

Research Article

LAND RIGHTS DISPUTES: TOWARDS THE EFFECTIVE PROTECTION OF RIGHTS, FREEDOMS, AND INTEREST BY THE ADMINISTRATIVE COURTS OF UKRAINE


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Keywords: *judiciary, jurisdiction, property rights, land, powers, public property*

ABSTRACT

Background: *The choice of an effective and appropriate method of protection is one of the most important stages of legal proceedings because it determines the achievement of the proceedings' goal. Procedural legislation and the practice of its application to unresolved issues have limited methods of protection in cases of the rights and interests of persons to land by courts of different jurisdictions and the possibility of their cross-application.*

Methods: *To obtain reliable and substantiated conclusions, general and special research methods were used, which processed the results of theoretical research on the problems of justice in Ukraine, land law and administrative process, and materials of legal practice in the form of conclusions on international human rights institutions and Ukrainian courts.*

Results and Conclusions: *The study found that when choosing a method of protection for the infringed right, freedom, or interest, courts should consider the direct relationship between the claim for protection, the content of the right, and the nature of the offence. The jurisdictional component of the right to a fair trial presupposes the need for courts to consider the scope of their powers under the Constitution and laws of Ukraine. The concept of expanding the limits of permissible remedies allows administrative courts to use such remedies (general and special), which will ensure the real restoration of the violated rights, for the protection of which the plaintiff appealed to the court. When considering the requirement to protect the right to a certain object of ownership (including land) in an administrative case, the administrative court is authorised to apply substantive remedies, taking into account the material nature of the violated right, as well as whether the violation was committed by a decision, action, or inaction of the subject of power, which legalises the right of a person to the relevant object of property and is beyond the discretion of the authority in the management of public property.*

1 INTRODUCTION

1.1 ONTOLOGICAL BASIS OF SCIENTIFIC INTEREST

The purpose of any type of proceedings, except constitutional and criminal, is revealed in the procedural codes as the effective protection of the rights, freedoms, and interests of individuals from violations. Administrative proceedings specify the range of subjects of such protective legal relations and indicate the need to ensure the protection of the rights, freedoms, and interests of the individual from the subjects of power (para. 1 Art. 2 of the Code of Administrative Procedure of Ukraine, hereinafter – CAP).

This goal determines the subordination of other procedural institutions to its achievement and directly affects the procedural activities of courts in considering relevant disputes. The primary importance of the right, freedom, or interest protected by the court requires an assessment of the outcome of the proceedings from the standpoint of achieving the *status quo*, which preceded the violation, or the creation of unimpeded conditions for further implementation. Accordingly, the result will depend on the application of such a method of protection, which would terminate the state of the offence and restore the status of the plaintiff in the disputed primary substantive legal relationship.

The issue of how to protect the rights of the individual in court is closely related to the definition of the powers of the court in considering and resolving the case. O. Khotynska-Nor attributes this to one of the two structural elements of the right to a fair trial, which is provided in Art. 6 of the European Convention on Human Rights (hereinafter – ECHR). She considers that this is a jurisdictional component of the guarantees of this right, to which she attributes the obligation of the court to act in the manner and in accordance with the powers provided by law, within its competence. This not only determines the principles of the organisation of a legitimate judiciary in the state but is also closely related to its procedural regime.³ Courts that are part of the state apparatus are subject to the provisions of the constitutional system, as found in Art. 6 and para. 2 Art. 19 of the Constitution of Ukraine on the obligation to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine to comply with the principle of functional separation of powers.

Therefore, the purpose of the proceedings cannot be used to fully justify any methods, forms, or remedies of action used by the appropriate authority. Failure to comply with the statutory framework of authority and competence can destroy the foundations of the constitutional order.

The sphere of litigation over the rights and interests of a person to land is one of the largest in terms of both quantity and legal significance because it decides the fate of a specific (exhaustive, valuable, and natural) property resource – the basis of ownership and production.

Prior to the emergence of administrative courts, depending on the method of protection of the plaintiff's land rights, claims arising from land relations in the literature were divided into claims for recognition, awards, and conversion lawsuits, and they were considered in civil or commercial proceedings.⁴ The ways of protecting rights and interests to land were determined in Art. 16 of the Civil Code of Ukraine (hereinafter – CC) and Art. 152 of the Land Code of Ukraine (hereinafter – LC).

Instead, there were already ideas that an effective way for the courts to protect the land rights of individuals, which is the subject of dispute or presumption of a legal fact, the establishment of which is associated with the exercise of powers by the subjects of power, would be to transfer the power of parallel decision-making to those courts. In fact, it was a matter of transferring the powers of active management to the courts.⁵

The creation of administrative courts, the practice of their activities, and the specifics of the remedies, derived from the normative nature of disputes (defined in Art. 5 and Art. 245

3 O Hotynska-Nor, 'The right to a 'court established by law' as a structural product of the right to a fair court: the Ukrainian context' (2015) 1 *Advokat* 185.

4 O Snidevych, 'Some issues of classification of civil lawsuits in cases arising from land relations' (2006) 2 *Pravo Ukrainy* 99-100.

5 O Snidevych, 'Land management lawsuits in the civil process of Ukraine' (2006) 6 *Pravo Ukrainy* 72; O Ilnytskyi, *Land disputes and the procedure for resolving them in Ukraine: administrative and legal approach* (FOP Pyatakov 2011) 191.

of the CAP), only added to the question of how they can effectively protect the rights and interests of a person regarding disputed land and whether they have the opportunity to apply the traditional tools of protection of property rights to land, in connection with which the administrative lawsuits arise.

1.2 RESEARCH METHODOLOGY AND APPEARANCE OF ACADEMIC INTEREST

The reason for the detailed study of the stated issues were numerous materials of law enforcement practice, which testified to the existence of problems of effective protection of land rights. According to the plaintiffs, these problems arise when appealing against decisions, actions, or inactions of government officials in administrative proceedings in this area. It also leads to the appeal of judicial institutions with requests for scientific conclusions on the application of methods of protection of violated property rights and property interests in the consideration of public law disputes and the formation of appropriate uniform case law.

Given the specifics of the topic, purpose, and objectives, the basis of the study is a dialectical approach to research. The systematic method was used to establish the content and purpose of remedies and methods of protection of rights, freedoms, and interests in accordance with regulations. On this basis, with the help of the formal-logical method, the definition of legal concepts that are essential (substantive) content, as well as the defined purpose of legal regulation, was formulated. The formal-dogmatic method allowed us to carry out the analysis of the normative-legal base of the state and reveal the functional orientation of the system of protection of the rights and interests of persons in land legal relations with the participation of subjects of power, their technical and legal perfection.

A number of other general scientific research methods were also used, in particular: analysis (to study the systematic application of concepts), historical and legal method (to study the establishment, change, and development of the deposit guarantee system), comparative law (in the study of legislation determining the features of protection of land rights and interests, litigation), and others.

The theoretical basis of the study was provided by the results of analytical reviews on the problems of justice in Ukraine, land law, and administrative process. But researchers avoid addressing the pressing issues that arise on the border of public and private regulation in the field of substantive law and procedural justice and are characterised by a high degree of controversy and inconsistency of conclusions. However, their avoidance in science does not mean the loss of practical significance of the search and unification of solutions.

At the same time, the applied theoretical approaches and the scientific conclusions formulated by the authors were substantiated by the wide application of materials of legal practice through the conclusions of international human rights institutions and Ukrainian courts.

2 INITIAL PRINCIPLES OF ESTABLISHING JUDICIAL PROTECTION IN THE FIELD OF LAND RELATIONS

2.1 THE CONTENT OF THE LAWSUIT AS A BASIS FOR JUDICIAL PROTECTION

The question of how to protect the rights and legally protected interests of subjects is key in the context of legal regulation of a particular sphere of public life in a state-organised system. In the absence of the possibility of effective protection, any subjective right loses

the necessary certainty for its owner in the unimpeded implementation of the opportunities provided or sanctioned by the state, which determine the content of this right.

The analysis of the institutions of protection of law is inextricably linked with the study of the impact on the sphere of rights, freedoms, and interests of the person after active, aggressive intervention by its violators. From a normative point of view, such interference is referred to as a violation, non-recognition, or challenge of a right.

Violation of the law should be considered a consequence of illegal behaviour of a person (offender) whose actions have harmed the subjective rights and interests of the entitled party in the legal relationship.⁶ The nature of the damage in this case has no significant legal meaning but is considered from the standpoint of material losses and non-material negative consequences (physical damage, moral distress, negative feelings, including ignoring the certainty and stability of legitimate expectations) due to the violator's behaviour towards the sphere of existence of the right holder.

Non-recognition of civil rights and interests belonging to a person consists in both active and passive actions of a third party, which are aimed at full or partial denial of the subjective rights of a person. These actions create uncertainty for the holder of subjective rights in their legal status. A challenge is the existence of a dispute between the participants in a civil law relationship about the affiliation or absence of a right of one of the parties.⁷

These three forms of interference combine to create barriers to the use of opportunities that constitute the content of a person's rights. This requires the state to intervene to remove these obstacles and restore the 'normal' order of satisfaction of a person's legitimate needs through permissible behaviour, the necessary influence on the violator in the primary legal relationship to a particular object and influence on their subject.

The established legal position of the Supreme Court affirms the direct relationship between the requirement of protection of the infringed right not only with the content of such right (which will be discussed in more detail below) but also with the nature of the offence.⁸

Therefore, the purpose of protection is to provide a person with the opportunity to meet their own legitimate needs in the primary dispute, in which unlawful interference (by violating, not recognising, or challenging these rights) makes it impossible or difficult to achieve the intended result in the form of material or other defined or expected benefit. The essence of the protection of the right is to eliminate the relevant barriers between the behaviour of the person and their expected (desired) result in the form of satisfaction of needs.

2.2 LEGAL INTEREST – THE OBJECT OF PROTECTION IN THE FIELD OF LAND RELATIONS

According to the current legislation of Ukraine, not only is the subjective right of a person protected by law but so is the interest. The concept of 'legally protected interest' was officially defined in the Decision of the Constitutional Court of Ukraine of 1 December 2004,⁹ and a detailed and thorough development was defined in judicial practice in the Resolution of the Supreme Court of 20 February 2019.¹⁰

6 TO Rodoman, 'On the question of methods to protect civil rights and interests in the context of the provisions of Art. 16 of the Civil Code of Ukraine' (2015) 4 (11) *Sudova apeliatsia* 66.

7 *Ibid.*

8 Case No 378/596/16-ц (Supreme Court [GC], 29 September 2020) <<https://reyestr.court.gov.ua/Review/93327297>> accessed 22 July 2021; Case No 910/7164/19 (Supreme Court [CCC], 28 May 2020) <<https://reyestr.court.gov.ua/Review/89485041>> accessed 18 June 2020.

9 Case No 18-пн/2004 (Constitutional Court of Ukraine, 1 December 2004) *Uriadovyi kurier* 239.

10 Case No 522/3665/17 (Supreme Court [ACC], 20 February 2019) <<https://reyestr.court.gov.ua/Review/80167902>> accessed 22 July 2021.

The systematic application of the approaches of the current legislation indicates that the definition of 'legal interest' reveals its following features:

- 1) it is a legitimate desire of a person (arising from the functioning of the system of objective law),
- 2) it meets the natural, socio-economic, cultural, and other needs of the person in accordance with the level of personal or social development,
- 3) it does not contradict legislative restrictions, public interests, justice, good faith, reasonableness, and other common law principles.

The normative concept of 'legally protected interest' in legal relations concerning land as a type of public property is important from the point of view of expanding the scope of protection. The public law regime of the land is based on this resource as the main national wealth (para. 1 Art. 14 of the Constitution of Ukraine) and the object of property rights of the Ukrainian people (para. 1 Art. 13 of the Constitution of Ukraine). It combines the features of land use as a territorial basis and natural resource and the main remedies (para. 'a' Art. 5 of the LC).

This significantly diversifies approaches to building an effective human rights system and obliges one to take into account not only the existence of direct property relations between entities and specific land plots but also the possibility of an unregistered (undocumented) relationship in the form of legal interest. This also needs proper (adequate) legal protection.

Based on this, in its decision, the Grand Chamber of the Supreme Court upheld the plaintiff's right to apply to the court (Representation of the American Association of Committees for Jews of the Former Soviet Union) on the grounds that the Zhytomyr City Council of Lviv Oblast had taken into communal ownership of the disputed garages located in the ancient Jewish cemetery in Zhydachiv in violation of the regime of lands of historical and cultural purpose of the land plot on which these garages were built. At the same time, the motivation for the need for protection was not based on the establishment of a property relationship with the disputed land plot as an object of the plaintiff's right. According to the Court, the defence needed an interest in the desire to use specific tangible and intangible goods due to the general content of objective and not directly mediated in subjective law of simple legitimate permission for the development of ethnic, cultural, linguistic, and religious identity as a national minority of Ukraine, preservation of monuments and other objects of cultural value, the development of national cultural traditions, the celebration of national holidays, the practice of their religion, and the preservation of the living environment in places of their historical and modern settlement in order to meet individual and collective needs.¹¹

Autonomous interpretation of the concept of 'possessions' as an object of conventional guarantees and protection in the ECHR system according to Art. 1 of the Protocol defines, *inter alia*: 'legitimate (legal) expectations' or 'lawful expectations' to take certain actions in accordance with a permit issued by public authorities (for example, legitimate expectations to be able to carry out the planned development of the territory, given the permit in force at the time (*Pine Valley Developments Ltd and Others v. Ireland*, application no. 12742/87, judgment of 23 October 1991); use of the land (decision on the admissibility of application no. 10741/84 '*S. v. the United Kingdom*' of 13 December 1984), private interests recognised under national law (*Beyeler v. Italy*), judgment [GC] of 05 January 2000, application no. 33202/96).¹²

11 Case No 914/582/17 (Supreme Court [GC], 26 June 2018) <<https://reyestr.court.gov.ua/Review/75265992>> accessed 22 July 2021

12 TI Fulei, *Application of the case law of the European Court of Human Rights in the administration of justice* (2015) 129-130; N Blazhivska, 'Interpretation of the concept of property in the case law of the European Court of Human Rights' (2018) 10 *Entrepreneurship, Economy and Law* 219-223.

To a large extent, legal interests in the field of land relations correspond to the conventional understanding of a person's legitimate (legal) expectations, including in relation to real estate.

2.3 'DISPUTE ABOUT THE LAW' IN ADMINISTRATIVE JURISDICTION

Before considering specific ways of protecting the rights and interests in administrative proceedings, it is also important to establish the characteristics of the object of protection.

The Grand Chamber of the Supreme Court drew attention to the fact that the application of a particular method of protection of civil law depends both on the content of the right or interest sought by the person and on the nature of its violation, non-recognition, or challenge. Such a right or interest must be protected by a court in a manner that is effective, that is, appropriate to the content of the right or interest concerned, the nature of the violation, non-recognition, or challenge, and the consequences of those acts.¹³ If the content of the latter is disclosed in advance (para. 2.1), the content of the violated right or interest is one of the key issues that not only affects the method of protection but also is used to delimit judicial jurisdiction and is known in law enforcement practice as a widely used criterion 'dispute about the civil law'.

According to the opinion of the judges of the Grand Chamber of the Supreme Court, which is consistently used in court decisions with an element of jurisdictional dispute, the criteria for distinguishing cases of civil jurisdiction from others are, firstly, their 'dispute about civil law', and secondly, the subjective composition of such a dispute (one of the parties to the dispute is, as a rule, an individual). Instead, the jurisdiction of administrative or commercial courts in the general sense can be defined as follows: the former has the power to resolve public law disputes, and the latter has the power to resolve disputes arising in the course of economic activity.¹⁴

The justification for such a difference in approaches can be found in doctrinal attempts to explain the difference between disputes over land relations of public law and private law, which is reflected, respectively, in the methods used by courts of different jurisdictions.

Public interest as a criterion for belonging of some of the land disputes to administrative jurisdiction is characterised by the fact that:

- 1) it is objectively present in society, i.e., the prerequisite for its existence is the natural needs of society, which are most important, significant, vital, in particular, the need to own, use and exploit of land;
- 2) it is inseparable, or independent, and is based on the will of the whole society, i.e., it concerns society as a set (wide range) of subjects for whom it is equally important and valuable;
- 3) it is recognised by the state and enshrined in the norms of public law, primarily in the provisions of the Constitution as the Basic Law;
- 4) it lies in the existence of obligations of the state to the society, which seeks their proper implementation, and public administration – the only entity that has the competence to ensure their implementation.

13 Case No 378/596/16-ц (Supreme Court [GC], 29 September 2020) <<https://reyestr.court.gov.ua/Review/93327297>> accessed 22 July 2021

14 O Kibenko, V Urkevych, 'Approaches of the Grand Chamber of the Supreme Court to determine the jurisdiction of disputes (*Sudebno-yuridicheskaya gaset*a, 24 March 2020) <<https://sud.ua/ru/news/blog/164290-pidkhodi-velikoyi-palati-verkhovnogo-sudu-do-viznachennya-yurisdiktsiynosti-sporiv?fbclid=IwAR2FbIrsVFSL64rP4-xNA4JkNcYLPb-An5uojKhAGru4fWfHkZS9zzF4upck>> accessed 23 September 2021.

The public interest in land disputes is objectively present in the vital and important aspirations of the whole society or a significant part of it to own, use, and exploit the land as a national good, as well as to preserve and protect its natural state from the effects of negative natural and artificial factors, which are recognised by the state and enshrined in public law, and the obligation to ensure and protect them rests with the competent subject of public administration.

The public nature of such property is evidenced by the ability of every citizen to use land, as well as the state's commitment to protecting such property. That is, the purpose of such property is to promote the daily realisation of the public interest.¹⁵

However, such a difference between the content and nature of the dominant interest is an external attribute that is important for the organisation of the judiciary rather than for the actual administration of justice as a form of justice to protect the rights, freedoms, and interests of the plaintiff. As we mentioned earlier, the purpose of any form of justice in Ukraine, including administrative, is the effective protection of the rights, freedoms, and interests of the person in respect of whom they apply to the court (para. 1 Art. 2 of the CAP).

The right to apply to the court (right to access court proceedings) is not abstract. It relates to the right of the individual in whose interests the trial is taking place and to whose conviction the state (represented by public authorities, local governments, officials, and officials) has unlawfully interfered with their rights or freedoms. A mandatory feature of a public law dispute is that a person believes that there is a violation of their rights and freedoms as a result of the performance or non-performance of government functions. To apply to the court, the person (plaintiff) must have a substantive legal interest in resolving the dispute.

This precludes the existence in the Ukrainian court of a claim 'in the interests of the rule of law', which is known in legal theory as 'actio popularis'. This form of complaint implies the right of everyone to file a complaint against a normative act after its promulgation, without the obligation to prove that the relevant norm directly affects their rights and freedoms. In this case, the citizen simply fulfils their duty to protect the Constitution, the law, and established order.¹⁶

Any public interest is not dominant in determining the right to apply to the court for a particular person, as they have no right to apply 'in the public interest', but only to protect their own rights, freedoms, or interests, which must be duly confirmed, activated, and legally formalised, potentially being 'in opposition' to the public foundations of legal relations, formally represented in the activities of the subjects of power – the defendants. In disputes in the field of land relations, this is obviously objectified, first of all, due to the existence of direct (law) or indirect (interest) property-legal connection with the object, even if it is a dispute over the exercise of power regarding the management of the same object with the regime of public property.

Therefore, any disputes considered in administrative proceedings are also not disputes about the objective legality of decisions, actions, or inactions of the subjects of power – the defendants. It is wrong to try to distinguish them from land disputes that arise over

15 MV Udod, VS Pyrogov, 'Public interest in determining the jurisdiction of land disputes' (2020) 4 Juridical Scientific and Electronic Journal 232 <<https://doi.org/10.32782/2524-0374/2020-4/55>> accessed 13 July 2020.

16 V Kravchuk, 'Is the right to defense in an administrative court unlimited?' (*Sudebno-yuridicheskaya gazeta*, 4 March 2019) <<https://sud.ua/ru/news/publication/136669-chi-ye-bezmezhnim-pravo-nazakhist-v-administrativnomu-sudi>> accessed 23 September 2021; Case No 522/3665/17 (Supreme Court [GC], 20 February 2019) <<https://reyestr.court.gov.ua/Review/80167902>> accessed 22 July 2021.

the existence or absence of a dispute between the parties over the subjective rights to land, which should be considered under the concept of 'dispute over the right' in civil proceedings. The main difference between land disputes, which are subject to administrative courts, in contrast to other types of litigation, is that they arise from the need to protect and concern different groups of rights or interests (including property rights or non-property rights in land relations) of persons in relations with public authorities and local self-government bodies or other appropriate defendants in the exercise of public authority administrative functions or the provision of administrative services as a defining feature of the jurisdiction of administrative courts.

The establishment of unlawful interference with the rights or interests of a person in the field of land relations is a necessary condition for obtaining legal protection, and the content of protection is determined by the essence of such right or interest and form of interference (violation, challenge, or non-recognition) and is carried out through appropriate remedies and methods of protection.

In addition, we consider it necessary to cite the conclusion of researchers who were at the origins of administrative proceedings in Ukraine, I.B. Koliushka and R.O. Kuybida (2007):

The nature of the subjective right that is violated does not matter at all for administrative jurisdiction – the Code of Administrative Procedure does not state anywhere that administrative courts protect only the public rights of a person. It is important for the administrative court that the law (whether public or civil) is violated by the subject of power in public relations, i.e. in the exercise of their powers.¹⁷

Accordingly, in judicial practice, the content of claims is understood as the plaintiff's proposed ways to protect their public rights, freedoms, or interests, and the circumstances in which the plaintiff substantiates their claims are specific legal facts with the occurrence of which the subjects of public law enter into physical or legal entities in disputed legal relations (para. 25 of the decision of the Grand Chamber of the Supreme Court of 19 May 2021 in the case no. 9901/29/21 [administrative proceedings no. 11-118zai21]).¹⁸

Thus, when applying to the administrative court, the material and legal interest of the plaintiff is not in the sphere of abstract wishes in the public law sphere to ensure control over the legality of the public administration in any matter, but in the rights, freedoms, and interests concerning a particular part of land resources, unimpeded possession, use, or exploitation of them, which is violated by the exercise of power by the subject of power.

And this emphasises the question of how effective will the protection of the rights and interests of the person be in the land sphere when using the powers of administrative courts, which are enshrined in Art. 245 of the CAP and whether administrative courts have the opportunity to apply methods of protection of property and personal non-property rights, defined by Art. 16 of the CC and Art. 152 of the LC, when considering cases arising from their violation by decisions, actions, or inactions of the subjects of power.

17 IB Koliushko, RO Kybida, 'Administrative courts: to protect human rights or the interests of the state?' (2007) 3 Law Ukraine 6.

18 CaseNo9901/29/21 (SupremeCourt[GC],19May2021) <<https://reyestr.court.gov.ua/Review/97286350>> accessed 13 July 2021.

3 METHODS OF PROTECTION OF RIGHTS, FREEDOMS, AND INTERESTS IN THE ADMINISTRATION OF JUSTICE

3.1 THE RATIO OF REMEDIES AND METHODS OF PROTECTION OF RIGHTS, FREEDOMS, AND INTERESTS OF A PERSON

The study of the categories ‘remedy’ and ‘method’ in relation to the protection of rights and interests, as well as the formulation of general conclusions in this regard, was carried out within the doctrine of civil procedure, given that civil proceedings have long remained the only type of litigation in the Soviet legal system for the protection of the individual.

For a long time, the lexical similarity of the etymology of the words ‘remedy’ and ‘method’ led to their identification by legal scholars for the purpose of characterising the constituent elements of the legal protection system. However, the evolution of legal regulation and theoretical thought, as well as the need to ensure the unification of legal terminology, has led to a kind of materialisation of the concept of ‘remedies’ of legal regulation. ‘Remedies’ should be considered in law from the standpoint of a set of actions and/or objects of the material world that allow to achieve a certain goal or perform any task. When applying the above approach to legal relations, it is proposed to consider legal norms or various institutional subjects of their application as remedies. Its main content is to outline the objects that ensure the achievement of a particular goal or task, which makes its legal significance closer to the method to another category in law – ‘tools’.¹⁹

In this context, remedies are classified according to their institutional nature into two groups – jurisdictional and non-jurisdictional.

The former includes the activities of state-authorized bodies and officials to protect violated, unrecognised, or disputed rights (court, prosecutor’s office, executive authorities, local governments, or other public entities, etc.), as well as the protection of subjective rights from possible encroachments (notary). Among the jurisdictional remedies, there are general (judicial) and special (administrative and notarial) remedies. The protection of the rights of the subjects of legal relations in court is the main among the jurisdictional remedies, has a universal character, is guaranteed by the Constitution of Ukraine, and is the most suitable for resolving disputes.

At the same time, the second group of remedies of protection of rights and interests of a person are non-jurisdictional remedies: it is the activity of individuals and legal entities to protect the rights and interests protected by law, which they carry out independently, without seeking help from competent authorities.²⁰

We believe that today, the current regulations and the procedure for its application allow us to fully agree with and support this approach to the delimitation and establishment of the definition of relevant concepts.

For example, the Grand Chamber of the Supreme Court drew attention to the fact that the current CC divides the methods of protection of civil rights and interests into two groups – judicial (Art. 16) and extrajudicial (Art. 17-19) (para. 15 of the Grand Chamber of the Supreme Court from 29 May 2019).²¹

19 MM Lasarenko, ‘The ratio of remedies, methods and forms of protection of property rights of a foreign investor in private international law’ (2017) 6 *Comparative and Analytical Law* 110-111; MA *Rozhkova Remedies and methods of protection of the parties to a commercial dispute* (Wolters Kluwer 2006) 64.

20 OO Karmasa, ‘Remedies and methods of protection of the rights of the subjects of housing relations’ (2012) 2 *Journal of Kyiv University of Law* 155.

21 Case No 310/11024/15-ii (Supreme Court [GC], 29 May 2019) <<https://reyestr.court.gov.ua/Review/82703516>> accessed 13 July 2021.

Based on the analysis of the regulations cited in the decision, it can be noted that they clearly distinguish the concept of 'ways to protect rights and interests' depending on the competence of institutions to influence disputed legal relations – the President of Ukraine, public authorities, authorities of the Autonomous Republic of Crimea local government in accordance with Art. 17 of the CC, notaries on the basis of Art. 18 of the CPC, or the person him/herself, as a victim of violations and unlawful encroachments, in accordance with Art. 19 of the CC.

Each of the listed options of intervention by the relevant entity in order to protect the rights, freedoms, or interests is limited to its own tools and the procedure for its implementation, as emphasised by law. Thus, the procedure for applying these tools (by exercising competence or application of rights) from the standpoint of influencing the content of the disputed legal relationship (rights, interests, and responsibilities of the parties) to eliminate violations of rights or interests should be defined as ways to protect each subject legal protection systems. At the same time, the functioning of judicial institutions or other opportunities to protect the rights and interests in the state should be considered as separate remedies of protection of rights with unique methods.

Confirmation of this can be found in the provisions of the ECHR on the analysis of the rules of admissibility of appeals to the European Court of Human Rights. Art. 35 of the ECHR's condition of admissibility is the exhaustion of all domestic remedies of protection of rights, in accordance with generally accepted principles of international law. Similarly, Art. 55 of the Constitution of Ukraine establishes the right of every person, after using all national remedies, to apply for protection of their rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or a participant.

From the content of the autonomous interpretation in the application of these provisions, the assessment of the use of rights protection remedies provides a priority to establish the use of national institutional systems of human rights, among which the judiciary is in a leading position. Thus, states are relieved of the need to be accountable to an international body until they take the opportunity to remedy the situation through their own legal system. The rule is based on the assumption reflected in Art. 13 of the ECHR, according to which there is an effective remedy capable of essentially resolving a 'non-groundless complaint' under the Convention and securing adequate redress (para. 44 of the ECtHR decision of 4 July 2019).²²

Further examination of the admissibility of a person's complaint about breaches of the Convention's obligations involves an analysis of the potential and actual ability of these systems to provide such protection through the definition of competence and its application (appropriate methods and their effectiveness).

The ECtHR holds a well-established position that:

in deciding on admissibility, it draws attention to the fact that applicants should exhaust only those available domestic remedies to which they have direct access and which at the time of the event were effective both theoretically and practically, i.e. which were available and capable of reimbursing the damages and which provided prospects for successful consideration of the case.²³

Thus, in addressing the admissibility of complaints to the ECtHR, both the systems of remedies (institutions) and the ways (defined by their competence) of the protections they apply are examined.

22 Case No 6433/18 *Sokolovskyy v Ukraine* [2019] *Oficiynyi visnyk Ukrainy* 87/34.

23 *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006) <<http://hudoc.echr.coe.int/eng?i=001-72629>> accessed 11 March 2021; *Paksas v Lithuania* App no 34932/04 (ECtHR, 6 January 2011) <<http://hudoc.echr.coe.int/eng?i=001-102617>> accessed 11 March 2021.

Also, in another of its decisions, the ECtHR reiterates:

the mentioned provision of Art. 13 of the ECHR guarantees effective remedies for the exercise of the rights and freedoms provided for in the Convention at the national level, regardless of how they are expressed in the legal system of a country.

The essence of this article is to provide a person with such remedies at the national level that would allow the competent public authority to deal with substantive complaints of violations of the provisions of the Convention and provide appropriate judicial protection, although the states under the Convention have some discretion as to how they ensure the fulfilment of their obligations.

In some circumstances, the requirements of Art. 13 of the ECHR may be provided by the full range of remedies provided for under national law.²⁴

The analysis of the above gives grounds to conclude that the legislative restrictions on the substantive legal remedies of civil law or interest are to be applied in compliance with the provisions of Arts. 55 and 124 of the Constitution of Ukraine and Art. 13 of the ECHR, according to which every person has the right to an effective remedy not prohibited by law.²⁵

3.2 METHODS OF PROTECTION OF RIGHTS AND INTERESTS OF A PERSON IN LAND DISPUTES

3.2.1 General definition of protection of rights, freedoms, and interests

The resolution of a land dispute is a legal guarantee of protection of land rights, which is provided (implemented) with the help of public authorities within the powers defined by law to make a decision that will restore the violated, unrecognised, or disputed right²⁶.

In this article, we will focus only on the current state of judicial (jurisdictional) protection of rights and appropriate methods of protection of rights and interests in land relations, which are used within its functioning.

The theory formulates various approaches to understanding the meaning of the concept of how to protect rights or interests. They mainly concern the civil law aspect, which is determined by the duration of scientific research in this area. At the same time, the general results and approaches of such research can be applied to the field of disputes in the public sphere, as it is about the only basic principles of the state apparatus and the mechanism of legal regulation in protecting the rights and interests of the individual.

The general conceptual definition of the method of protection is provided by Z. Romovska (2005), who understands this concept as: 'A concentrated expression of the content (essence) of the measure of state coercion by remedies of which the desired result is achieved'.²⁷ Thus, the method of protection is most clearly tied to the mechanisms of state provision of law and order as the desired result of the functioning of the state-organised system of public relations.

This approach has found significant support in the special scientific literature and is supplemented by researchers' own additional features. O. Karmaz (2012) defines the method

24 Chahal v United Kingdom App no 22414/93 (ECtHR, 15 November 1996) <<http://hudoc.echr.coe.int/fre?i=001-58004>> accessed 11 March 2021.

25 Case No 910/7164/19 (Supreme Court [CCC], 28 May 2020) <<https://reyestr.court.gov.ua/Review/89485041>> accessed 18 June 2020.

26 YaZ Yaremak 'The importance of the institution of land dispute resolution in the land law system' (2019) 51 Current Issues of Improving the Current Legislation of Ukraine: A Collection of Scientific Papers 101-102, 106.

27 Z Romovska, *Ukrainian civil law* (Atika, 2005) 494.

of protection from its linguistic interpretation, complements the legal features of certainty in law, substantive and coercive nature of the impact on the behaviour of the offender, whose purpose is to restore (recognise) of violated (disputed or unrecognised) rights.²⁸

A systematic study of the current legal regulation and law enforcement practice indicates that non-judicial remedies are gaining more and more recognition and importance. Accordingly, it is possible to distinguish a group of methods of land rights and interests that restore them by exercising the competence of a notary (for example, in case of satisfaction of the creditor's claims by foreclosure on the subject of the mortgage, which is land, under Art. 33 of the Law of Ukraine 'On mortgage' of 5 June 2003), contractual forms of settlement of disputes (for example, the establishment of an easement and a contractual change in the legal relationship in this regard) or through self-protection (for example, unilateral termination of the contract due to breach of obligations' contracting or cutting off the roots and branches of trees in case of moving from one land site to another, if such movement is an obstacle to the use of land for its intended purpose or liquidation of trees at the common border, in order to implement the principles of good neighbourliness under Chapter 17 of the LC).

In this case, the definition of coercion is broad and includes both the force and effect of state influence as a result of the positive effect of legal regulation on a person's behaviour (so-called positive legal responsibility), including by both persuasion and real coercion to act against the will of the person concerned under the threat of legal sanctions.

In this aspect, we cannot agree with the identification in the literature of the remedies and measures of responsibility on the basis of the formula of 'coercion'. Instead, the remedies may include appropriate sanctions for violations of the rights, freedoms, or interests of the person, if the purpose of protection is to meet the needs of the person in dispute by restoring, recognising, and creating conditions for the unimpeded realisation of rights and interests.

Accordingly, we consider it appropriate to agree with the provided definition of ways to protect the violated, disputed, or unrecognised right or legal interest provided by V.V. Petrunya, as a set of actions provided by law, contract, or those that do not contradict the principle of the rule of law of authorised state bodies or relevant persons, which can be used to achieve termination, prevention, elimination of violations, restoration (recognition) of violated (disputed) rights, or compensation of damages and influence on the offender.²⁹

A similar approach to determining the method of protection is accepted in law enforcement practice. Clause 14 of the decision of the Grand Chamber of the Supreme Court of 29 May 2019 defines the method of protection of civil rights or interests as: 'Actions aimed at preventing the violation or at restoring a violated, unrecognised, contested civil right or interest. The remedies of protecting a civil right or interest must be accessible and effective'.³⁰

Scholars define ways of protecting a right as actions provided by law that are directly aimed at protecting the relevant right. Such actions are final acts of protection in the form of substantive legal actions or jurisdictional actions to remove obstacles to the exercise of their rights or the cessation of offences, the restoration of the situation that existed before the violation. The application of a specific method of protection of the violated or denied right is the result of protection activities.³¹

28 OO Karmasa, 'Remedies and methods of protection of the rights of the subjects of housing relations' (2012) 2 Journal of Kyiv University of Law 156.

29 VV Petrunya, 'The concept and system of methods to protect the rights of economic entities' (PhD (Law) thesis, National University 'Odesa Law Academy' 2019) 4.

30 Case No 310/11024/15-ц (Supreme Court [GC], 29 May 2019) <<https://reyestr.court.gov.ua/Review/82703516>> accessed 13 July 2021.

31 'On methods to protect the law in public law relations' (Yurydychna gazeta Online, 19 November 2019) <<https://jur-gazeta.com/publications/practice/sudova-praktika/pro-sposobi-zahistu-prava-upublichnopravovih-vidnosinah.html>> accessed 23 September 2020.

In its relationship with the subject of research of this scientific intelligence in the jurisdictional judicial remedies of protection of rights or interests of land rights, speaking of the relevant acts (actions or inactions), it should be about the competence of relevant jurisdictions to influence the dispute and the disputed legal relationship from which it arose.

3.2.2 Different ways to protect the rights and interests of persons in land relations for individual jurisdictions

In procedural codes, there is a significant difference between the methods of protection used by administrative courts and courts when considering disputes arising from civil, labour, family, housing, economic, and other legal relations, including land – in the sense of para. 1 Art. 19 of the CPC and cases in disputes concerning the right of ownership or other real rights to property (movable and immovable, including land) for para. 6 para. 1 Art. 20 of Commercial Procedural Code (hereinafter – ComPC) – which fall under the jurisdiction of civil and commercial courts.

Paras. 1 and 2 Art. 5 of the CAP guarantees every person the right to apply to an administrative court in accordance with the procedure established by this Code, if they consider that the decision, action, or inaction of the subject of power violates their rights, freedoms, or legal interests, and to request their protection by:

- 1) recognition of a normative legal act or its separate provisions as illegal and invalid;
- 2) recognition as illegal and cancellation of the individual act or its separate provisions;
- 3) recognition of the actions of the subject of power as illegal and the obligation to refrain from certain actions;
- 4) recognition of the inaction of the subject of power as illegal and the obligation to take certain actions;
- 5) establishing the presence or absence of competence (powers) of the subject of power;
- 6) adoption by the court of one of the decisions specified in paragraphs 1-4 of this part and recovery of funds from the defendant-subject of power to compensate for the damage caused by his illegal decisions, actions, or inactions.

Protection of violated rights, freedoms, or interests of a person who appealed to the court may be carried out by the court in another way that does not contradict the law and provides effective protection of the rights, freedoms, and interests of man and citizen, or other entities in the field of public relations, from violations by the subjects of power.

The remedies listed in para. 1 Art. 5 and para. 2 Art. 245 of the CAP are based on the nature and forms of activity of subjects of power, indicate coercive measures that can be applied in court, ways to counteract the illegal exercise of competence by public authorities or local governments as the main defendants in administrative proceedings. We believe that the basis of this approach is that after the court corrects the violations of the procedure for exercising their powers, the authorities, within the framework of the special permit principle, will refrain from repeating these violations in the future, with minimal actual interference in the problem of distribution of authorities and competencies between branches of government.

However, even when correcting an error in the activities of the public administration in such ways or equally effectively, the court will take care of the restoration of violated, disputed, or unrecognised rights and interests of the person. In part, it may seem that under the existing system of judicial protection by administrative courts, the main focus of their activities is on the problems of the apparatus rather than the rights and interests of the person violated by it. This gives researchers and practitioners of justice the opportunity to even support the discussion and substantiate their own theses about the doubts for the 'ontological purity' of administrative justice as a form of administration of justice.

It is hardly possible to agree with the last thesis from both the formal and the factual points of view. But the peculiarities of the application of methods of protection by administrative courts in the protection of the rights, freedoms, and interests of the individual obviously exist, which confirms the relevance of this and subsequent scientific developments.

Instead, regulations of paras. 1 and 2 Art. 5 of the CPC and paras. 1 and 2 Art. 5 of the ComPC, which are similar in content, define:

in the administration of justice, the court protects the rights, freedoms and interests of individuals, the rights and interests of legal entities, state and public interests in the manner prescribed by law or contract.

If the law or the contract does not determine an effective way to protect the violated, unrecognized or disputed right, freedom or interest of the person who appealed to the court, the court in accordance with the claim of such person may determine in its decision such a method of protection that does not contradict the law.

Thus, civil and commercial litigation in determining the remedies mainly refers to the content of special legislation governing the disputed legal relationship and therefore determines the implementation of rights, freedoms, and interests of the individual and possible ways to restore them through coercive force. This approach is obviously more correct, given the substantive nature of the violated rights, freedoms, or interests and the consequent nature of the remedies that should be used to restore them.

For the current state of legal regulation, a non-exhaustive list of ways to protect land rights is contained in para. 3 Art. 152 of the LC, para. 2 Art. 16 of the CC, and para. 2 Art. 20 of the Commercial Code of Ukraine (hereinafter – ComC).

Analysis of the content of methods of protection of land rights shows that their role and significance are different: each method of protection has its own characteristics, functions, purpose, and conditions of use.

As defined by the doctrine of land law, some of them are directly aimed at protecting the right of ownership of land or land use rights; others are aimed indirectly. All these methods of protection of land rights can be classified into separate, relatively independent groups: property law, contract law, and special methods of land rights protection. Property and legal methods of protection of land rights are directly aimed at protecting the subjective right of ownership of land or land use rights of persons who at the time of the violation of the right are not in a binding relationship with the infringer (claiming land from someone else's illegal possession [vindictive claim]; the requirement of the landowner or land user to eliminate violations in the exercise of their rights, which are not related to the deprivation of land ownership [negative claim]; and so on). Mandatory legal remedies are aimed at protecting the rights of the subject as a party to the binding relationship (compensation for damages caused by non-performance or improper performance of the contract; return to the owner of the land provided for use under the lease, etc.). Special methods of protection of land rights apply to special cases of violation of the rights of landowners and land users. They are due to a special circle of authorised or obligated persons and extraordinary circumstances

(recognition of the land agreement as invalid; invalidation of decisions of executive authorities or local governments that violate the rights of landowners and land users, etc.).³²

It is noted in the literature that the definition of methods in the Land Code of Ukraine as legal guarantees of protection of land rights places a functional burden on them, which is to restore the rights that were violated, to remove obstacles to their implementation, and so on.³³ In fact, this is what any kind of litigation seeks, if we carefully examine their regulatory tasks.

However, the methods of protection used by administrative courts and in civil or commercial proceedings are significantly different, except for invalidation (which is identical to illegality, unlawfulness, invalidity) of decisions of public authorities and local governments, which suggests the existence of normative-formal difference of legal protection in the order of various types of legal proceedings. However, such a conclusion would force us to agree with the difference in the essential common principles of the functioning of the justice system, its goals, and objectives.

3.2.3 Assessment of the possibility of recourse to the court to achieve the purpose of administrative proceedings

Regarding the legal characteristics of jurisdictional (judicial) methods of protection in administrative proceedings, special attention should be paid to the definition of such methods in court proceedings in public law disputes, at the request of the subject of power in cases where the right to apply to the court for a public law dispute is granted to such a subject by law (clause 5 para. 1 Art. 19 of the CAP).

In this category of disputes, the usual basic model of approaches to the characterisation of judicial activity is undergoing significant changes. This is evidenced by the fact that for a long time, any possibility of referring this category of cases to the jurisdiction of administrative courts was denied, justifying their inconsistency in the legal nature and purpose of administrative justice, the real punitive functions when it considers cases caused by the claim of the object of power to the person.³⁴ System analysis of Art. 55 of the Constitution of Ukraine and the provisions of the CAS of Ukraine indicates that administrative courts consider cases 'person against the state' and are designed to protect people from the arbitrariness of the state (state bodies), not vice versa.

However, the experience of the institute of administrative justice has proved the unfoundedness of the last objections and their lack of motivation since the basis of their argument was superficial external attributes of proceedings initiated by the subjects of power. Instead, it should be agreed that a detailed study of the categories of cases and the grounds for their consideration in courts, on the contrary, allows us to speak more fully of administrative proceedings, due to the consideration of such disputes it should prevent human rights violations by judicial control over 'interference' powers of the authorities.³⁵

32 Land Code of Ukraine: comment (Odyssey, 2002) 402; MV Shulha, HV Anisimov, NO Bahai, AP Hetman, Land Law Ukraine (Yurincom Inter, 2004) 143; ZV Yaremak, 'The effectiveness of methods to protect land rights: problems of judicial practice' (2020) 4 Juridical Scientific and Electronic Journal <<https://doi.org/10.32782/2524-0374/2020-4/27>> accessed 21 March 2021.

33 Ibid.

34 V Averyanov, D Lukyanets, Yu Pedko, 'Code of Administrative Procedure of Ukraine: the need and ways to eliminate conceptual and conceptual defects' (2006) 3 Law Ukraine 10-11; VM Bevzenko, SM Minko, 'Features of determining the jurisdiction of public law disputes' (2007) 3 Bulletin of Commercial Justice 124-125.

35 IB Koliushko, RO Kuibida, *Administrative justice: European experience and proposals for Ukraine* (Fakt, 2003) 33.

The basic instructions of the CAP, which outline the tasks and principles of this form of justice in Arts. 2 and 5 of the CAP, indicate the universal obligation of the court to use procedural possibilities and powers in order to effectively protect the rights, freedoms, and interests of individuals in the process of considering public law disputes of administrative jurisdiction. When appealing to the administrative court, when only the adoption of a judicial act allows them to exercise the powers granted, in cases established by law, the court checks the activities of the representative of the government. In such cases, the court actually grants permission to enforce the administrative act. This again raises the question of verifying the legitimacy of the document, which provides for the assessment of the behaviour not so much of the person subject to coercive measures but of the compliance by a representative of the authorities with the requirements relating to legal acts of management.³⁶

The continental German model of administrative justice, received by Ukraine, has, over its long history, approved the approach to the expediency and jurisdiction of the relevant categories of cases within the competence of administrative courts.³⁷

In the same category of cases, it is objectively difficult to apply the traditional approach to determining the methods of protection used by administrative courts in other disputes 'against a subject of power'. Therefore, it demonstrates the multifaceted discussion of the object and subject of this scientific article.

In decisions on appeals of subjects of power, the courts neither recognise the activity of the authority as illegal with the recognition of invalidity or cancellation of the act, nor require certain actions, nor refrain from committing them in the resolution. Instead, quite often, the decision to satisfy the appeals of the subject of power, on the contrary, can raise doubts on who is protected by the courts in a particular case when deciding to forcibly alienate land, other real estate located on it, for reasons of public necessity (Art. 267 of the CAP).

Even in such an extraordinary form, the internal content of judicial activity is primarily aimed at assessing the legality of decisions (acts), actions, or inactions of the subject of power, which potentially lead to interference in the rights, freedoms, and interests of the individual. Its result, establishing their legality or illegality, determines the satisfaction of the court with the relevant appeal or the refusal of such satisfaction, which authorises public administration activities.

From the description above of the methods of protection as actions of authorised state bodies, by remedies of which the prevention of violations of rights can be achieved, this judicial activity best corresponds to the given definition. It has the potential to provide effective protection in terms of preventing violations that will negatively affect the rights, freedoms, and interests of the individual, to prevent such from the negative impact of the actions of the subjects of power.

According to O.V. Ilnytsky (2011), for land relations, this category of cases is one of the most important in terms of exercising the powers of administrative courts to monitor the observance of human rights, which is determined by the constitutional principle of inviolability of property and exclusion of grounds for compulsory alienation (Art. 41 of the Constitution of Ukraine).³⁸

36 Yu Bytyak, N Pysarenko, 'Procedural form of administration of justice in disputes involving a subject of authority' (2006) 10 Law Ukraine 79-80.

37 Siegfried F Franke, *Allgemeines Verwaltungsrecht der Bundesrepublik Deutschland: Grundzüge, Erläuterungen und Beispiele* (R. v. Decker's Fachbücherei: Recht und Wirtschaft 1999) 173-175.

38 O Ilnytsky, *Land disputes and the procedure for resolving them in Ukraine: administrative and legal approach* (FOP Pyatakov 2011) 207.

In this regard, for example, Art. 143 of the LC, when determining the grounds for compulsory termination of land rights, indicates as the imperative the provision of judicial procedure to assess the existence of factual and regulatory grounds for such interference in the field of land rights, freedoms, and interests of the person, some of which is at the request of the subject of power in administrative proceedings.

In the civil theory of protection of rights, freedoms, and interests, 'other ways of protection' can also include judicial activity, namely prior judicial control. That is, when performing an action that may have legal consequences and affect the rights and legal interests of the authorised person, it is necessary to first go to court. Thus, in accordance with the provisions of the Constitution of Ukraine, no one may be forcibly deprived of housing other than on the basis of law by a court decision (Art. 47).³⁹

4 ENSURING THE EFFECTIVENESS OF WAYS TO PROTECT THE RIGHTS AND INTERESTS OF THE PERSON REGARDING LAND IN ADMINISTRATIVE PROCEEDINGS

4.1 UNDERSTANDING OF EFFECTIVENESS AS A CRITERION FOR THE PURPOSE OF THE PROCEEDINGS

The purpose of legal proceedings, which is formulated through the sign of 'effectiveness' of judicial protection, requires the establishment of a normative definition of this sign. Moreover, this feature is currently important in law enforcement, which borders on the guarantee of the right to judicial protection. Frequent cases in the practice of the Supreme Court are the refusal to satisfy the claim on the grounds of the ineffectiveness of the chosen method of protection of the rights of the person, which is defined by them in the claims, because it does not restore violated, disputed or unrecognised rights, freedoms, or interests of the plaintiff. Consequently, the task of judicial proceedings is not fulfilled. This leads to the courts' assessment of the question of to what extent such a dispute in this case is legal and belongs to the court jurisdiction according to Art. 124 of the Constitution of Ukraine.

The provision on ensuring the effectiveness of judicial protection also corresponds to the guarantees of the rights of the person set forth in Art. 13 of the ECHR. The ECtHR has repeatedly stated in its decisions, analysing national redress systems for compliance with the right to the effectiveness of internal safeguards mechanisms, that in order to be effective, the remedies must be independent of any action taken by the public authorities, be directly available to those concerned (see *Gurepka v. Ukraine*, application no. 61406/00, para. 59) and able to prevent the occurrence or continuation of the alleged infringement or to provide adequate compensation for any infringement that has already taken place (see *Kudla v. Poland*, judgment of 26 October 2000 in the case *Kudla v. Poland*, (<...>) [GC], application no. 30210/96, ECHR 2000-XI, para. 158) (para. 29).⁴⁰

The remedies must be 'effective' in the theory of law and in practice, in particular in the sense that its use cannot be unduly complicated by the actions or inactions of the respondent State authorities (decision of 18 December 1996 in *Aksoy v. Turkey*, para. 95).

³⁹ OO Karmasa, 'Remedies and methods of protection of the rights of the subjects of housing relations' (2012) 2 Journal of Kyiv University of Law 156.

⁴⁰ Case 20390/07 *Garnaga v Ukraine* [2013] *Oficiynyi visnyk Ukrainy* 1/203.

In assessing effectiveness, it is necessary to take into account not only the formal remedies but also the general legal and political context in which they operate and the applicant's personal circumstances (decision of 24 July 2012 in *Djordjevic v. Croatia*, para. 101; decision of 6 November 1980 in *Van Oosterwijk v. Belgium*, para. 36-40). Thus, the effectiveness of the remedies is assessed not in an abstract way but by taking into account the circumstances of a particular case and the situation in which the plaintiff found him/herself after the violation.

The issue of the effectiveness of legal protection was analysed in the decisions of national courts. In particular, in the decision of 16 September 2015 in case no. 21-1465a15, the Supreme Court of Ukraine concluded that the court decision, in case of satisfaction of the claim, should be such that would guarantee the protection of the rights, freedoms, and interests of the plaintiff from violations by the defendant, ensure its implementation and prevent the need for further appeals to the court. The method of restoring the violated right must be effective and such that excludes further illegal decisions, actions, or inactions of the subject of power, and in case of non-execution or improper execution of the decision, there would be no need to go to court again, and enforcement of the decision would take place.

In its case law, the Supreme Court has repeatedly stated that an 'effective remedies' within the meaning of Art. 13 of the ECHR must ensure that the violated right is restored and that the person obtains the desired result. Making decisions that do not directly lead to changes in the scope of rights and ensuring their enforcement does not comply with this provision of the Convention (Resolution of the Grand Chamber of the Supreme Court of 28 March 2018 in case no. 705/552/15-a, decisions of the Supreme Court of 18 April 2018 in case no. 826/14016/16, of 11 February 2019 in case no. 2a-204/12).

The method of protection chosen by the plaintiff should be aimed at restoring the violated rights, protection of legal interests and, if the court satisfies his/her claims, the decision should result in the actual restoration of those rights for which the plaintiff went to court (para. 27-31).⁴¹

The effectiveness of the protection of rights, freedoms, and interests as a result of application to the courts is a complex collective concept, which in the most general terms, can be described as the ability to ensure the real impact of the court decision on the legal status of the person in dispute by restoring or recognising unrecognised rights, freedoms, or interests of the person, for which he/she appealed to the court.

V. Kravchuk (2020) distinguishes the reality of protection of rights, speed, and accessibility (in the context of monetary costs) by the criteria of efficiency of judicial protection. The reality depends on the quality multiplied by the immediate implementation of the decision. In turn, the quality of the decision, in his opinion, is clarity, effectiveness, 'enforceability', and its independence from the plaintiff. In addition, the decision should include safeguards against the recurrence of violations and the formation of new disputes.⁴²

Thus, an effective remedy (method) should be understood as one that leads to the desired results, consequences, or has the greatest effect. Therefore, an effective method of protection must ensure the restoration of the violated right and be adequate to the existing circumstances.

41 Case No 340/2074/19 (Supreme Court [ACC], 4 August 2020 <<https://reyestr.court.gov.ua/Review/90755073>> accessed 13 July 2021.

42 V Kravchuk, 'Principles of administrative proceedings' (*UBA.ua*, 19 June 2020) <<https://uba.ua/ukr/news/7657/>> accessed 26 June 2021.

Therefore, the administrative court, having received the statement of claim, must establish the existence of the fact of violation of the right and apply a specific way to protect the violated right. The method used depends on the content of the subjective right for the protection of which the person applied and the nature of the violation.

All this inevitably leads to the use of methods of protection by the court in resolving the case that would ensure the set goal and perform the tasks that follow from it in the specified context.

When choosing between general methods of protection of law (provided by law) or special methods, administrative courts must prevent abuse of the right to protection and violation of the rights of defendants, repeated proceedings on essentially identical but formally different requirements, as well as not complicate enforcement decisions. That is, having established the violated right of the applicant, the court must protect his/her right and must not allow chaos in law enforcement.

It follows that for the effective restoration of the infringed right, it is necessary that there be a clear link between the offence and the method of protection of the right. In other words, the purpose of the stated claims should be to eliminate obstacles to the exercise of the right, and its achievement is a certain way to protect the right, which would exhaust itself.⁴³

4.2. THE LEVEL OF EFFECTIVENESS OF GENERAL METHODS OF PROTECTING THE RIGHTS OF FREEDOMS AND INTERESTS OF ADMINISTRATIVE COURTS IN DISPUTES OVER LAND RIGHTS

The right to property is an indisputable object of protection by the parties in cases of appeal against decisions, actions, or inactions of subjects of power in the usage of public property (including land property).

The range of tools used by the substantive and legal powers of administrative courts is aimed at resolving issues of restoring the legitimacy of public administration in compliance with the guarantees of the constitutional system (for example, in terms of the concept of the functional distribution of branches of government). In deciding the issue of the proper exercise of competence, the result of its implementation is also one of the criteria for judicial evaluation. However, for the party, this algorithm has the opposite effect: they protect their own rights, freedoms, or interests, which must be provided by public authorities or local governments.

In the scheme of evaluating the activities of the subject of power, the courts face numerous problems of competence, discretion, and public succession as a result of the reorganisation of the mechanism of the state. The court decision, through the 'general' means of protection of administrative proceedings (Arts. 5 and 245 of CAP), provides an assessment of the exercise of powers, directing the defendant (subject of power) in the legal direction of activity. Only relatively recently have administrative courts taken a proactive stance, according to which the mere finding of illegal actions in person-friendly proceedings does not restore the rights of such a plaintiff. To this end, the administrative court is endowed with appropriate powers, in particular, Part 4 of Art. 245 of the CAP of Ukraine stipulates that in the case specified in para. 4 of Part 2 of this article, the court may oblige the defendant, who is the subject

⁴³ 'On methods to protect the law in public law relations' (*Yurydychna gazeta Online*, 19 November 2019) <<https://jur-gazeta.com/publications/practice/sudova-praktika/pro-sposobi-zahistu-prava-u-publichnopravovih-vidnosinah.html>>, accessed 23 September 2020.

of power, to decide in favour of the plaintiff, if such a decision meets all the conditions prescribed by law and acceptance of such a decision does not provide for the right of the subject of power to act at its own discretion. Therefore, the long inaction of the defendant in violation of regulatory requirements for the exercise of their competence and the need to ensure effective protection, which excludes further illegal decisions, actions, or inaction of the subject of power, determine the need to oblige the defendant to authorise (those which grant (certify) the relevant right) decisions (paras. 58-60).⁴⁴

This is especially important in cases where the previous dishonest behaviour of the subject of power indicates the absence of their intent to make a reasonable and lawful decision in the form prescribed by applicable law, taking into account the position of the court. As the process of refusing the plaintiff to grant permission to develop a land management project on formal grounds without making an appropriate government decision (according to Art. 118 of the LC) can be quite long, as indicated by the wrongful conduct of the defendant, who repeatedly enforces similar violations rights of the plaintiff, in this case, the proper way to protect the violated right is the obligation of the land management authority to grant permission to develop a land management project (para. 55).⁴⁵

From the practice of law enforcement, even the satisfaction of such claims is not a guarantee of restoration of violated rights, as the court decision will not be a direct basis for technical activities in the field of land management. O. Snidevych (2006) notes that it is quite reasonable to see the possibility of violation of human rights to effective judicial protection, guaranteed by Art. 13 of the ECHR. The adoption of such acts by the relevant body is only a delay in the development of the land management process. The acts of these bodies do not bring anything new to the regulation of land relations. They are just an extra part of this process. In addition, such decisions can be enforced only by the executive or local self-government bodies themselves.⁴⁶ And this contradicts the existing positions of guarantees for the effectiveness of judicial protection.

Thus, having chosen the procedure for exercising competence by the subject of power as the main 'goal', administrative-procedural methods of protection come into formal conflict with the normative task of the judiciary on the priority of rights, freedoms or interests of a person violated by such public authority.

This conclusion is indirectly confirmed in the legal positions of the Grand Chamber of the Supreme Court. For example, in a study of the use of land rights common to civil and administrative litigation, declaring as illegal and challenging decisions of public authorities and local governments, the Court considered this method of protection ineffective because it could not protect or restore the infringed property right of the plaintiff (if there is any), in particular, the return to their possession or use of the disputed land, compensation of damages.

The methods of protection of property rights are defined in the Civil Code. Judicial protection must be complete and comply with the principle of procedural economy, i.e., ensure that there is no need to go to court to seek additional remedies. Satisfying the claims for illegality and challenging the disputed decision to lease the land to a third party, which has already been sold and expired, will not restore the plaintiff's rights, restore possession, use, or disposal of the property, and it will require additional protection. Based on the circumstances of this case, the proper way to protect the plaintiff will be to apply to the court to recover property from someone else's illegal possession, if the plaintiff was deprived of land

44 Case No 813/5074/17 (Supreme Court [ACC], 2 April 2021) <<https://reyestr.court.gov.ua/Review/95982464>> accessed 13 July 2021.

45 Case No 812/1313/18 (Supreme Court [ACC], 30 April 2020) <<https://reyestr.court.gov.ua/Review/89035537>> accessed 13 July 2021.

46 O Snidevych, 'Land management lawsuits in the civil process of Ukraine' (2006) 6 *Pravo Ukrainy* 72.

ownership, or remove obstacles to the exercise of property use and disposal, if the plaintiff is denied their right. The Grand Chamber of the Supreme Court also draws attention to the fact that according to the method of protection chosen by the plaintiff, the proper defendant, in addition to the subject of power, may be an individual to whom the land was transferred. The plaintiff's choice of an inappropriate way to protect his/her rights is a separate ground for dismissing the claim (para. 47-54).⁴⁷

T.O. Tretyak's (2016) study of the recognition of the legality or illegality of a legal act gives reason to believe that it is not a separate method of protection and has no independent significance. The resolution of this issue during the protection of the right to land is necessary to determine the rights and obligations of the plaintiff and the defendant after the decision of the executive authorities or local governments. The protection of these rights may, without any harm to the plaintiff and society, be carried out by other means of protection.⁴⁸

In these examples, we can see that for civil and commercial litigation, the criterion for the effectiveness of protection is the shortest path for a person to obtain or restore his/her rights. Obviously, this is also relevant for administrative proceedings. However, the application of the remedies defined in the CAP (powers of administrative courts) is not always able to perform this task, given the denial of the substantive nature of violated rights, freedoms, and interests on the basis of public law in the exercise of administrative functions.

4.3 PROBLEMS OF EXPANDING THE METHODS OF PROTECTION OF LAND RIGHTS USED BY ADMINISTRATIVE COURTS

As stated in this article, within the framework of certain principles of the constitutional order, the question of the methods of protection used by the court, in addition to assessing their effectiveness, is based on the principles of determination of legal competence.

Therefore, when resolving disputes by administrative courts, the list of methods of protection and powers of administrative courts, which are defined in Arts. 5 and 245 of the CAP, are applied as an imperative.

At the same time, for example, para. 2 Art. 5 of the CAP provides that the protection of violated rights, freedoms, or interests of the person who appealed to the court may be carried out by the court in another way that does not contradict the law and provides effective protection of the rights, freedoms, and interests of people, citizens, and other entities of public relations from violations by the subjects of power. This provision allows the court to act with a significant degree of freedom within law, choosing a method of protection that is not directly provided by procedural law but follows from the nature of the law, the protection of which is sought by the person in a public dispute within the jurisdiction of administrative courts and its legal regulation, taking into account the requirements of the effectiveness of protection.

The issue of legislative restrictions on the use of remedies in civil and commercial proceedings, instead of expanding them to ensure the completeness and effectiveness of judicial protection, was explained by the underdevelopment of the independence of the judiciary and distrust of judicial discretion, which should determine the content of remedies.

47 Case No 945/642/19 (Supreme Court [GC], 02 February 2021) <<https://reyestr.court.gov.ua/Review/95439652>> accessed 13 July 2021.

48 TO Tretyak, 'Recognition of illegal decisions, actions or inactions of executive authorities or local governments as a way to protect property rights or land use rights' (2016) 1-2 Ecology Law of Ukraine 75.

However, expert research on this issue has substantiated the opposite trend.⁴⁹ This trend was substantiated by the fact that the legislative restriction of the remedies does not guarantee the correct application of law but becomes an obstacle to the real protection of a person's property rights. The latter may be dismissed by the court for non-compliance with statutory remedies. The list of methods of protection is considerable, but even in this case, it is almost impossible to prescribe in the law the grounds and procedure for the application of each of them. The court is forced to adapt the provisions of the law to real social relations, for example, the way to restore the violated right to the content of the violation. In this case, there are as many ways to restore the violated right as ways to violate it. Resolving issues of protection on the basis of formal provisions of the law, instead of the rule of law, leads to negative phenomena: covert denial of justice, protection of the interests of the state (rather a person authorised to make decisions on its behalf), instead of rights and legal interests of a person from the realisation of power competence.⁵⁰

The protection of property rights in the field of land relations has always been and remains one of the main areas of scientific and practical discussion on the effectiveness of protection. For example, O. Podtserkovnyi (2009) noted that:

Judicial bodies refuse to satisfy claims of land users to local governments for recognition of land ownership, given that this method of protection is not provided by the Land Code, and the solution of these issues is the exclusive competence of local governments. It turns out that the right to property in relations with individuals can be protected in practice, in particular, by recognizing the right, and in relations with public authorities one should expect 'mercy' of these authorities. It is clear that this upsets the balance between public and private interests, undermines confidence in the domestic legal system.⁵¹

Para. 4 of the Letter of the Supreme Court of Ukraine dated 29 October 2008 no. 19-3767/08-08 'On the consideration of land disputes' denied the possibility of acquiring ownership of the land by a court decision by establishing a fact of legal significance, thus asserting the inadmissibility of equating the court decision and the relevant decision of the competent subject of management as a legal fact of the emergence of land rights in non-litigation proceedings. This virtually remedies that a court decision assesses legal relations only in a disputed situation regarding the existence of land rights and cannot be a self-sufficient act to establish such rights, bypassing executive or local self-government bodies. However, in the case when a person applies for protection of the right to land, the court may not limit itself to assessing the general legality of decisions, actions, or inactions that violate this right, but also take measures to protect it – even if the violator is a subject of authority.

The reason for restricting the entry of administrative courts beyond the limits of Arts. 5 and 245 of the CAP are not only formal requirements of the law but also the systematic assertion of the lack of independent legal significance of property claims in cases of administrative jurisdiction, as well as a high level of discretion of management entities in cases involving public property and inadmissibility of court intervention in this area.

However, in this case, taking into account the content of the disputed legal relationship, it is necessary to consider which protection of the right or interest of the person is in question.

Property claims with appropriate substantive remedies may be considered and satisfied

49 D Luspenyk, 'Those, who play with procedural laws, can easily break the logic of the CPC with one failed innovation' (2012) 6 Law and Business 1, 4.

50 OP Podzerkovnyi, 'About problems of application of method of protection of the broken right (on an example of recognition of the property right in mortgage relations)' (2012) Scientific Works of the National University of Odessa Law Academy 190-191.

51 OP Podzerkovnyi, 'Methods of protection in land relations' (2009) 9 Law of Ukraine 190-191.

by administrative courts in the event that the subject matter of the case, which meets the characteristics of administrative, was the right of the person to the individual property, and not just the right to receive it in the sense of 'Lawful (legitimate) expectation' in the context of protection Art. 1 of the Protocol of the ECHR.

On the basis of a detailed scientific study of the application of land rights protection methods, Y. Myahkohod (2014) came to the conclusion that

The use of the recognition of a right as a means of its protection will be quite effective when a person acquired the right to land in accordance with the land law, but due to various circumstances this right was not officially formalized and is disputed.⁵²

It is clear that this conclusion is relevant in the case of obstacles to the legalisation of the right to land due to improper exercise of power and public authority management functions by the subjects of power.

Thus, the application of recognition of the right by the administrative court is possible, but only in respect of established property, when the decision of the subject of power is only a fact that legalizes the right of the person to the property and is beyond the discretion of the authority management of public property at this stage of the right of the person (for example, in the final stages of the transfer of the formed land plots from the state or municipal property to private property by way of privatisation). This will comply with the principles of effective judicial protection of property rights violated by the subject of power, instead of making the plaintiff's right dependent on additional procedures to enforce the court's decision by the defendant, obliging the latter to reconsider and decide on legalisation of the person's right.

The nature of the claim due to the circumstances of the case, which allows for the differentiation of the dispute over the **right to property (land)** or the **right to a particular property (land)**, must be taken into account by the court as to the procedure, including determining the subject and procedure evidence in court and in assessing the permissible effective ways to protect the rights of the individual.

5 CONCLUSIONS

In choosing the method of protection of the infringed right, freedom, or interest, the courts must take into account the direct relationship between the claim for protection and the content of such right and the nature of the offence. Accordingly, the requirement of complete protection of rights, freedoms, and interests in administrative proceedings does not limit the categories of cases they consider on the basis of violated rights, freedoms, or interests, and jurisdiction is determined solely on the basis of the subject composition and nature of the disputed relationship due to the implementation of public authority management functions.

The jurisdictional component of the right to a fair trial presupposes the need for courts to take into account the scope of their powers under the Constitution and laws of Ukraine. At the same time, the concept of expanding the limits of permissible remedies, which are not limited to formal legal instructions but are determined only by the requirements of the need to ensure effective protection of rights, freedoms, and interests, allows administrative courts to use means (general and special) that will ensure the real restoration of the violated rights, which are adequate to the existing circumstances. In the future, rights will not depend on the will or other additional actions of the defendant, and if necessary, will be restored by enforcement.

52 YV Miahkohod, 'Ways to protect land rights' (PhD (Law) thesis, Taras Shevchenko National University of Kyiv 2014) 32.

The administrative court is authorised to apply substantive remedies when considering the claim for the protection of the right to a certain object of property rights (including land) in an administrative case, taking into account the material nature of the violated right, as well as if the violation is committed by decision, action or inaction of the subject of power and is only a fact that legalises the right of a person to the relevant object of property, and is beyond the discretion of the authority in the management of public property.

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