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THE ROLE OF COURTS IN ENVIRONMENTAL RIGHTS PROTECTION IN THE CONTEXT OF THE STATE POLICY OF UKRAINE

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THE ROLE OF COURTS IN ENVIRONMENTAL RIGHTS PROTECTION IN THE CONTEXT OF THE STATE POLICY OF UKRAINE

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Abstract *The protection of the environmental rights of citizens is an important issue for the domestic and foreign state policy of Ukraine. Although environmental rights are formally recognised and enshrined in law, they fail to be implemented in practice. This indicates the imbalance and lack of effective political and legal mechanisms for an appropriate system of measures to create conditions for exercising environmental rights and interests, their protection, and restoration, as well as to assure environmental awareness and culture.*

In light of these general considerations, this research article aims to examine the current issues concerning access to justice for protecting environmental rights through the lens of the state policy of Ukraine and its real application to ensuring such protection. Accordingly, the underlying tasks of the article are: to analyse how meaningful and comprehensive the provisions of approved strategic documents are; to analyse the cases of the ECtHR against Ukraine in environmental matters; to study the national case-law concerning access to justice on environmental rights protection and whether they correspond with the state policy areas of ensuring environmental human rights; to analyse how efficient the mechanism of their protection in Ukraine is and whether conditions for equal access to court in environmental cases are created; to find and illuminate the current state policy gaps that might threaten the effective observance and enforcement of environmental human rights; to formulate theoretical and practical suggestions for their further improvement.

Keywords: *access to justice, human rights, environmental rights protection, ECtHR, state policy, environmental state policy, climate change litigation.*

1 INTRODUCTION

The Fundamental Law of Ukraine proclaims human rights and freedoms to be of the highest value, a proclamation that obliges the state to perform the functions of a primary duty bearer in affirming and ensuring human rights and freedoms. Judicial protection for environmental rights and interests is a constitutional guarantee, and it is the state that has a constitutional duty to ensure environmental safety and maintain ecological balance (Art. 16 of the Constitution of Ukraine).

Unfortunately, though, two-thirds of the population in Ukraine currently lives in areas where the quality of the air does not meet hygienic standards, which affects the overall morbidity; water pollution leads to various diseases; general deterioration of health of the population leads to an increase in the overall incidence, in particular, of infectious and oncological diseases; the effects of climate change (flooding, increasing frequency and intensity of extreme weather events), together with the high level of vulnerability of certain segments of the population, are leading to social and economic costs today and in the future.¹

Therefore, the protection of the environmental rights of citizens is an important issue of the state policy of Ukraine. Existing approaches show a clear difference between theory and practice in the protection of environmental rights. Formally, they are recognised and enshrined in law, but in reality, they are not implemented, which indicates an imbalance and lack of effective political and legal mechanisms for an appropriate system of measures to create conditions for exercising environmental rights and interests, their protection, defence, restoration of violated rights, and raising environmental awareness and culture of the population. It is an indisputable fact that every human right is valuable only when it receives proper protection and defence. The current tendency of non-compliance with the requirements of environmental legislation leads to legal nihilism, destruction of the law enforcement system, reduction of the state's authority, the formation of corruption, abuse of office, etc. It is obvious that the current mechanism of legal regulation of environmental rights protection in Ukraine is far from perfect. Government institutions do not perform their specified functions, which prevents the sustainable development of society and the realisation and protection of environmental rights and leads to systemic distortions in the field of environmental law.

Meanwhile, in response to the issues outlined above, national courts are developing case-law concerning the protection of environmental rights and private and public environmental interests.

If the main goal of the current national state environmental policy of Ukraine is to ensure compliance with the environmental rights of citizens and public access to justice on environmental issues and natural resource use, state policy should be considered a fundamental basis for the establishment of an objective and effective legal mechanism in order to create the necessary conditions for every citizen to exercise and protect his or her environmental rights and ensure the fair access to justice in environmental matters.

The aim of this article is to examine the current state policy of Ukraine as regards its ability to ensure the protection of environmental rights. The underlying tasks of the article are the following: to analyse how meaningful and comprehensive the provisions of approved strategic documents are; to study the national case-law concerning access to justice on environmental issues and whether they correspond with the state policy in the areas of ensuring environmental human rights; to analyse how efficient the mechanism of their protection is in Ukraine and whether conditions for equal access to justice in the stated sphere are created; to find and illuminate the current state policy gaps that might threaten the effective observance and enforcement of environmental human rights; to formulate scientific suggestions for their further improvement.

1 Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030' (2019) <<https://zakon.rada.gov.ua/laws/show/2697-19>> accessed 25 March 2021.

2 STATE POLICY OF UKRAINE FOR ENSURING ENVIRONMENTAL RIGHTS

The fundamental legal act in the area of ensuring human and citizens' rights and freedoms is the Resolution of Ukrainian Parliament 'On the Principles of State Policy of Ukraine in the Field of Human Rights', which establishes the principles and key spheres of state policy in the area of human rights.² In 2015, the Resolution was complemented by the National Human Rights Strategy approved. It was the first comprehensive national strategic document that was aimed at improving the system of observance and enforcement of human and citizens' rights and freedoms in Ukraine.³ Further, the 'Action Plan for the implementation of the National Human Rights Strategy until 2020' was approved by the order of the Government of Ukraine on 23 November 2015⁴. All of these documents were seen as major tools for enforcing the state's constitutional and international obligations on the protection of human rights but had absolutely no provisions ensuring environmental rights as a separate category or type of human rights. As a result of this legal and strategic gap, it is possible to assume that the absence of identification of the field of environmental rights as a priority area at the national strategic level directly affects the level of observance of environmental human rights, making the mechanism for guaranteeing and ensuring them more complicated.

It is important to note that on 24 March 2021, the updated National Human Rights Strategy was approved by Presidential Decree No. 119/2021 to serve as a basis for further coordinated activities of state bodies, local governments, and civil society institutions in ensuring human rights in Ukraine⁵. Among the 27 strategic areas, which cover a wide range of issues in the field of human rights and determine the priorities of the state in the relevant areas, a new strategic area, 'Ensuring environmental rights' (para. 15 of the Strategy), was introduced. The Strategy underlines that in order to overcome the economic and environmental crisis, the main responsibility of the state shall be the reformation of public administration to ensure human rights and freedoms.

It should be emphasised that this is the first time that issues of environmental rights protection have been acknowledged and declared at the level of national human rights policy. The strategic area devoted to ensuring environmental rights is aimed at solving the problems of anthropogenic impact on the environment threatening human health and the low level of control over compliance with the legislation in the field of environmental protection, as well as the problem of public ignorance about environmental rights and mechanisms for their implementation and protection.

The strategic goal of the area presupposes the development of measures to guarantee the possibility of receiving compensation in case of violations of environmental legislation resulting in a deterioration of a person's health and property. Expected outcomes include effective mechanisms for compensating for damage caused by violations of environmental legislation. Thus, key indicators of the successful achievement of the expected results are outlined as the following: an increased level of public awareness of environmental rights and mechanisms for their implementation and protection; an

- 2 Resolution of the Verkhovna Rada of Ukraine No 757-XIV 'On the Principles of State Policy of Ukraine in the Field of Human Rights' (1999) <<https://zakon.rada.gov.ua/laws/show/757-14#Text>> accessed 26 March 2021.
- 3 Decree of the President of Ukraine No 501/2015 'On Approval of National Human Rights Strategy' (2015) <<https://zakon.rada.gov.ua/laws/show/501/2015#Text>> accessed 26 March 2021.
- 4 Order of the Government of Ukraine on 23 November 2015 'Action Plan for the implementation of the National Human Rights Strategy until 2020' <<https://zakon.rada.gov.ua/laws/show/1393-2015-p#Text>> accessed 26 March 2021.
- 5 Decree of the President of Ukraine No 119/2021 'On Approval of National Human Rights Strategy of Ukraine' (2021) <<https://zakon.rada.gov.ua/laws/show/119/2021#Text>> accessed 26 March 2021.

increased number of appeals by the members of the public to the relevant national and local government bodies, courts, etc.

The development of the adapted National Strategy took into account the recommendations provided to Ukraine at the sixth session of the Human Rights Dialogue between Ukraine and the EU, as well as the results of the Third Cycle of the Universal Periodic Review, and may be considered an important step that will contribute to the fulfilment of Ukraine's international human rights obligations.

However, the Strategy appears to be incomplete and is definitely insufficient to combat the present challenges. The rights of climate refugees are not recognised and enshrined in either the environmental area of the Strategy or the areas concerning the rights of refugees (para. 19) and the rights of internally displaced persons (para. 19). It is our conviction that this is a great drawback of the current state policy, as we strongly believe that climate rights should be considered as an independent human rights institution in the process of formation, closely interconnected and correlated with a comprehensive intersectoral institute of environmental rights. Additionally, it is reasonable to adapt not only the concept of rights of refugees (as climate refugees' rights) but as climate rights in general.

3 ENVIRONMENTAL STATE POLICY OF UKRAINE AND ENVIRONMENTAL RIGHTS PROTECTION

Current state environmental policy, as an activity of the authorities, is aimed at ensuring the constitutional right of everyone to a safe environment and to compensation for damage caused by the violation of this right. Environmental policy at the national level is formed and implemented by the Ministry of Environmental Protection and Natural Resources of Ukraine.⁶ It is worth noting that its institutional capacity for establishing state policy concerning environmental safety and protection of the environment will be strengthened by reforming and improving public administration and approximation of environmental legislation to the environmental law of the European Union.

Because the main goal of the modern national state environmental policy is to ensure compliance with environmental rights and responsibilities of citizens and public access to justice in environmental matters and nature management, it seems reasonable that it is the Strategy for the state environmental policy of Ukraine that has to be the reference point for further development and legislative support of the ecological and legal status of subjects, the foundation of their legal guarantees and effectiveness.

The Strategy is defined by the Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030' (hereinafter, the Strategy)⁷ and proclaims the achievement of strategic goals, which are aimed at ensuring: the ecological values and principles of sustainable consumption and production; the sustainable development of the country's natural resource potential; the integration of environmental policy into decision-making processes regarding the state's socio-economic development; minimising environmental risks; and an effective environmental management system.

6 Resolution of the Cabinet of Ministers of Ukraine No 614 'On regulation of Ministry of Environmental Protection and Natural Resources of Ukraine' (2020) <<https://zakon.rada.gov.ua/laws/show/614-2020-%D0%BF#n13>> accessed 26 March 2021.

7 Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030' (2019) <<https://zakon.rada.gov.ua/laws/show/2697-19>> accessed 25 March 202.

However, an analysis of the provisions of the Strategy highlights the following drawbacks. The legislative use of terms in the document to denote long-term state planning is inconsistent, ambiguous, declarative, and illogical. This statement is grounded on the following observations. Firstly, there is the goal of the state environmental policy, which recognises the achievement of 'good environmental status' by introducing an ecosystem approach to all areas of socio-economic development of Ukraine to ensure the constitutional right of every citizen of Ukraine to 'clean and safe environment' and the introduction of sustainable nature and restoration of applied ecosystems. The legal constructions can be seen as misleading, especially in the logic of their construction laid down in outlining the basic principles of state environmental policy, such as '(sustainable) development', and a declarative strategic goal of 'the formation of environmental values in society'.

It is worth emphasising that today's conditions for the formation of the theoretical knowledge of environmental law and further systematisation of environmental legislation require a balanced approach and rethinking the highest social values, such as: a) human rights (including natural, fundamental, priority environmental); b) public security as a whole and environmental security as a component; c) sovereignty of the state (not only the supremacy, independence, completeness, and indivisibility of power within the territory of the state and independence and equality in foreign relations, but also as the protection of human rights, freedoms, and interests); d) the rule of law, etc. The aggregation of goals and redistribution in the direction of reducing the strategic objectives of the Strategy, unfortunately, did not improve this situation. In addition, there are also some problems with the indicators listed in the annex to the current Strategy.

The point to note is that the current Strategy has achieved the goals of the state environmental policy to ensure environmental safety and regulatory protection of the environment and replaced them with new ones ensuring sustainable development and reducing environmental risks. Ensuring environmental safety and maintaining ecological balance on the territory of Ukraine, and increasing the level of environmental safety in the exclusion zone are now proclaimed in the Strategy as the main principles of the state environmental policy. However, back in 1996, this was already established in the Constitution of Ukraine, which means that at the constitutional level, ensuring environmental safety and maintaining ecological balance on the territory of Ukraine is the duty of the state (Art. 16). It is important to note that according to Ukrainian legislation, environmental safety is considered as both subjective and objective. In the objective sense, it is the state of the natural environment that ensures the prevention of the aggravation of the environmental situation and the emergence of danger to human health, while health and human life are subject to state protection against the negative impact of adverse environmental conditions, and the state is responsible for ensuring environmental safety through authorised bodies. In the subjective sense, environmental safety is also guaranteed as a certain legal possibility, a subjective environmental right that correlates with the constitutional right of citizens to an environment that is safe for life and health.⁸

It is reasonable to support the opinion of A. Demydenko that the first conceptual step towards a new understanding of the concept of 'environmental safety' was made by formulating environmental risk reduction as goal 4 of the updated Strategy, but the situation regarding the understanding of environmental risks by the public, government and the Verkhovna Rada, particularly regarding natural or anthropogenic threats, remains complex. The researcher emphasises that it is legislatively stated that safety is the absence of danger. The elimination of environmental risk is possible only by eliminating its cause – greenhouse gas emissions – not by reducing the impact of climate change by limiting exposure or vulnerability. For

8 Law of Ukraine 'On Environmental Protection' (as amended of 01 January 2021) <<http://zakon0.rada.gov.ua/laws/show/1264-12>> accessed 25 March 2021.

comparison, consider the understanding of environmental risk proposed at the Davos Forum as the product of the probability of danger on its outcome/impact. This definition can be compared with the one proposed by the Intergovernmental Panel on Climate Change, which considers risk to be the product of three factors – hazard, exposure, and vulnerability – where the impact is the product of exposure and vulnerability.⁹

Particular attention should be paid to the fact that among the priorities defined by the National Security Strategy of Ukraine,¹⁰ there is the provision of environmental security on creating safe living conditions, in particular, in areas affected by hostilities, and creating an effective system of civil protection. The National Security Strategy of Ukraine emphasises that the living environment, air quality, drinking water, and food are deteriorating, which, in turn, affects people's lives and health. In addition, the Strategy points out that there is the irrational use of natural resources and degradation of forests, water basins, and agricultural lands, while the system of household and industrial waste management, as well as the ability to adapt the economy, livelihoods, and civil protection to climate change, are considered inefficient.

It is important to note that the National Security Strategy is considered the basis for the development of the Strategy for Environmental Security and Climate Change Adaptation (which was expected to be developed within six months after the adoption of the National Security Strategy, i.e., in the spring of 2021, but so far nothing has been proposed for public discussion). We strongly believe that Strategy for Environmental Safety and Adaptation to Climate Change should be elaborated with regards to the requirements on ecosystem restoration (reproduction) of natural resources and complexes and the preservation of natural resource potential, which will contribute to the formation of an effective legal mechanism to ensure, *inter alia*, the efficient protection of environmental (and climate) rights.

4 ECtHR CASE-LAW IN ENVIRONMENTAL MATTERS: CASES V. UKRAINE

According to Art. 17 of the Law of Ukraine 'On the execution of judgments and application of the case-law of the European Court of Human Rights',¹¹ the ECHR and the practice of the ECtHR are recognised as a source of law¹², which makes them applicable in environmental proceedings.

It is worth clarifying that no environmental right (e.g., to a safe/healthy environment) is expressly embodied in the ECHR. However, the ECtHR considers that harmful environmental conditions, as well as exposure to environmental risks, may threaten the exercise of the

9 A Demydenko, 'How to understand environmental safety after the adoption of the updated Environmental Strategy in February 2019?' (*ECOBUSINESS Ecology of the Enterprise*, 17 June 2020) <<https://ecolog-ua.com/news/yak-rozumityi-ekologichnu-bezpeku-pislya-prynyattya-onovlenoyi-ekologichnoyi-strategiyi-v>> accessed 19 April 2021.

10 Decree of the President of Ukraine 'On the National Security Strategy of Ukraine' (2020) <<https://zakon.rada.gov.ua/laws/show/392/2020#Text>> accessed 28 March 2021.

11 Law of Ukraine 'On the execution of judgments and application of the case-law of the European Court of Human Rights' (2006) <<http://zakon2.rada.gov.ua/laws/show/3477-15>> accessed 26 March 2021.

12 More about the impact of the ECtHR case impact on the Ukrainian legal doctrine in the special issue of Access to Justice in Eastern Europe (2021) <http://ajee-journal.com/upload/attaches/att_1614587521.pdf> accessed 26 March 2021. In particular, I Izarova, S Kravtsov 'About the Special Issue on the Occasion of the 70th Anniversary of the European Convention on Human Rights' 2021 1(9) Access to Justice in Eastern Europe 5–7, Komarov, T Tsuvina 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' 2021 1(9) Access to Justice in Eastern Europe 79–101, N Sakara 'The Applicability of the Right to a Fair Trial in Civil Proceedings: the Experience in Ukraine' 2021 1(9) Access to Justice in Eastern Europe 199–222 and others.

human rights stated in ECHR and thus has developed its case-law on environmental issues.¹³ Therefore, the case-law of ECtHR on the protection of environmental rights is grounded in the application of such concepts as the right to life (Art. 1 of the ECHR), the prohibition of inhuman or degrading treatment (Art. 3), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), and the right to respect for private and family life and home (Art. 8).

As of February 2021, the ECtHR has delivered 1,520 judgements stating that Ukraine has violated the provisions of the ECHR and its Protocols.¹⁴ Among them, the number of judgments on environmental issues is small, but they are very valuable, especially the so-called 'pilot' cases, such as *Dubetska and others v. Ukraine*, *Grimkovskaya v. Ukraine*, *Dzemyuk v. Ukraine*, etc.

In the well-known case of *Dubetska and others v. Ukraine*, the ECtHR concluded that adverse effects of the industrial pollution violated the rights guaranteed by Art. 8, the application of which is substantiated when the environmental hazard reaches such a serious level that it significantly impairs the applicant's ability to use his or her home and have a private or family life. It was noted that the assessment of such a minimum level is relative and depends on the circumstances of the case, such as the intensity and duration of the adverse effects and their physical or psychological effects on the health or quality of life of the individual. Particular attention was paid to the fact that the claim under Art. 8 cannot be substantiated if the hazard is insignificant in comparison with the environmental risks that are common for life in every modern city. Additionally, Ukraine was found unable to comply with ensuring a fair balance between the competing interests of the applicants and the community as a whole, as required by para. 2 of Art. 8 of ECHR.¹⁵

Therefore, it can be stated that an important precondition for a fair trial in the sphere of access to justice on environmental issues is a balance maintained between the interests of the state, society, and individuals. As proclaimed by Art. 16 of the Constitution of Ukraine, it is the responsibility of the state to ensure environmental safety and maintain ecological balance in the territory of Ukraine. The prevention of environmental risks is a fundamental goal of modern state environmental policy, which is associated with a system of preventive measures, *inter alia*, in the sphere of environmental protection.

With regard to a fair balance between private and public interests (the applicant's interests and the interests of society) and compliance with the minimum guarantees of such by Ukraine, the case of *Grimkovskaya v. Ukraine* is of great significance for understanding how environmental rights are ensured on both international and national levels. In this case, violation of the applicant's rights to respect for private and family life and home was considered to be the result of the destructive impact of the environment (in particular, noise, vibration, air and soil pollution), which caused damage to the home and deterioration of health. When assessing the case, the court noted that the negative impact of environmental pollution, which deteriorates the quality of private and family life, is estimated by a certain minimum level that is relative and has to be assessed in every single case, taking into account all of its circumstances. Additionally, the understanding of the category of 'deterioration of health' was seen as questionable because of the obvious difficulties to distinguish the impact of anthropogenic factors and environmental risks from other factors, such as physiological characteristics, lifestyle, occupational deformities, etc.¹⁶

13 *Factsheet – Environment and the ECHR* (Press Unit of ECtHR 2021) <https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 26 March 2021.

14 *Press Country Profile – Ukraine* (Press Unit of ECtHR 2021) <https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf> accessed 26 March 2021.

15 *Dubetska and others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) <[https://hudoc.echr.coe.int/fre/#{"itemid":\["001-103273"\]}](https://hudoc.echr.coe.int/fre/#{) > accessed 26 March 2021.

16 *Grimkovskaya v Ukraine* App no 38182/03 (ECtHR, 21 July 2011) <<http://hudoc.echr.coe.int/eng?i=001-105746>> accessed 26 March 2021.

For this reason, we have considered the interpretation of this concept under the Ukrainian doctrine of environmental law. However, despite the number of studies of the constitutional right to a safe environment for life and health, its 'uncertainty' remains relevant because of: a) insufficient theoretical development of the concept; b) a limited system of legal regulations to determine the quality of the environment; c) gaps in the reflection of this right in land, water, forest legislation, subsoil legislation, protection of ambient air, and protection and use of wildlife; d) shortcomings in the development of the system of guarantees in the sphere of environmental protection.¹⁷ It is also worth noting that 'quality of life', as well as other legal categories of 'safe environment', 'favourable conditions', etc., are evaluative concepts that have subjective characteristics. Accordingly, in each case, national courts must establish in detail the facts of the case and determine whether the state is liable under Art. 8 of the ECHR, whether the situation was the result of a sudden and unexpected turn of events or whether it existed for a long time and was well known to the state authorities; whether the state was or should have been aware that the danger or harmful influence had affected the applicant's private life and to what extent the applicant had contributed to this situation for him/herself and was able to remedy it without undue expense. The court should also assess whether the authorities have conducted sufficient preliminary research to assess the risk of planned potentially hazardous activity and whether they have developed an adequate policy on polluting enterprises on the basis of available information, and whether this policy has been implemented in a timely manner.

It is also worth pointing out the judgment in *Antonenko and Others v. Ukraine*,¹⁸ in which the ECtHR, in view of its previous case-law in *Zelenchuk and Tsitsyura v. Ukraine*, recognised the violation of Art. 1 of the First Protocol to the ECHR (protection of property rights) in connection with the general prohibition at the legislative level of the sale or any other form of alienation of agricultural land. Although these cases are directly aimed at ensuring the right of citizens to the protection of land ownership, they also contain important provisions concerning the judicial protection of environmental rights and should be taken into account by Ukrainian courts in cases of this category.

In *Dzemyuk v. Ukraine*, the application of Art. 8 was substantiated by the fact that the appropriate state of the environment directly impacted the applicant's 'quality of life' and reached a sufficient level of severity. Thus, the Court stated that the interference with the applicant's right to respect for his home and private and family life had not been 'in accordance with the law'.¹⁹

However, from our point of view, the most interesting case in the context of such an urgent and challenging environmental problem of the present as climate change is *Duarte Agostinho and Others v. Portugal and Others* (pending Application No. 39371/20 of 7 September 2020),²⁰ in which Ukraine is one of the 33 countries the case was brought against. On 13 November 2020, the notice of the application was given by the ECtHR to the defending governments. The case concerns the contribution to global greenhouse gas emissions by each of the defending countries, which are considered equally responsible for the harms affecting living conditions and health of the applicants caused by global warming and

17 Yu Shemshuchenko, *Legal Problems of Ecology* (Naukova Dumka 1989) <http://library.nlu.edu.ua/POLN_TEXT/MONOGRAFII_2010/SHEMSHUCHENKO_1989.pdf> accessed 31 March 2021.

18 *Antonenko and Others v Ukraine* App nos 45009/13 and 53 others (ECtHR, 20 February 2020) <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_561cfc7226b50d347f3f2624df9f2c487fd6466b693fb70a1d95e6072591a409> accessed 27 March 2021.

19 *Dzemyuk v Ukraine* App no 42488/02 (ECtHR, 4 September 2014) <[https://hudoc.echr.coe.int/fre/#{“itemid”:\[“001-146357”\]}](https://hudoc.echr.coe.int/fre/#{“itemid”:[“001-146357”]})> accessed 26 March 2021.

20 *Duarte Agostinho and Others v Portugal and Others* App no 39371/20 (ECtHR, 7 September 2020) <<http://hudoc.echr.coe.int/eng?i=001-206535>> accessed 26 March 2021.

climate change. Additionally, the argument is based on extraterritorial jurisdiction for significant transboundary environmental harm and calls on the Court to determine whether the respondent states are doing their 'fair share' towards mitigation efforts. It should be noted that the uniqueness of this case is in its attempt to connect the issues of climate change with human rights, underlining the need for interaction not only between human rights law and environmental law but also climate change law.

Only the most important (from a doctrinal point of view) ECtHR judgements have been mentioned, although the authors have conducted analyses of a number of ECtHR cases against Ukraine in environmental matters, based on which they suggest dividing such cases into nine categories:

- the first concerns the violation of the rights to a safe and healthy environment (interpretation of Art. 2 and 8);
- the second deals with protection of private property rights according to Art. 1 of the First Protocol of the ECtHR;
- the third comprises the specifics of the application of the doctrine of *ultra vires* (outside the powers) to ensure protection against errors of public authorities operating in environmental relations outside the powers (competences) granted to them by national law;
- the fourth includes access to justice (guaranteed by Art. 6 of the ECHR) for the protection of their real or eligible environmental rights, as well as cases of public participation;
- the fifth concerns the interpretation of Art. 8 of the ECHR on the right to respect for private and family life, in particular, as regards ensuring a fair balance between the interests of the individual and the interests of society in environmental relations;
- the sixth covers the right to freedom of expression (Art. 10 of the ECHR) regarding access to environmental information (information on the state of the environment); the seventh is related to the right to a fair remedy (Art. 13 of the ECHR);
- the eighth includes cases of waiver of obligations during an emergency (Art. 15 of the ECHR);
- the ninth is new and includes climate cases (concerning protection of living conditions deteriorated by the consequences of climate change and ensuring climate rights as a new group of human rights, which is in the process of active formation), etc.

Thus, we conclude that there is a certain scope of issues concerning ensuring environmental rights and access to justice for their protection in Ukraine; hence national courts must take into account the case-law of the ECtHR to address environmental rights at the national level.

5 NATIONAL CASE-LAW ON ACCESS TO JUSTICE ON ENVIRONMENTAL ISSUES

As stated in the Law of Ukraine 'On Environmental Protection', the state guarantees its citizens the realisation of environmental rights granted to them by law (part 1 of Art. 11). In cases of violation, citizens' rights in the sphere of environmental protection shall be restored, and their protection is carried out in court with regard to the legislation of Ukraine (part 3 of Art. 11). The forms of access to justice in environmental matters include: 1) appealing against decisions, actions (inaction) of public authorities and other entities, which break national environmental law; 2) lawsuit as a legal remedy, which is enforced by means of filing claims to halt environmentally hazardous activities, compensate for damages, etc.

Therefore, we suggest that an analysis should be conducted on the number of cases concerning public access to justice for the protection of environmental rights and rights to a safe environment reviewed by the Supreme Court of Ukraine (hereinafter SCU) during the period of 2018-2020. In the Courts of Cassation, 23 cases involving public participation in decision-making and access to justice in the environment were reviewed. Of these, the Grand Chamber of the SCU reviewed one case, the Supreme Court of Cassation, two cases, the Commercial Cassation Court within the SCU, three cases, and the Administrative Court of Cassation within the SCU, 17 cases.²¹

Applicants most often applied to the court as members of the public (individually or in the form of an association of citizens) under Art. 50 of the Constitution of Ukraine, which guarantees everyone the right to the environment that is safe for life and health and consequential right to compensation for damages caused by violation of this right. Additionally, Art. 2 and Art. 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, the Aarhus Convention) were cited as legal grounds for applying to the court for protection of environmental rights and interests. In this context, it is noteworthy that since this Convention was ratified by Ukraine,²² its provisions are the norms of direct action and an integral part of the national legislation of Ukraine, while the provisions of national legislation on procedures and mechanisms of judicial protection of violated environmental rights and interests can specify them.

According to Art. 9 para. 3 of the Aarhus Convention, it is the duty of the state to ensure access to procedures for appealing against actions and omissions of state bodies and individuals who violate the requirements of national environmental legislation to the public members.²³ Additionally, they are guaranteed the right to challenge violations of national environmental legislation, regardless of whether such violations concern access to information and public participation in decision-making guaranteed by the Convention or not.²⁴ It should be pointed out that cases filed under Art. 9 of the Aarhus Convention mainly concerned: a) appeals against decisions of local governments on the provision of land plots, which were taken with violation of their purposeful designation and placement on them of objects that could harm the environment; b) violation of land and water legislation on the allocation of land plots within the nature protection zones of rivers and inland seas; c) cruel treatment of animals and birds, in particular, those listed in the Red Data Book of Ukraine; d) emissions of pollutants into the air.

It is worth mentioning that the Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making (the Sofia Principles) are also a priority for national legislation and environmental law doctrine. There, it is stipulated that the public should have access to administrative and judicial proceedings, which should be aimed at challenging the actions or omissions of individuals and public authorities that violate the provisions of national environmental law as set out in Art. 9 para. 3 of the Aarhus Convention.²⁵ Therefore, it can be stated that access to justice in Ukraine is provided on the

21 'Judgements of the Supreme Court' (*Ukrainian Judiciary*, 2021) <<https://supreme.court.gov.ua/supreme/gromadyanam/reyestr-vs/>> accessed 25 March 2021.

22 Law of Ukraine 'On ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (1999) <<https://zakon.rada.gov.ua/laws/show/475/97-bsp#Text>> accessed 25 March 2021.

23 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (1998) 2161 UNTS 447 <<http://www.unece.org/env/pp/treatytext.html>> accessed 25 March 2021.

24 UN ECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, 2014) 278.

25 UN ECE, Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making submitted by the ECE Working Group of Senior Governmental Officials 'Environment for Europe' (UN 1995) 6 <<https://unece.org/DAM/env/documents/1995/cep/cecep.24e.pdf>> accessed 25 March 2021.

basis of the provisions of the abovementioned Convention, as well as national environmental legislation.

The above is approved by the court practice, namely, by the Grand Chamber of the Supreme Court in the following cases: the claim of the ICO 'Ecology-Law-Human' against LLC 'Akvadelf' on the ban of dolphinarium's activity (Case No 910/8122/17)²⁶ and the action seeking a declaration of invalidity of the Methodology for calculating the amount of compensation for damages caused to the state as a result of excessive emissions of pollutants into the atmosphere (Case No 826/3820/18).²⁷ In both cases, the SCU concluded that the right to appeal a legal action is related to the constitutional right to a safe environment, which belongs to everyone and can be exercised individually or collectively via associations of citizens (community). It should be pointed out that in these judgements, the SCU finally determined that the right of a citizen or non-governmental organisation to go to court in order to protect the constitutional right to a safe environment cannot be restricted in any way.

In the judgment of the SCU in Case No 826/9432/17 on the claim of Volodymyr Rashko concerning the recognition of unlawful actions, inactivity, recognition of established limits for animals hunting, cancellation of the order, and the obligation to take certain actions, it was also found inadmissible to restrict the interpretation of the current legislation of Ukraine regarding the right to go to court for the protection of the legally guaranteed interest in the sphere of environmental safety.²⁸

Therefore, one can see that the SCU is developing its legal position concerning the judicial protection of environmental rights and the duty of the state to ensure public access to justice in this category of cases. It can be stated that public participation in the protection of environmental rights is seen as a legal guarantee of their protection. For instance, the judgement of the SCU in Case No 373/239/18 confirmed the applicant's right to apply to the court under part 2 of Art. 9 of the Aarhus Convention. The case concerned an appeal against conclusions of an environmental inspection during the construction of a biomass power plant. The courts found an infringement of environmental law and of the rights of the applicant, but in view of incorrect application of substantive law as to the methods of judicial protection and a violation of the rules of procedural law, it came to the early conclusion to dismiss the claim due to the applicant's choice of ineffective legal remedy.²⁹

Taking into account the cases above and having analysed the judgements of the SCU, it can be concluded that a relatively effective national judicial practice is currently being formed in the sphere of ensuring the right of the public to go directly to court for the protection of the violated environmental rights, as well as the mechanism of judicial protection of citizens' constitutional right to a safe and healthy environment.

However, the number of lawsuits filed by citizens or environmental non-governmental organisations to protect environmental rights (including constitutional ones) and the environment is comparatively low. Moreover, when such lawsuits are filed, they are considered for a long time, without taking into account the irreversible consequences for humans and the environment as a whole. This situation can be directly caused by the relatively low level of public awareness and legal education of citizens concerning opportunities for taking legal

26 Case No 910/8122/17 [2018] Supreme Court of Ukraine <<http://reyestr.court.gov.ua/Review/78977479>> accessed 25 March 2021.

27 Case No 826/3820/18 [2019] Supreme Court of Ukraine <<http://www.reyestr.court.gov.ua/Review/85087717>> accessed 26 March 2021.

28 Case No 826/9432/17 [2019] Supreme Court of Ukraine <<http://www.reyestr.court.gov.ua/Review/85087717>> accessed 26 March 2021.

29 Case No 373/239/18 [2020] Supreme Court of Ukraine <<http://www.reyestr.court.gov.ua/Review/85087717>> accessed 26 March 2021.

action if environmental legislation or environmental interests and rights are violated. And this, respectively, can be considered as the result of insufficient state policy, which fails to ensure the effective mechanism for realising environmental human rights.

6 CONCLUDING REMARKS

State policy is considered the basis for improving state activities on the observance and enforcement of environmental human rights, establishing an efficient mechanism of their protection, and creating conditions for equal access to justice on environmental issues. Thus, the low number of lawsuits filed by citizens or public environmental organisations to protect environmental rights in Ukraine can be interpreted as the indicator of insufficient state policy, which does not ensure the effective mechanism of environmental human rights realisation.

On the grounds of the analyses conducted on the case-law of national courts on environmental matters, a restructuring of the modern judicial system of Ukraine is suggested in order to achieve the fast and effective consideration of environmental cases, which should include: reasonable (in terms of the possibility of proving a causal link) time limits for the processing of cases and clear impact of court decisions on further improvement of environmental state policy.

The National Human Rights Strategy is considered the main strategic document aimed at forming and establishing a systematic approach to solving problems in the sphere of guaranteeing, ensuring, realising, and protecting human rights and fundamental freedoms. Despite this, it does not fully cover all the urgent issues in the realm of environmental protection. Thus, the absence of provisions that prioritise the sphere of climate change mitigation demonstrates that the current state policy of Ukraine is behind the curve and unable to respond to the present challenges. The authors drew attention to the expediency of making appropriate changes to this policy, as well as to the other strategic documents and national legislation. Having taken into account both the domestic experience and the principles developed and tested by the international community, these changes, based on suggestions outlined in the present article, can create the grounds for improving the system of ensuring and protecting environmental human rights.

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