup>223</sup>). The protection of the environment in the process of the criminal proceedings is realized through a civil claim for compensation of material and / or moral damage caused by a criminal offense or other socially dangerous acts against the environment.

At constitutional proceedings the citizens of Ukraine, foreigners, non-citizens and legal entities may fulfill their right for the legal defense in the form of a constitutional appeal in written form to the Constitutional Court of Ukraine about the necessity for an official interpretation of the Constitution of Ukraine to realize or protect the constitutional human rights and freedoms and the rights and freedoms of legal entities. (articles 42, 43 of the Law of Ukraine “On the Constitutional Court of Ukraine”<sup>224</sup>).

Special procedure of disputes consideration and adjudication is provided by the courts of arbitration. In accordance with the Article 5 of the Law of Ukraine “On Arbitration Courts”<sup>225</sup>, any legal entity and / or an individual has the right to refer to arbitration any dispute which arises in civil or commercial relations, except as provided by

---

<sup>223</sup> Criminal Procedural Code of Ukraine 13.04.2012. [Electronic resource] — Access regime: <http://zakon4.rada.gov.ua/laws/show/4651-17>.

<sup>224</sup> The Law of Ukraine About the Constitutional Court: 16.10.1996. [Electronic resource] — <http://zakon2.rada.gov.ua/laws/show/422/96-%D0%B2%D1%80>

<sup>225</sup> On Arbitratry Courts; Law of Ukraine of 11.05.2004. [Electronic resource] — Access regime: <http://zakon2.rada.gov.ua/laws/show/1701-15>.

law. The dispute may be referred to arbitration if both parties signed the arbitration agreement which meets the requirements of this Law. Taking into the consideration the list of cases that cannot be the subject of arbitration courts (Article. 6 of the Law), we conclude that not all disputes relating to the protection of environmental rights may be settled by arbitration. For example the cases where one of the parties is a state authority, local authority, their official or officer or other entity is fulfilling the administrative functions basing on the legislation, including delegated authorities, state institution or organization, state enterprise. Also in disputes concerning real estate, including plots of land; cases where after the legal investigation an arbitration court will require certain actions from government authorities, local governments, their officials and other units while they are implementing their duties on the basis of legislation, including delegated powers etc.).

Exploring the question of access to justice for the protection of environmental rights, it is important to determine the range of entities that have the right to appeal to court. The existing national procedural law specifies that the right to go to court have the individuals whose rights, freedoms or legitimate interests are violated, are not recognized or disputed. As well as authorities and individuals who have been granted the right to protect the rights, freedoms and interests of others, or national or public interests in cases established by law (Article. 3 of the Code of Civil Procedure of Ukraine, article 1 of the Commercial Procedural Code of Ukraine, article 6 of the Code of Administrative Proceedings of Ukraine).

In this context, it is worth paying attention and analyzing the Aarhus Convention<sup>226</sup> provisions, which gives the society “the right of wide access to justice” (Article 9, part 2 of the Convention). Adapting that norm to the legal legislation means “to have the right to go to court, within the meaning of the Convention, it is not necessary to prove that personal rights of the applicants themselves are violated. In this case it is enough to be a public organization established by the Law of

---

<sup>226</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters ratified by the Law of Ukraine of 06.07.1999 [Electronic resource] — Access regime: [http://zakon4.rada.gov.ua/laws/show/994\\_015](http://zakon4.rada.gov.ua/laws/show/994_015).

Ukraine “On Public Associations”, if in the Articles of the organization among its activities the protection of environmental rights of citizens is mentioned”<sup>227</sup>. Moreover, in national scientific literature proves an idea that any individuals which form the community and not only the individuals whose rights were violated and the environmental public organizations under the condition of failure to prove their rights in case when such violation has a negative impact on the environment have the right to complain against the actions of state authorities violating the legislation relating to environmental protection; when violating the set of legal norms leads to the fact that the actions of state authorities or individuals ensuring environmental safety or environmental protection are clearly less effective in terms of environmental safety and / or environmental protection<sup>228</sup>.

Summing up the results of the conducted investigation, it should be noted that nowadays the problem of protecting the environmental rights of citizens of Ukraine remains actual. The issue of the right to access to justice on environmental rights is not regulated, that creates problems of real protection of these rights in practice, and ultimately reduces the efficient implementing of environmental rights.

---

<sup>227</sup> Judicial protection of the environmental rights of citizens of Ukraine: for judges / Krasnova M., Malysheva N, Shevchuk P.M. — Kyiv: KM Academiya, 2001. — p. 34.

<sup>228</sup> Tretiak T. Legal issues of access to justice for the public on matters relating to environmental protection // Law and civil society. — 2012. — № 1. — pp. 75–81.