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ACCESS TO JUSTICE FOR THE PROTECTION OF ENVIRONMENTAL RIGHTS IN UKRAINE

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ACCESS TO JUSTICE FOR THE PROTECTION OF ENVIRONMENTAL RIGHTS IN UKRAINE

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Abstract The article deals with specific issues of access to justice relating to the protection of environmental rights. The harmonization and approximation of national legislation with international standards is an essential factor in the development of environmental rights. Particular attention is paid to public participation in the consideration of environmental protection by administrative authorities and in judicial proceedings.

Keywords: environmental justice, environmental disputes, environmental human rights

1 INTRODUCTION

Access to justice is a fundamental element of the right to a fair trial and an indisputable condition for the exercise of the rule of law, as reflected in the Convention for the Protection of Human Rights and Fundamental Freedoms¹ (hereinafter – ECHR). According to Art. 6, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law to dispute his/her civil rights and obligations of a type or to determine the validity of any criminal charge against him/her.

The case law of the European Court of Human Rights (hereinafter – ECtHR) is important in interpreting this international standard. Thus, according to the decision of the ECtHR, *Stanev v. Bulgaria*², the very design of the right to a fair trial would be ineffective if it did not protect the right for a case to be heard at all. Fair trial is thus a common generic concept and explicitly includes access to justice. The concept of accessibility can be understood as the possibility to go to court without special permission, to conduct pre-trial procedures, and so on. But the case law of the ECtHR has shown that access to justice and access to courts is not absolute. Rights may be restricted, but only in such a way and to such an extent that the content of those rights is not violated. In addition, restrictions should not be covered by the content of Art. 6 para 1 if it does not pursue a 'legitimate aim' and if there is no 'proportional relationship between the means employed and the aim pursued'. This position is reflected in the decision of the ECtHR *Fayed v. the United Kingdom*³.

1 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS 5.

2 *Stanev v Bulgaria* App no 32238/04 (ECtHR, 6 November 2012) <[https://hudoc.echr.coe.int/fre#{%22it%22:\[%22001-114259%22\]}](https://hudoc.echr.coe.int/fre#{%22it%22:[%22001-114259%22]})> accessed 17 April 2021.

3 *Fayed v The United Kingdom* App no 17101/9 (ECtHR, 21 September 1990) <<http://hudoc.echr.coe.int/?i=001-164404>> accessed 02 April 2021.

Although it is not possible to restrict access to the courts, the national laws of certain countries and the practice of the ECtHR itself may define such lawful limitations as statutory limitation periods, or the need to pay legal fees and representation in the case.

2 GENERAL APPROACHES TO ACCESS TO JUSTICE IN ENVIRONMENTAL DISPUTES

The right of access to justice is regulated not only in universal legal instruments, but also in the case law of the international and regional judicial bodies. The lack of implementation of the right to access to justice is one of the main obstacles to the protection of an individual against torture, the elimination of trafficking in human beings, the fight against environmental crimes, and respect for social and economic rights.

While providing access to justice, these international instruments did not address environmental protection at the outset. However, the need to regenerate the protection of the environment was inevitable in view of the essential public interest of the international community and international organizations. By 1972, at the time of the United Nations Conference, the Declaration on the Human Environment was adopted⁴, which regulated the existence of two elements of the environment – the natural element and the element that a person him/herself had created. These elements are considered indispensable for the well-being of the individual and for the full enjoyment of his or her fundamental rights, including the right to life itself.

The thin line between human activities and environmental protection has been the subject not only of scientific research but also of normative expression within the framework of the protection of human rights in the ECHR.

To date, courts and competent authorities are dealing with an increasing number of cases related to environmental protection. This trend is associated with increased opportunities to access information on the environmental situation in a particular location or in a country as a whole. Using the judicial form of protection, with the possibility of administrative appeal or other mechanisms of access to justice, and in order to be able to apply substantive and procedural guarantees, the conditions under which *locus standi* can be obtained should be specified, in such terms as, which specific procedures and remedies should exist once the first issue has been resolved, or does the existence of judicial review through specific procedural mechanisms, also called review standards, ensure access to justice in environmental cases?

Such procedures and remedies are subject to many legal prerequisites, which vary considerably from one jurisdiction to another. Examples of such prerequisites include lengthy court proceedings and lack of information about access to justice. The effectiveness of access to justice procedures depends, to a large extent, on the availability of interim measures and on the avoidance of abuse of procedural and substantive rights during the trial. The existence of such measures may have a negative impact on the environment, even if the case in court is successful. However, the most serious obstacle to the handling of environmental disputes is specifically a financial one, including not only litigation costs, but also the existence of possible civil claims for damages that may arise if projects are stopped during the trial.

The modalities and scope of judicial review also differ from country to country. The scope of judicial review depends on two factors: first, which legal acts are taken into account by judges when resolving a dispute on the legality of the contested acts or omissions of public authorities or other commercial organizations in the observance of environmental rights;

4 United Nations, 'Report of the United Nations Conference on the Human Environment' (Stockholm, 5-16 June 1972) <<https://undocs.org/en/A/CONF.48/14/Rev.1>> accessed 22 April 2021.

and second, consideration of a judicial case in a clearly defined legal line, which should be more effective than the powers of administrative bodies, which are empowered to take specific decisions on the observance of environmental rights.

Access to environmental justice is a crucial issue at the international level⁵. A common understanding of the environment and development is not an entirely new concept, and the relationship between access to environmental justice and governance is a modern and unexplored issue. It is this issue that can be considered as confirming the specificities of international environmental law and the possibility of its application in both international and national law.

The trend of legislating environmental human rights began with the adoption of the Stockholm Declaration on the Environment in 1972. It would appear that for almost 45 years the concept of environmental human rights has moved around the world. Since then, the number of national constitutions with enshrined environmental rights has increased significantly. While in 1994 just over 60 countries adopted constitutional provisions on the protection of the environment, currently, out of 193 Member States of the United Nations, more than 160 States have incorporated some provisions on environmental human rights into their constitutions.

This trend is all the more important as the process of extending the scope of environmental rights has taken place in parallel, that is, both in international law and in national legal systems. Here, is a sublime example of the internationalization of constitutional law.

In general, the allocation of environmental rights is not only a means of meeting the individual environmental interests of their holder, but also, and importantly, a means of preserving and restoring a favourable environment as a public good.

The unique place of environmental human rights in a generally accepted classification is determined by the fact that they manifest themselves in all types and categories of human rights. Thus, personal rights define the protection of an individual, his/her health and property against unlawful interference (for example, from environmental hazards). Political rights include the right to a referendum on environmental protection and public participation in environmental decision-making. Cultural rights imply an increase in the level of human ecological culture and a specificity in the protection of human rights in the use of natural resources. Social and economic rights are designed to provide a decent standard of living, taking into account environmental specificities; the right to environmental education and the right to health also have an environmental component.

Moreover, environmental human rights are manifested both as individual rights and as collective rights of the so-called 'third generation'. In many countries, class actions have been legislated, and recourse to international bodies also involves individual and collective complaints.

Today it can be said that the world community has reached consensus on four types of environmental human rights: 1) the right to a favourable environment; 2) the right to access

5 See more about environmental access to justice in Directorate-General for Environment, *Access to justice in environmental matters* (EU publications 2017) DOI 10.2779/844077; 'Study on Access to Justice in Environmental Matters, in Compliance with Decision IV/9(F) of the Meeting of the Parties to the Aarhus Convention' <https://unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Spain_A2J_Environment.pdf> accessed 21 April 2021; European Commission, 'Roadmap: Access to Justice in Environmental Matters' Ref Ares(2020)1406501 <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12165-Access-to-Justice-in-Environmental-matters>> accessed 21 April 2021. See more about GSD in M He, 'Sustainable Development through the Right to Access to Justice in Environmental Matters in China' (2019) 11 Sustainability 900 DOI 10.3390/su11030900. More about general approach to the access to justice in environmental matters may be found here J Ebbesson, 'Access to Justice in Environmental Matters' in *Max Planck Encyclopedias of International Law* (2019) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1906>> accessed 21 April 2021.

environmental information; 3) the right to public participation in decision-making concerning the environment; 4) the right to an access to justice in connection with environmental matters. The first is a substantive right and the next three are procedural human rights.

The proponents of substantive rights do not trust purely procedural rights for one simple reason: even if procedural rights are fully exercised and enjoyed by civil society as a whole, it is possible that democratic power will opt for immediate results instead of long-term environmental protection. Democracy may well be predisposed to excessive consumerism and as a result may destroy the environment, so procedural rights alone do not guarantee its protection⁶.

Proponents of procedural rights propose to dispense with substantive rights altogether, believing that other environmental rights, such as the right to participation (consultation), may well serve to protect human environmental interests and the right of access to justice.

There are, of course, differences between states in the protection of environmental human rights. But the absence of legislative regulation of environmental rights or the possibility of protecting them at the national level enables citizens to turn to international bodies, ensuring that they are adequately protected.

3 PUBLIC PARTICIPATION IN ENVIRONMENTAL DISPUTES IN UKRAINE

The state of the environment directly affects our health and the quality of life in general. Not surprisingly, environmental disputes (environmental human rights and environment protection disputes) are becoming more relevant and more frequent. This requires new knowledge and skills from the judiciary. The relevance of the topic arises from the need to study problematic issues related to appeals by the public concerned with repeated violations of the requirements of the law in the field of environmental protection.

The fact that public participation plays a significant role not only in the administration of justice (part of the principle of openness and transparency) but also in the activities of public authorities raises the question of the role of the public in the implementation of environmental policy. In this connection, it should be emphasized that international treaties, by which the Verkhovna Rada of Ukraine has consented to be bound, are sources of law and that national courts apply in the adjudication of cases. At the same time, the rules of an international treaty have higher legal force than national legislation.

Questions of access to justice in the context of the possibility of environmental protection were addressed by both Ukrainian and foreign scientists of civil procedure and environmental law. Thus, the protection of the environment by an indeterminate circle of persons is an important issue which is dealt with in the doctrine of civil procedure⁷.

However, despite a fairly broad regulatory framework for measures to ensure the implementation of environmental rights, according to the data on the state of the natural environment given in the Law of Ukraine 'On the Basic Principles (Strategy) of Ukraine's

6 See more here: International Center for Not-For-Profit Law and United Nations Development Programme, 'The Role of Legal Reform in Supporting Civil Society: An Introductory Primer' (2009) <https://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/role_of_legal_reform_in_supporting_civil_society_november_2009.pdf> accessed 21 April 2021.

7 T Stepanenko, 'Starting an action in claims for protection of the rights and interests of an uncertain circle of persons' (2007) 3 *Forum Prava* 256. <<http://dspace.univd.edu.ua/xmlui/handle/123456789/2933?locale-attribute=en>> accessed 16 April 2021.

State Environmental Policy for the Period up to 2030⁸, the level of environmental pollution in Ukraine remains extremely high, making it impossible to adequately protect the most important environmental rights: the right to a natural environment that is safe for life and health.

The practice of poor environmental management at the state level has exacerbated climate change in the world and raised the issue of the need to incorporate the concept of climate rights into national policies.

Such transformations in the system of environmental rights oblige a new level of judicial protection of human and citizen's environmental rights. This means that Ukraine's modern judicial system must resolve how to incorporate a more rapid and efficient handling of environmental disputes, including reasonable (from the point of view of the possibility of establishing a causal link) deadlines for the consideration of cases, and the impact of judicial decisions on the further development of the state's environmental policy.

One of the greatest obstacles to the speedy and effective handling of environmental cases by the courts today is: 1) lack of a summary of case law on environmental disputes; 2) consideration of an environmental dispute on the basis of the principle of jurisdiction; 3) overburdening the courts with other categories of cases; 4) judges' lack of professional qualifications in environmental disputes; 5) lack of public participation in the protection of violated environmental rights; 6) the obligation to carry out various types of expert reports; and 7) evidence of causation⁹.

The Aarhus Convention¹⁰ is the fundamental international legal instrument that governs access to justice in the context of environmental protection. According to Art. 1 of the Aarhus Convention, the main objectives are to guarantee the right to access to information, public participation in decision-making and access to justice in environmental matters.

However, despite the fact that the Aarhus Convention has been part of national legislation for 20 years, Ukrainian courts, especially courts of first instance and appellate courts, do not apply or they misapply the provisions of the Aarhus Convention, especially its provisions on the rights of the public to challenge in court decisions, acts or omissions committed in violation of environmental law considering that the contested decisions do not affect the rights and interests of the plaintiffs.

This provision of the Aarhus Convention is based on preambular paragraphs 18 and 26 of the Sofia Guidelines¹¹ and is intended to provide the public with the procedural capacity to enforce environmental law, that is, to promote compliance directly, namely by bringing cases before the court. This active role of the public is extremely supportive of the public environmental authorities, who often suffer from a lack of funding or of human, technical or other resources, etc. It is also an effective mechanism for combating corruption in the administration. The

8 Law of Ukraine 'On the Basic Principles (Strategy) of the Ukraine's State Environmental Policy for the Period up to 2030' <<https://zakon.rada.gov.ua/laws/show/2697-19#Text>> accessed 21 April 2021.

9 Yu Krasnova, 'Problems of ensuring the right to environmental safety in the national courts of Ukraine and ways to solve them' in International Judicial Forum: 'Judicial Protection of the Natural Environment and Environmental Rights' (Kyiv, 7 November 2019).

10 The United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998) <<https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>> accessed 18 April 2021.

11 ECE Working Group of Senior Governmental Officials 'Environment for Europe', 'Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making (United Nations Economic Commission for Europe, Sofia, Bulgaria, 23–25 October 1995) <<https://unece.org/DAM/env/documents/1995/cep/ece.cep.24e.pdf>> accessed 18 April 2021.

Aarhus Convention makes it clear that enforcement of environmental law is not an exclusive responsibility of the state environmental authorities and prosecutors, but that the public plays an important role in it. A classic example of such cases is the application to a court of a non-governmental environmental organization requiring a private entity to cease activity, which is prohibited by law for environmental reasons (economic activity within the reserve) or is in violation of environmental regulations (without a permit, exceeding limits, without appropriate treatment equipment) or requiring a public authority to revoke an unlawful decision or to declare unlawful an omission in the context of a failure to comply with its environmental authority (to revoke an authorization illegally issued to a private entity, to develop a local waste management plan, to conduct an environmental compliance audit).

The provision under review obliges members of the public to have access to judicial procedures. This commitment is unconditional. However, the Aarhus Convention gives parties more discretion on how to implement this obligation. By referring to the 'criteria provided for in national legislation, if such established', the convention does not define these criteria, nor does it specify the criteria to be avoided. The Aarhus Convention does not oblige parties to grant the right to bring such actions to everyone, although this approach satisfies the requirements of the Convention. In the Netherlands, for example, since 1987, environmental non-governmental organizations have been recognized by all courts as having an interest in environmental protection¹². This interest is considered also to be a general public interest, and it is not necessary to have a right of ownership or any other specific interest to apply to the court for the protection of the environment.

The Aarhus Convention allows parties to establish criteria for standing for members of the public in these cases, but such criteria should be consistent with the objectives of the Convention to ensure broad access to justice. In its conclusions and recommendations, the Aarhus Convention's Compliance Committee paid much attention to the compatibility of a criterion of national law with the objectives of the Convention¹³.

In the case against Belgium, the Compliance Committee indicated that the parties were not obliged to provide in national law for a system providing for a right of action by any person (a people's action) so that everyone could appeal any decision, acts or omissions relating to the environment. Thus, it was determined that the wording of the Aarhus Convention on the existence of such criteria for the public should be understood as a mandatory rule and not as an exception. Parties to the Convention are required by law to define such criteria, otherwise the rule cannot be used.¹⁴

The Constitutional Court of Ukraine, in its decision¹⁵, ruled that a public organization may only defend in court the personal non-property and property rights of its members and the rights and legally protected interests of other persons seeking such protection in cases when such power is provided for in its statutes and if the relevant law determines the right of a public organization to apply to a court for the protection of the rights and interests of other persons.

12 S Stec (ed), *Handbook on Access to Justice under Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe 2003).

13 United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (second edition, United Nations 2014). <https://www.unece.org/env/pp/implementation_guide.html> accessed 18 April 2021.

14 Belgium ACCC/2005/11; ECE/MPPP/C1/2006/4/Add2, 28 July 2006, para 26.

15 Decision of the Constitutional Court of Ukraine of 28 November 2013 in case No 12-rp/2013 <<https://zakon.rada.gov.ua/laws/show/v012p710-13#Text>> accessed 21 April 2021.

Besides, according to the Art. 1 of the Law of Ukraine 'On Public Associations,' voluntary associations of natural and legal persons are directed, in addition, to the protection of environmental rights¹⁶.

According to para. 3 Art. 21 of the Law of Ukraine 'On Environmental Protection'¹⁷, public organizations in the field of environmental protection have the right to submit claims to the court for compensation of damage caused by violation of the law on environmental protection, including the health of citizens and the property of public organizations.

Systematic analysis of the Civil Procedure Code of Ukraine, leads to the conclusion that in cases specified by law, bodies and persons who are entitled by law to take legal action on behalf of other persons or in the public or public interest, may apply to the court¹⁸.

In the case against Germany, the Compliance Committee noted that para. 3 Art. 9 does not distinguish between public and private interests and that this part is not limited to one of the above-mentioned categories of interests or rights. In addition, these provisions apply to violations of any requirements of national law relating to the environment. While different parties and legal systems may apply different definitions of public and personal interests or objective and subjective rights, all are obliged to ensure access to appeal procedures in case of any violation of national environmental protection legislation. In one case from Germany, the Committee explained that access to justice was based solely on the violation of subjective rights.

The Ukrainian legislature supports broad public access to appeal procedures, as no special standing criteria are provided for in national legislation. Judicial practice on this issue differs in Ukraine. Unlike the local and appellate courts, the (upper) court is taking the side of environmental protection, giving the public and non-governmental organizations broad access to justice in environmental law cases.

In their decisions, the Supreme Administrative Court of Ukraine and the Supreme Court of Ukraine¹⁹, in the case concerning the International Charitable Organization (ICO) 'Ecology-Law-Man' lawsuit against the decision of the Cabinet of Ministers of Ukraine to the granting of land parcels to the National Atomic Energy Generating Company 'Energom' on the basis of the violation of the requirements of the environmental protection legislation by the disputed act and the legitimate interest of the plaintiff, which consisted of the preservation of the environment, decided that in accordance with the Law of Ukraine 'On the Nature Reserve Fund of Ukraine', the disputed parcel of land is protected as a national treasure and is subject to a special protection regime. In view of the national social significance of the Nature Conservation Fund, the contentious legal relations relate to public law, so that an unlimited number of persons have the right to apply to the courts for their protection.

16 Law of Ukraine 'On Public Associations' of 22 March 2012 No 4572-VI <<http://cis-legislation.com/document.fwx?rgn=51533>> accessed 21 April 2021.

17 Law of Ukraine 'On Environmental Protection' of 25 June 1995 No 1264-XXII <http://www.vertic.org/media/National%20Legislation/Ukraine/UA_Law_Environmental_Protection.pdf> accessed 21 April 2021.

18 Civil Procedure Code of Ukraine, Art 56. See more in: I Izarova, 'Reform of civil proceedings in Ukraine: novelties of the lawsuit' (2017) 8 Ukrainian Law 33; V Komarov, *Civil procedural legislation in the dynamics and practice of the Supreme Court of Ukraine* [Tsyvilne protsesualne zakonodavstvo u dynamitsi rozvytku ta praktytsi Verkhovnoho Sudu Ukrainy] (Law 2012) 45.

19 Decision of the Supreme Court of Ukraine of 29 May 2012 in case No 21-6a12 <<http://reyestr.court.gov.ua/Review/25128506>> accessed 21 April 2021.

The issue of the right of a public organization to be a plaintiff in a dispute on environmental protection was decided by the Grand Chamber of the Supreme Court in the case of ICO 'Ecology-Law-Man' to LLC 'Aquadelf' on the prohibition of dolphinaria activities²⁰.

In the decision of 11 December 2018, the Grand Chamber noted that the plaintiff is an environmental protection organization in accordance with the provisions of the Aarhus Convention and the Laws of Ukraine 'On Environmental Protection', 'On Public Associations', 'On Charitable Activities and Charitable Organizations', and in accordance with its statute, it has the right to represent in court the environmental interests of society and its individual members for the purpose of protecting violated environmental rights of individuals and citizens or for the purpose of eliminating violations of the requirements of environmental legislation. The Grand Chamber accepted the plaintiff's arguments that, when dismissing the case, the courts had applied a limited interpretation of the existing legislation, of which the Aarhus Convention was a part, and had failed to acknowledge that the right to the protection of the violated constitutional right to a safe environment belongs to everyone and that this right can be realized both personally and through the participation of a member of the public, which in this case is the ICO 'Ecology-Right-Man'²¹.

In addressing a seemingly legal issue in case No826/3820/18²², the Supreme Court found that the right to appeal a regulation related to the constitutional right to environmental security belongs to everyone and can be exercised by citizens individually or jointly: through citizens' associations, and also that, given the importance of real environmental protection, it is inadmissible to restrict the interpretation of the current legislation of Ukraine, of which the Aarhus Convention is a part, with regard to the right to apply to the courts for the protection of a legally protected interest in the field of environmental safety²³.

Considering that the legislator has not established specific criteria for the standing of public organizations to challenge acts and omissions of citizens and public authorities that violate national environmental legislation, the Supreme Court adopted a permanent legal position with regard to the State's duty to ensure unhindered public access to justice in this category of cases, to comply with international obligations under part 3, Art. 9 of the Aarhus Convention and Art. 6 of the ECHR in the context of legal certainty. It is recommended that courts of first instance and appellate courts provide access to justice in a context of weakened state environmental control and low compliance with environmental legislation to provide the public with ample opportunities to ensure compliance with environmental legislation. Preserving the environment and strengthening the rule of law in the state would be in the public interest.

4 CONCLUDING REMARKS

Ukrainian legislation does not establish clear criteria for members of the public to participate in judicial or administrative environmental protection procedures. In such circumstances, in order to comply with its international obligations under Art. 2 of the Aarhus Convention,

20 Resolution of the Grand Chamber of the Supreme Court in case No 910/8122/17, proceeding No 12-186h18 of 11 December 2018 <<https://verdictum.ligazakon.net/document/78977479>> accessed 19 April 2021.

21 Resolution of the Grand Chamber of the Supreme Court of 11 December 2018 in case No 910/8122/17 <<http://reyestr.court.gov.ua/Review/78977479>> accessed 19 April 2021.

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23 Resolution of the Supreme Court of 21 October 2019 in case No 826/3820/18 <<http://www.reyestr.court.gov.ua/Review/85087717>> accessed 19 April 2021.

Ukraine should ensure access for members of the public to justice in such categories of cases, especially for environmental non-governmental organizations. This is necessary, in view of the current unsatisfactory level of environmental legislation, to give the public ample opportunity to enforce compliance with environmental legislation.

Analysis of the experience of foreign countries leads to the conclusion that the courts recognize the interest of all persons in the protection of the environment on the basis of their right to a safe environment for life and health, and of their duty to protect it. In view of the above, it should be considered appropriate and necessary in Ukraine to develop and adopt the practice of considering cases in court on public claims, to aim to protect the legitimate interest of the preservation of the environment.

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